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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ALFRED GONZALES AND,  
KELLY GONZALES, Individually  
and on Behalf of All Others Similarly  
Situated,

Plaintiffs,

CASE NO. 10-cv-01010-LJO-BAM

**FINDINGS AND RECOMMENDATIONS ON  
PLAINTIFF’S MOTION FOR CLASS  
CERTIFICATION; APPOINTMENT OF  
REPRESENTATIVE PLAINTIFFS AND  
LEAD COUNSEL**

COMCAST CORPORATION, and  
DOES 1 through 10 Inclusive,

Defendants.

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**I. INTRODUCTION**

By notice filed on August 22, 2011, plaintiffs Alfred Gonzales and Kelly Gonzales (“Plaintiffs”) filed a motion to certify two putative classes in this matter. (Doc. 64.) Defendant Comcast Corporation. (“Comcast”) filed an opposition on September 26, 2011. (Doc. 75.) Plaintiffs filed their Reply Brief on October 14, 2011. (Doc. 78.) The Court heard oral arguments on the matter on November 18, 2011.<sup>1</sup> (Doc. 83.) Having considered the moving, opposition and reply papers, the declarations and exhibits attached thereto, arguments presented at the November 18, 2011 hearing, as well as the Court’s file, the Court issues the following findings and recommendations.

\_\_\_\_\_ <sup>1</sup> Counsel Kevin Ruf and Coby Turner appeared for Plaintiffs. Counsel Bryan Merryman and Jaime Bianchi appeared for Comcast.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 On May 3, 2010, Plaintiffs, individually and on behalf of all others similarly situated, filed a  
3 putative class action complaint against Comcast in the Superior Court of the State of California in and  
4 for the County of Fresno. (Doc. 1, Attach. 1., the “State Court Action”) On June 3, 2010, Comcast,  
5 pursuant to 28 U.S.C. §§ 1446(a) and (d), removed the State Court Action to this Court. (Doc. 1.) On  
6 May 13, 2011, Plaintiffs filed a First Amended Complaint (Plaintiffs’ “FAC”), which is the operative  
7 pleading underlying the instant Motion. (Doc. 56.)

8 The crux of Plaintiffs’ FAC, as well as their Motion for Class Certification, challenge Comcast’s  
9 billing and service cancellation practices. (Pls.’ Mot. Class Cert., 1: 7-13, Doc. 64.) Specifically,  
10 Plaintiffs challenge Comcast’s policies and practices relating to post-cancellation billing of consumers  
11 who seek to “port”<sup>2</sup> their telephone number to another service provider. (Pls.’ FAC ¶¶ 23-5, Doc. 56.)  
12 Additionally, Plaintiffs allege that Comcast’s policies and practices result in consumers receiving unclear  
13 and inaccurate billing statements. (Pls.’ FAC ¶¶ 22, 41, Doc. 56.) Plaintiffs argue that Comcast  
14 “purposefully uses arcane and confusing final billing statements to prevent its customers from  
15 understanding its improper billing methods, such as billing past the last date of service, using inaccurate  
16 refund calculations, and delaying the last day of service past the customer’s requested date in order to  
17 ‘confirm’ porting.” (Pls.’ Mot. Class Cert., 5: 3-8, Doc. 64.)

18 **A. Comcast’s Billing and Account Cancellation Model**

19 According to Plaintiffs’ FAC, Comcast is the largest cable provider in the United States and  
20 conducts a substantial amount of its business in the State of California. (Pls.’ FAC ¶ 1, Doc. 56.) When  
21 California consumers sign up for Comcast’s services, they are required to enter into standard Residential  
22 Service Contracts.<sup>3</sup> (Declaration of Kevin F. Ruf (“Ruf Decl.”), Ex 14, 106: 19-22, Doc. 66.) When a  
23 consumer seeks to cancel their Comcast services, the Residential Service Contract provides that  
24 consumers are responsible for all applicable fees and charges until the Contract is terminated, service  
25 is disconnected and equipment is returned. (Declaration of Bryan A. Merryman (“Merryman Decl.”),

26 \_\_\_\_\_  
27 <sup>2</sup> “Porting” is the process by which an existing telephone number is reassigned to a new telephone service provider.

28 <sup>3</sup> With the exception of references to new products and services, the evidence indicates that the Residential Service Contracts are standard documents tendered to all California consumers. (Ruf Decl., Ex 14, 106: 19-22, Doc. 66.)

1 Ex. A at 11, Doc. 75.)

2 Comcast's billing model entails billing and collection of money in advance of Comcast's  
3 providing the services for which the customer is being billed. (Merryman Decl., Ex. T at 194-5, Doc.  
4 75.) Because Comcast's services are billed in advance of their use - thus, often resulting in  
5 overpayments when consumers seek to cancel their Comcast account - Comcast has internal mechanisms  
6 in place for automatically generating prorated refunds to customers. (Merryman Decl., Ex. A at 11; Ex.  
7 Q at 141-44; Ex. T at 196-201; Doc. 75.)

8 If a Comcast customer includes a porting request when cancelling their Comcast service,  
9 Comcast does not close the customer's account until the porting has occurred. (Pls.' FAC, ¶ 23, Doc.  
10 56; Merryman Decl., Ex. P at 138-140, Ex. T at 190-92, Doc. 75.) Accordingly, if a porting request is  
11 unresolved, even if a customer has returned Comcast's equipment and the agreed-upon cancellation date  
12 has passed, the customer will continue to be billed, because it is Comcast's policy to leave customer  
13 accounts open until the port-out is confirmed. (Ruf Decl., Ex 14, 5: 17-23; Ex. 18, 5: 11-28, Doc. 66.)

14 **B. Plaintiffs Alfred Gonzales' and Kelly Gonzales' Experience With Comcast**

15 In or around November of 2004, Plaintiffs contracted with Comcast to provide various  
16 communication and entertainment services in their home. (Ruf Decl., Ex. 24, ¶ 4, Doc. 66.) When  
17 Plaintiffs signed up for Comcast's services, they received a Residential Services Contract (the  
18 "Contract") which provided, *inter alia*, that Plaintiffs would be responsible for all applicable fees and  
19 charges until the Contract was terminated, services were disconnected and equipment was returned.  
20 (Ruf. Decl., Ex. 24, ¶4, Doc. 66; Merryman Decl., Ex. A at 11, Doc. 75.) The Contract further provided  
21 that Comcast would refund all prepaid monthly service fees charged for Comcast's services after the date  
22 of termination. (Merryman Decl., Ex. A at 11, Doc. 75.)

23 Sometime in 2008, Plaintiffs signed up for a service provided by Comcast called "Pay Direct,"  
24 which permits Comcast's customers to establish automatic recurring payments, debited from the  
25 consumer's checking account, in making their monthly payments to Comcast. (Ruf Decl., Ex. 24 ¶ 5,  
26 Doc. 66.) The Pay Direct Agreement provides that in order to cancel the Pay Direct service or otherwise  
27 cancel the automatic billing, the customer was to give notice to Comcast - either in writing, by  
28 telephone or internet. (Merryman Decl., Ex. B at 38-44, Doc. 75.)

1 Sometime between October 8, 2008 and November 6, 2008, Plaintiffs contacted Comcast to  
2 cancel their Comcast services,<sup>4</sup> establishing an effective cancellation date of November 6, 2008.<sup>5</sup> (FAC,  
3 ¶12, Doc. 56; Ruf Decl., Ex. 24 ¶ 7, Doc. 66.) Plaintiffs additionally requested that their telephone  
4 number be released for porting to a new service provider. (Merryman Decl., Ex. S at 171, Doc. 75.) At  
5 this time, Plaintiffs did not separately terminate the Direct Pay Agreement.<sup>6</sup> (Merryman Decl., Ex. S at  
6 169-70; Ex. B at 38-44, 56-57, Doc. 75.) On November 4, 2008, an automatic payment of \$174.46 was  
7 debited from Plaintiffs' checking account, representing payment for Comcast's services for the billing  
8 period of October 19, 2008 to November 18, 2008. (FAC ¶ 13, Doc. 56; Merryman Decl., Ex. E, Doc.  
9 75.)

10 On November 7, 2008, Plaintiffs returned all Comcast equipment to a Comcast retail store, and  
11 Plaintiffs were given a receipt after returning the equipment.<sup>7</sup> (FAC ¶ 12, Doc. 56; Ruf Decl. Ex. 24 ¶  
12 8, Doc. 66; Merryman Decl., Ex. F at 83, Doc. 75.) At this time, Plaintiffs' Account remained open  
13 because Comcast's records indicated the requested porting had not been completed. (Comcast's Op.,  
14 4: 13-15; Merryman Decl., Ex T at 201-02, Doc. 75.) Because Plaintiffs' account remained open,  
15 Plaintiffs' checking account was debited on December 4, 2008, in the amount of \$174.46, representing  
16 the billing period of November 19, 2008 to December 18, 2008. (Comcast's Op., 4: 18-20, Doc. 75; FAC  
17 ¶16, Doc. 56.) Plaintiffs' Account continued to remain open and generate billing statements until at  
18 least January 9, 2009, when Plaintiffs received a bill for \$351.88.<sup>8</sup> (Ruf Decl., Ex. 24 ¶ 13, Doc. 66.)  
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20  
21 <sup>4</sup> Plaintiffs state they unsuccessfully attempted to cancel their Comcast services on or about September 22, 2008.  
22 (FAC, ¶12, Doc. 56; Ruf Decl., Ex. 24 ¶ 6, Doc. 66.) However, this allegation does not factor into Plaintiffs' theory of  
23 liability and, as such, the Court beings its analysis with the Plaintiffs' second attempt to cancel their Comcast services.

24 <sup>5</sup> The parties disagree on what the agreed-upon termination date was, as Comcast contends the termination date was  
25 November 7, 2008. (Comcast Op., 4: 10-11.) This disagreement is not critical to the Court's analysis for this Motion.

26 <sup>6</sup> Ultimately, Plaintiff did not cancel their Pay Direct Authorization until sometime in December 15, 2008. Doc.  
27 66, Ex. 24 ¶ 12; Doc. 75, 4: 23-4.

28 <sup>7</sup> The Parties dispute whether this receipt was a billing statement on the account, or a receipt solely for the return  
of the equipment. *Compare* Doc. 66, 4: 3-10 *with*; Doc 75, 4: 10-12. This disagreement is not critical to the Court's analysis  
for this Motion.

<sup>8</sup> These statements, however, reflected an account receivable, rather than a debit from Plaintiffs' checking account,  
as Plaintiffs had withdrawn their Direct Pay Authorization on or about December 15, 2008.

1 On April 27, 2009, Plaintiffs received a check from Comcast in the amount of \$241.23,  
2 representing a refund of funds deducted from Plaintiffs' checking account via Direct Pay on November  
3 3, 2008 and December 4, 2008; less a prorated portion for services rendered between October 19, 2008  
4 and November 7, 2008.<sup>9</sup> (FAC ¶ 19, Doc. 56; Ruf Decl., Ex. 24 ¶ 15, Doc. 66; Comcast's Op., 4: 26-28,  
5 Doc. 75.) In or around October of 2010, Plaintiffs re-subscribed to Comcast's services. (Comcast's Op.,  
6 2: 7-8, Doc. 75.)

7 **C. Plaintiffs' FAC**

8 Plaintiffs' FAC states claims against Comcast on behalf of two proposed Classes for: (1)  
9 violations of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* (the "UCL"); (2)  
10 violations of the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (the "CLRA"); and (3)  
11 breach of contract. (Pls.' FAC ¶¶ 39- 58, Doc. 56.)

12 Plaintiffs plead a claim against Comcast under the Section 1770(a)(5) CLRA, arguing that  
13 Comcast's porting and billing practices are tantamount to "a representation that [Comcast's] goods or  
14 services have characteristics, uses and benefits which they did not have." Cal. Civ. Code § 1770(a)(5).  
15 Plaintiffs state two separate claims under the UCL: a claim for "unlawful" business practices and a claim  
16 for "unfair" business practices. Plaintiffs' claim for unlawful business practices under the UCL is  
17 predicated on an alleged violation of Video Customer Service Act, Cal. Govt. Code § 53088 *et seq.* (the  
18 "Video Act"). Specifically, Plaintiffs allege Comcast has violated Section 53088.2(f) of the Video Act  
19 by failing to render bills that are accurate and understandable. Plaintiffs also plead an "unfair" business  
20 practice claim under the UCL for Comcast's practice of leaving customer accounts open until porting  
21 has been confirmed, and for Comcast's use of inaccurate and unclear billing statements. Plaintiffs allege  
22 an additional unlawful UCL claim predicated on the above-referenced CLRA claim. Lastly, Plaintiffs  
23 plead a claim for breach of contract,<sup>10</sup> arguing that Comcast has "charged Plaintiffs and Class Members  
24 for more fees than were permitted under the Service Contract."

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25 <sup>9</sup> The Parties dispute whether the April 27 refund was a full refund of monies due to Plaintiff from the period of  
26 November 7, 2008 through December 4, 2008. This issue is discussed in greater detail below.

27 <sup>10</sup> It is unclear if Plaintiffs are attempting to assert their breach of contract claim on behalf of both Classes, or just  
28 the Porting Class. However, because Plaintiffs have stated this claim applies "when customers' accounts were kept open  
without their knowledge or consent[.]" it would appear this claim only applies to the Porting Class.

1 **D. Plaintiffs’ Motion For Class Certification**

2 Plaintiff seeks to certify the following classes:

- 3 1) The “Cancellation Class” comprising all Comcast customers in California, who,  
4 from May 3, 2006 to the present, cancelled their Comcast services and returned  
5 their Comcast equipment but were not given an accurate billing statement upon  
6 termination that clearly stated the date of account termination, the last day of  
7 service charges incurred and/or the correct final billing credit amount [and;]
- 8 2) The “Porting Class” comprising all Comcast customers in California, who, from  
9 May 3, 2006 to the present, cancelled their Comcast services and returned their  
10 Comcast equipment, but whose accounts were not closed at that time.

11 Plaintiffs seek certification for both the Cancellation Class and the Porting Class (“collectively referred  
12 to as the “Classes”) pursuant to Rule 23(b)(2) and 23(b)(3).<sup>11</sup> Plaintiffs’ Motion for Class Certification  
13 also seeks to appoint Plaintiffs as class representatives and appointment of Plaintiffs’ counsel, Glancy  
14 Binkow & Goldberg LLP, as lead counsel for the Classes. Additionally, Plaintiffs seek to assert claims  
15 for breach of contract and violations of the UCL and CLRA on behalf of both Classes.

16 **IV. DISCUSSION**

17 **A. Standing**

18 Before considering whether Plaintiffs’ proposed Classes meet the requirements of Rule 23,  
19 the Court must determine whether Plaintiffs’ have standing to assert their claims. In class actions,  
20 questions of standing do not generally defer until the class certification stage. *LaDuke v. Nelson*, 762  
21 F.2d 1318, 1325 (9<sup>th</sup> Cir. 1985) (“Standing ... is a jurisdictional element that must be satisfied prior  
22 to class certification.”) It is proper for the Court to address the issue of standing before addressing  
23 the issue of class certification. *See Easter v. Am. West Fin.*, 381 F.3d 948, 962 (9th Cir.2004).

24 **1. Standing Requirements**

25 Under Article III’s standing requirement, a plaintiff must have suffered an “injury in fact”  
26 that is “distinct and palpable,” the injury must be fairly traceable to the challenged action, and the  
27 injury must be likely redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S.  
28 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In other words, the alleged injury can not be “abstract  
... conjectural or hypothetical.” *Whitmore v. Arkansas*, 495 U.S. 149, 155–56, 110 S.Ct. 1717, 109

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<sup>11</sup> While Plaintiff’s Notice of Motion and Motion for Class Certification only requests certification pursuant to Rule 23(b)(3), Plaintiffs’ Memorandum of Points and Authorities, as well as Plaintiffs’ arguments presented at the November 18 hearing, requested certification under to Rule 23(b)(2). Accordingly, the Court will discuss whether certification is appropriate under both standards.

1 L.Ed.2d 135 (1990) (internal quotation marks omitted). “[T]he Supreme Court’s precedent may be  
2 read to support a general rule of standing along these lines: If the injury is not concrete, there is no  
3 injury in fact even if the injury is particularized[.]” *Covington v. Jefferson County*, 358 F.3d 626 (9<sup>th</sup>  
4 Cir. 2003).

5 To confer standing under the UCL, as well as to serve as a class representative, plaintiff must  
6 “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e.,  
7 economic injury, and (2) show that the economic injury was the result of, i.e., caused by, the unfair  
8 business practice or false advertising that is the gravamen of the claim.” *Kwikset Corp., v. Superior*  
9 *Court*, 51 Cal. 4<sup>th</sup> 310, 322 (Cal. 2011); Cal. Bus. & Prof. Code 17204. Under the CLRA, Plaintiff  
10 must show a tangible increased cost or burden resulting from an alleged unlawful practice. Cal. Civ.  
11 Code § 1780(a); *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4<sup>th</sup> 634, 643 (Cal. 2009).

## 12 **2. Plaintiffs Bear The Burden of Demonstrating Standing**

13 Comcast argues that under Article III, the UCL and CLRA, Plaintiffs’ lack standing to  
14 represent the proposed Classes. (Comcast’s Op. 7-9. Doc. 75.) Specifically, Comcast argues that  
15 because Plaintiffs received a full refund for any over-billing that took place, Plaintiffs have not  
16 suffered the requisite “injury in fact” required under Article III and Plaintiffs’ substantive claims. *Id.*  
17 In response, Plaintiffs argue that “Defendant has not presented any evidence to show that Plaintiffs  
18 have been fully refunded[.]” and that “[i]n the absence of any evidence proving that Plaintiffs do not  
19 have standing, [i.e., received a full refund] the well pled allegations in the Complaint should be taken  
20 as true at the class certification stage.” (Pls.’ Reply, 4: 6-14, Doc. 78.) Plaintiffs additionally argue  
21 they have suffered an economic injury resulting from overdraft fees imposed by Plaintiffs’ bank as a  
22 result of Comcast’s improper billing. (Pls.’ Reply, 3: 22-25, Doc. 78).

23 Plaintiffs argue it is Comcast’s burden to demonstrate Plaintiffs lack standing. Specifically,  
24 Plaintiffs argue that “[i]n the absence of any evidence proving that Plaintiffs do not have standing,  
25 the well pled allegations in the Complaint should be taken as true at the class certification stage.”  
26 (Pls.’ Reply, 4: 6-14, Doc. 78.) The Court disagrees. It is not Comcast’s burden to prove Plaintiffs  
27 lack standing. On the contrary, it is axiomatic that Plaintiffs bear the burden of demonstrating their  
28 own standing. *See United States v. Hayes*, 515 U.S. 737, 743 (1995) (the burden is on plaintiff “to

1 allege facts demonstrating that [plaintiff] is a proper party to invoke judicial resolution of the  
2 dispute.”); *Friendly House v. Napolitano*, 419 F.3d 930, 932 (9<sup>th</sup> Cir. 2005)(“Plaintiffs have not met  
3 their burden of demonstrating an injury-in-fact.”) (emphasis added); *Caldwell v. Caldwell*, 420 F.  
4 Supp. 2d 1102, 1105 (N.D. Cal. 2006) (“Plaintiff also bears the burden of demonstrating that she has  
5 standing to pursue the claims alleged in the complaint.”). Plaintiffs’ standing, therefore, can not be  
6 presumed by the Court. Rather, Plaintiffs are required to put forward evidence demonstrating  
7 Plaintiffs *in fact* have legal standing to pursue the claims alleged in their complaint.

### 8 **3. Plaintiffs’ Individual Standing**

#### 9 **i. Speculative Nature of Injury In Fact Resulting From Inadequate Refund**

10 Plaintiffs have failed to establish an injury in fact or economic loss sufficient to confer  
11 standing under Article III, the UCL or the CLRA. With respect to Plaintiffs’ claims of inadequate  
12 refunds, the Court finds Plaintiffs’ claim that the refund provided by Comcast was inadequate is too  
13 speculative to plead a concrete injury in fact. *See Bernhardt v. County of Los Angeles*, 279 F.3d 862,  
14 872 (9<sup>th</sup> Cir. 2002) (“a claim for damages that is too speculative in some circumstances precludes  
15 standing.”).

16 The Court disagrees with Plaintiffs that “Defendant has not presented any evidence to show  
17 that Plaintiffs have been fully refunded.” (Pls.’ Reply, 4: 6-14, Doc. 78.) The undisputed evidence  
18 before the Court demonstrates that Comcast provided a prorated refund for money debited from  
19 Plaintiffs’ bank account in November and December of 2008 – the time frame Comcast is alleged to  
20 have improperly take money from Plaintiffs’ account. (FAC ¶ 19, Doc. 56; Ruf Decl., Ex. 24 ¶ 15,  
21 Doc. 66; Comcast’s Op., 4: 26-28, Doc. 75.) In response, Plaintiffs claim that the prorated refund  
22 was less than what Plaintiffs were entitled to receive. However, Plaintiffs have failed to  
23 demonstrate, or even allege with any degree of concreteness, that the refund was inadequate. Indeed,  
24 Plaintiffs’ FAC acknowledges that Comcast tendered a refund to Plaintiffs, and that “it has been  
25 virtually impossible to determine what Plaintiffs were billed for and whether their refund check  
26 compensates them for the improper charges they incurred.” (FAC ¶ 20, Doc. 56.) Nowhere in the  
27 FAC does Plaintiffs actually allege the refund was inadequate.

28 Looking to the evidence before the Court, Plaintiffs’ evidence that the refund was inadequate

1 is highly speculative. First, Plaintiffs have failed to present non-speculative evidence regarding *how*  
2 Comcast calculates its refunds.<sup>12</sup> Rather, Plaintiffs - without the aid of experts and without any  
3 reference to Comcast's specific billing or refund practices - have devised a series of rudimentary and  
4 varying calculations based on seemingly indiscernible and ever-changing variables. The damages  
5 resulting from these varying calculations run the gamut of possibilities - anywhere from around five  
6 cents to upwards of \$106.69<sup>13</sup> for the same period.<sup>14</sup> The deposition of Mrs. Gonzales demonstrates  
7 the speculative nature of Plaintiff's inadequate refund claims:

8 So there's so many different ways this [the refund calculation] can be done. I know  
9 it's crazy.... (Gonzales Depo., 232: 18-19.)

10  
11 ...there would be more days from October 19<sup>th</sup>, '08 to November 18<sup>th</sup>, '08' than there  
12 would be in November 19<sup>th</sup>, '08 to December 18<sup>th</sup>, '08 . . . . (Gonzales Depo., 228: 1-  
13 6.)

14 And the November statement, the November 9<sup>th</sup> statement is actually billed for 30  
15 days, so if you look, they are charging me for the same amount on both statements,  
16 though one is 31 days and one is 30 days, so it's really hard to come up with a figure  
17 because if you take 174.46, this is just, it's crazy and confusing, I know, but bear with  
18 me. If you take 174.46 and you divide that by 31, well, now you get 5.63 a day. I

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19  
20 <sup>12</sup> At oral argument, Plaintiffs acknowledged they had failed to determine how Comcast calculated its refunds with  
21 respect to Plaintiff or the putative Class Members.

22 <sup>13</sup> Plaintiffs' estimate that the damages could be as high as \$106.69 can be rejected on its face as this calculation  
23 simply argues that Plaintiffs should be entitled to an entire refund of the November 4, 2008 debit in the amount of \$174.46.  
24 Because this debit covered the billing period from October 18, 2008 to November 19, 2008, and because the agreed-upon  
cancellation date was November 7, 2008, it is clear Plaintiffs were not entitled to a full refund of the November 4, 2008 debit.  
Plaintiffs would have had to pay for Comcast's services between October 18, 2008 and November 7, 2008.

25 <sup>14</sup> For example, in Plaintiffs' Motion for Class Certification, Plaintiffs state that the refund *may* have been calculated  
26 at a rate of \$2.0952 per day, when in fact, Plaintiffs argue, the daily refund figure should have been 2.0964 per day – resulting  
27 in damages of twelve-one-hundredths of a cent per day. (Pls. Mot. Class Cert. 6, n. 13.) At this rate, Plaintiffs' total damages  
28 would be approximately five cents. In that same footnote, Plaintiffs suggest another calculation that would bring Plaintiffs'  
damages claim to \$1.64. *Id.* In response to written discovery from Comcast, Plaintiffs responded that "Plaintiffs[,] based  
on their personal calculations, believe the amount of damages suffered . . . are in the range of \$20 to \$90." (Deposition of  
Kelly Gonzales, 246: 1-9.) In that same deposition, however, Mrs. Gonzales stated that she felt the refund check should have  
been \$348.92, which would have resulted in a total damage claim of \$106.69. (Gonzales Depo., 138: 1-8.)

1 know, crazy, but if you take the 174.46 and you divide that by 30 days, which the  
2 November statement would be for, let's go for that now. Oh, pardon me. Divided by  
3 30 days. Now that's 5.82 per day. So I'm not really sure what they charge. Is it 5.82  
4 per day? Is it 5.63 a day? Because they are both different amounts and look at two  
5 different things. It's really hard. It's really confusing. I don't know.... (Gonzales  
6 Depo., 233: 4-19.)

7 But I would also have to say something else. Now, how are taxes done? Because, you  
8 know, if you are saying it's that much per day, well, are taxes charged per day? Are  
9 they charged per month? Because you have all these one-time charges, franchise fees,  
10 sales tax, FCC user fee, you have paid capital fee. So if we're including those and  
11 dividing, are those consistent things, or are we dividing them out? (Gonzales Depo.,  
12 234: 16-25.)

13 [Counsel reading an interrogatory response from Plaintiffs into the deposition record:]  
14 However, Plaintiffs are unsure of the per diem charge of Comcast services since it's  
15 not delineated in the billing statements and are also unsure of which day billing  
16 ended. And in absence of this information from Comcast, Plaintiffs cannot formulate  
17 a precise answer to this interrogatory. Plaintiffs[,] based on their personal  
18 calculations, believe the amount of damages suffered, even discounting Comcast's  
19 eventual refund, are in the range of \$20 to \$90. (Gonzales Depo., 246: 1-9.)

20 Even now, at the class certification stage, Plaintiffs can not explain what their damages are,  
21 and the justification for claiming those damages. Plaintiffs' Motion argues that the total refund  
22 calculation resulted in damages to Plaintiffs anywhere from five cents to \$1.64, but as Plaintiffs'  
23 deposition indicates, these calculations fail to consider the many possible variables that could have  
24 gone into Comcast's refund calculation. Plaintiffs have failed to identify how Comcast incorporates  
25 these many variables into its refund calculation; a problem which would apply equally to the Class  
26 members. Considering the de minimis amount Plaintiffs allege, coupled with Plaintiffs' failure to  
27 present a reasonable basis for claiming these minimal damages, the Court does not find Plaintiffs  
28 have concretely alleged an injury in fact relating to inadequate refunds. Rather, the present claim

1 “rests at the bottom on some abstract conception or speculative measure of harm.” *Associated*  
2 *General*, 459 U.S. at 543.<sup>15</sup>

3 **ii. Injury In Fact Resulting From Bank Overdraw Fees**

4 Plaintiffs have additionally argued they suffered an injury in fact in the form of overdraft fees  
5 imposed by Plaintiffs’ bank when Comcast impermissibly withdrew funds from Plaintiff’s checking  
6 account. (Pls. Reply, 3: 21-25, Doc. 78.). The Court believes this alleged injury sufficiently  
7 establishes a concrete injury of fact. *See Steele v. Hospital Corp. of America*, 36 F.3d 69, 71 (9th  
8 Cir.1994) (allegations of a “concrete financial loss” suffice to confer standing). Overdraft fees, if  
9 caused by Comcast’s conduct, constitute a “concrete financial loss.” This injury in fact stems from  
10 the same conduct of Comcast alleged to have caused the inadequate refunds. The overdraft injury  
11 sufficiently confers standing on Plaintiffs under Article III, the UCL and CLRA.<sup>16</sup>

12 **4. Absent Class Member’s Have Not Suffered An Injury In Fact Resulting From**  
13 **Inadequate Refunds**

14 Putative class members need not submit evidence of personal standing, however, a class must  
15 be defined in such a way that anyone within it would have standing. *Wal-Mart Stores, Inc. V. Dukes*,  
16 --- U.S.--- ,131 S.Ct. 2541, 2552 (2011) (“*Dukes*”) (acknowledging the need to exclude putative class  
17 members seeking injunctive relief who were no longer employed by Wal-Mart because those absent  
18 class members “lack[ed] standing to seek injunctive or declaratory relief against [Wal-Mart’s  
19 current] employment practices.”); *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 612-13 (1997)  
20 (instructing district courts to be “mindful that Rule 23’s requirements must be interpreted in keeping  
21 with Article III constraints.”); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir.2006) (“[N]o  
22 class may be certified that contains members lacking Article III standing.”); *Burdick v. Union Sec.*

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24  
25 <sup>15</sup> Under Rule 23, the Court is to conduct a “rigorous analysis.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980  
26 (9<sup>th</sup> Cir. 2011). The Court has found Plaintiffs lack standing for failure to show an injury in fact with respect to inadequate  
27 refunds. Nonetheless, the Court conducts the proceeding Rule 23 analysis as though Plaintiffs had sufficiently stated an  
28 inadequate refund injury in fact for standing purposes.

<sup>16</sup> Nonetheless, the overdraft injury is not typical of the injuries alleged on behalf of the Class members.  
Additionally, there is no evidence indicating the determination of this type of injury could be ascertained on a common class-  
wide basis.

1 *Ins. Co.*, No. 07-cv-4028 - ABC (JCX), 2009 WL 4798873, at \*4 (C.D. Cal., Dec. 9, 2009) (“absent  
2 class members lacking justiciable claims under Article III should be excised from the case.”); *Sanders*  
3 *v. Apple, Inc.*, 672 F.Supp. 2d 978, 991 (N.D. Cal. 2009); *O’shea v. Epson America, Inc.*, No. 09-cv-  
4 8063-PSG (CWX), 2011 WL 4352458, at \*8 (C.D. Cal., Sept. 19, 2011) (“*Tobacco II* does not  
5 permit a federal class action to proceed where class members lack Article III standing”); *Aho v.*  
6 *AmeriCredit Financial Services, Inc.*, No. 10-cv-1373 DMS, 2011 WL 3047677 (S.D. Cal., July 25,  
7 2011) (“The requirement that all members of the class have Article III standing makes sense. If that  
8 were not the rule, a class could include members who could not themselves bring suit to recover,  
9 thus permitting a windfall to those class members and allowing Rule 23 to enlarge substantive  
10 rights.”)

11         The evidence before the Court demonstrates that none of the putative Class members have  
12 suffered an injury in fact. As discussed above, to establish standing under Article III, the UCL or the  
13 CLRA, Plaintiffs must establish not just a wrongful act prohibited by those statutes, but Plaintiffs  
14 must also show that those wrongful acts resulted in an injury to Plaintiffs and the putative Class  
15 members. In other words, it is insufficient, for standing purposes, to allege that Comcast’s billing  
16 statements violate the Video Act, or that Comcast’s porting practices violate the UCL or CLRA.  
17 Injuries must also flow from these wrongful acts.

18         Plaintiffs claim that Comcast’s cancellation and porting practices result in over-billing to  
19 Comcast customers. This is the sole injury alleged on behalf of the Classes. Comcast, however, has  
20 put forward evidence that Comcast maintains internal mechanisms for automatically generating  
21 refunds. Indeed, Plaintiffs received such a refund. Plaintiffs have not presented any evidence  
22 indicating that Comcast fails to generate these refunds. On the contrary, because Comcast bills for its  
23 services in advance, automatically generating refunds would seem to be a fundamental aspect of  
24 Comcast’s business model. In response, Plaintiffs argue these refunds are inadequate due to  
25 incorrect refund calculations. As discussed above, however, *see supra* Section IV.A.3.i, Plaintiffs  
26 have failed to present any non-speculative evidence that the refund calculation is incorrect or  
27 otherwise results in an injury to Plaintiffs or the absent Class members.

28         For the same reasons that Plaintiffs have failed to establish an injury in fact relating to their

1 own refund, Plaintiffs have similarly failed to put forward any evidence that absent Class members  
2 have suffered any injury resulting from Comcast's alleged unlawful conduct. In other words, even  
3 assuming Comcast's billing, cancellation and porting practices violate the Video Act, UCL, CLRA  
4 and the terms of Comcast's Service Agreement, Plaintiffs have not presented any evidence indicating  
5 that any of the putative Class members have suffered an injury as a result of these practices. As a  
6 result, neither Plaintiffs nor the absent members of the Cancellation or Porting Classes have standing  
7 to assert the claims alleged in Plaintiffs' First Amended Complaint.

8 **B. Rule 23 Certification Analysis**

9 The Court has found Plaintiffs failed to show they have standing. Nonetheless, even if  
10 Plaintiffs could demonstrate standing, certification of the Classes would fail.

11 **1. Legal Standard**

12 A class may be certified only if: (1) the class is so numerous that joinder of all members is  
13 impracticable (numerosity); (2) there are questions of law or fact common to the class  
14 (commonality); (3) the claims or defenses of the representative parties are typical of the claims or  
15 defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect  
16 the interests of the class. Fed. R. Civ. P. 23(a). In addition to the requirements imposed by Rule  
17 23(a), Plaintiffs bear the burden of demonstrating that the class is maintainable pursuant to Rule  
18 23(b). *Narouz v. Charter Commc'ns, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). In this case,  
19 Plaintiff seeks certification of both Classes under Rule 23(b)(2) and Rule 23(b)(3). Rules 23(b)(2)  
20 and 23(b)(3) are satisfied if:

21  
22 (2) the party opposing the class has acted or refused to act on grounds generally  
23 applicable to the class; or

24  
25 (3) the questions of law or fact common to the members of the class predominate over  
26 any questions affecting only individual members, and a class action is superior to  
27 other available methods for the fair and efficient adjudication of the controversy.

28 Fed. R. Civ. P. 23(b).

1 Rule 23 is more than a pleading standard. “A party seeking class certification must  
2 affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that  
3 there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Dukes*, 131  
4 S.Ct., at 2552 (emphasis in original). “[A]ctual, not presumed, conformance with Rule 23(a) remains  
5 . . . indispensable.” *General Telephone Co. Of Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

6 When considering a motion for class certification, the Court must conduct a “rigorous  
7 analysis” to determine “the capacity of a classwide proceeding to generate common answers apt to  
8 drive the resolution of the litigation.” *Dukes*, 131 S.Ct. at 2551-2; *Ellis v. Costco Wholesale Corp.*,  
9 657 F.3d 970, 980 (9<sup>th</sup> Cir. 2011). Frequently “that ‘rigorous analysis’ will entail some overlap with  
10 the merits of the plaintiff’s underlying claim.” *Ellis*, 657 F.3d at 980 (citing *Dukes*, 131 S. Ct. at  
11 2551). While the court is generally required to accept a Plaintiff’s allegations as true, *Blackie v.*  
12 *Barrack*, 524 F.2d 891, 901, n.17 (9th Cir. 1975), a court is not required to “unquestioningly accept a  
13 plaintiff’s arguments as to the necessary Rule 23 determinations.” *Campion v. Old Republic Home*  
14 *Protection Co., Inc.*, 272 F.R.D. 517, 525 (S.D. Cal. 2011) (internal citation omitted). In fact, the  
15 Court *must* probe behind the pleadings if doing so is necessary to make findings on the Rule 23  
16 certification decision. *Ellis*, 657 F.3d at 981.

## 17 **2. Numerosity**

18 Rule 23(a)(1) requires the members of a proposed class to be so numerous that joinder of all  
19 of the class members would be impracticable. Fed. R. Civ. P. 23(a). “Impracticability does not mean  
20 ‘impossibility,’ but only the difficulty or inconvenience in joining all members of the class.” *Harris*  
21 *v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir.1964) (quoting *Advertising*  
22 *Specialty Nat. Ass'n v. FTC*, 238 F.2d 108, 119 (1st Cir.1956)). Additionally, the exact size of the  
23 class need not be known so long as “general knowledge and common sense indicate that it is large.”  
24 *Perez-Funez v. Dist. Dir.*, 611 F. Supp. 990, 995 (C.D. Cal. 1984).

25 The evidence shows that Comcast currently claims to have 2.1 million customers within the  
26 State of California. (Ruf Decl., Ex 14 at 189-190, Doc. 66.) In an effort to establish numerosity of  
27 the Classes, Plaintiffs have proffered a Comcast record which categorizes various Comcast customer  
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1 complaints relating to their Comcast accounts. (Ruf Decl., Ex 15, Doc. 66.) While this evidence  
2 does align with some of the allegations in Plaintiffs' FAC, the Classes Plaintiffs seek to certify relate  
3 entirely to Comcast consumers who sought to terminate their accounts. None of the information  
4 conveyed in Plaintiffs' Exhibit 15 specifically relates to Comcast consumers who sought to terminate  
5 their accounts. As such, Plaintiff's Exhibit 15 does little to aid the Court in its numerosity analysis.

6       It seems self-evident, however, that the proposed Classes are sufficiently numerous.  
7 Considering Comcast has millions of customers in California alone, it is reasonable to infer that  
8 many may have, in the last five years, cancelled their Comcast service. Comcast has not provided any  
9 meaningful objection to the numerosity requirement. While Plaintiffs probably could have obtained  
10 information relating to the number of former Comcast consumers who have terminated their  
11 Comcast accounts in the relevant class period - thus providing a more accurate picture of the relative  
12 class size - the Court will infer that the proposed Classes are sufficiently numerous to meet the  
13 relatively low threshold required under Rule 23(a)(1). *See Philadelphia Electric Co. V. Anaconda*  
14 *Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) (noting that classes of only 25 members are  
15 sufficiently large enough to justify certification); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610,  
16 617 (C.D. Cal. 2008) (“[a]s a general rule, classes of forty or more are considered sufficiently  
17 numerous.”) Accordingly, the proposed Classes are so numerous that joinder is impracticable and  
18 the numerosity requirement is met.

### 19       **3. Commonality**

20       Rule 23(a)(2) requires “questions of law or fact common to the class.” Historically, the  
21 requirements of Rule 23(a)(2) have “been construed permissively,” and “[a]ll questions of fact and  
22 law need not be common to satisfy the rule.” *Hanlon*, 150 F.3d at 1019. Indeed, “[e]ven a single  
23 [common] question” will satisfy the Rule 23(a)(2) inquiry. *Dukes*, 131 S. Ct at 2556 (internal  
24 citation omitted).

25       The Supreme Court's recent decision in *Dukes*, however, has undoubtedly increased the  
26 burden on class representatives by requiring that they identify *how* common points of facts and law  
27 will drive or resolve the litigation. *Dukes*, 131 S. Ct at 2552 (“What matters to class certification ...  
28

1 is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide  
2 proceeding to generate common answers apt to drive the resolution of the litigation.”) (internal  
3 citations omitted.) Under this standard, it is insufficient to merely allege any common question, for  
4 example, “did Defendant’s conduct violate the UCL or CLRA?” *See Ellis v. Costco*, 657 F.3d at  
5 981; *Dukes*, 131 S.Ct. at 2551-52.

6 Plaintiffs argue that “common facts and questions of law abound[,]” because this case is  
7 based on standardized billing practices, service contracts and porting policies. (Pls.’ Mot. Class  
8 Cert., 11: 1-11, Doc. 65.) Plaintiffs argue that the common questions which “form the core” of the  
9 Court’s analysis, found in Plaintiffs’ FAC and Motion, are:

- 10 a. Whether, by the misconduct set forth in this FAC, Defendant has engaged in  
11 unfair, fraudulent or unlawful business practices with respect to the refunding,  
12 cancellation, disconnection, porting confirmation, and/or termination of  
Comcast services;
- 13 b. Whether Defendant violated the Consumer Legal Remedies Act;
- 14 c. Whether Defendant breached their Service Contract and Recurring Payment  
15 Contract with consumers by charging them additional fees; and
- 16 d. Whether, as a result of Defendant’s misconduct as alleged herein, Plaintiffs  
17 and the Classes are entitled to damages, injunctive relief and other remedies to which  
18 Class Members are entitled as a result of Defendant’s wrongful conduct, and, if so,  
the amount and nature of such relief.

19 (FAC ¶35, Doc. 56; Pls.’ Mot. Class Cert., 16: 16-26, Doc. 65.)

20 Comcast argues that Plaintiffs have failed to meet the commonality requirement because  
21 Plaintiffs’ common questions “merely repeat the Complaint’s three counts and its prayer for relief.”  
22 (Comcast’s Op., 11: 14-17, Doc. 75.) Comcast cites *Dukes* in arguing that the court should “require  
23 plaintiffs to articulate not just common questions, but to show that there are ‘common answers’ to  
24 the issues that will ‘drive the resolution of the litigation’ for the proposed class as a whole.”  
25 (Comcast’s Op. 12: 1-3, Doc. 75.) (Emphasis in original.) Comcast additionally argues that, because  
26 the primary issues driving this litigation are (1) whether each customer is entitled to a refund, and (2)  
27 whether there is a common answer regarding causation for the Cancellation Class’s claims - issues  
28

1 that, in Comcast’s opinion, can not be resolved on a class-wide basis - commonality can not be met.<sup>17</sup>  
2 (Comcast’s Op. 13: 1-8, Doc. 75.)

3 The Court agrees with Comcast. Plaintiffs’ FAC and moving papers fail to properly  
4 articulate common issues of fact and law capable of generating common answers to issues that will  
5 drive resolution of this litigation. In *Dukes*, the Court presented the following hypothetical  
6 “common” questions as inadequate to meet the requirement of Rule 23(a)(2):

7 “Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion  
8 over pay? Is that an unlawful employment practice? What remedies should we get?  
Reciting these questions is not sufficient to obtain class certification.”

9 *Dukes*, 131 S.Ct. at 2551. These hypothetical common questions, while insufficient, nonetheless  
10 sought to answer specific, discrete factual queries that ultimately failed to “resolve an issue that is  
11 central to the validity of each one of the claims in one stroke.” *Dukes*, at 131 S.Ct. at 2551. The  
12 common questions presented in Plaintiffs’ FAC fall short of the hypothetically inadequate ones  
13 presented in *Dukes*. Plaintiffs’ common questions fail to provoke a single specific, common factual  
14 inquiry. Instead, Plaintiffs’ common questions do little more than rephrase Plaintiffs’ causes of  
15 action and request for relief in the question form.

16 Despite Plaintiffs’ failure to adequately articulate common questions, it is appropriate for the  
17 Court to look to the arguments of the parties and the evidence before the Court in determining  
18 whether such common questions exist. *See Dukes*, 131 S.Ct. 2551-3 (evaluating whether the  
19 plaintiffs claims “depend[ed] on a common contention”); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582,  
20 589 (C.D. Cal. 2011) (finding Plaintiff has established commonality by evaluating the pleadings and  
21 contentions as a whole, rather than looking to specifically articulated questions regarding the issue of  
22 commonality)

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26 <sup>17</sup> The Court agrees with Comcast on both of these points, however, this argument does not defeat the Rule 23(a)(2)  
27 analysis. The goal of the 23(a)(2) analysis is not to identify the *primary* issues related to class certification, but rather, to  
28 merely identify *some* common questions of fact or law, the common answers to which will drive the resolution of the litigation  
for the proposed class as a whole. *Dukes*, 131 S. Ct at 2552 It is not necessary, under Rule 23(a)(2), to demonstrate the  
*predominant* issues with respect to the Class are indeed common issues. In other words, Comcast’s position is more  
appropriately considered under the Rule 23(b)(3) analysis, which specifically endeavors to identify the predominate issues.

1                   **i. Common Questions Specific to the Cancellation Class**

2           Plaintiffs’ Cancellation Class claims do not present a single common question capable of  
3 generating common answers apt to drive the resolution of this litigation. The only common fact  
4 referenced by Plaintiffs is that Comcast utilizes “only one billing system and one billing format[.]”  
5 (Pls.’ Mot. Class Cert., 10: 27-7, Doc. 65.) Based on Comcast’s common billing system, Plaintiffs  
6 argue, common questions are present as to whether Comcast’s billing statements are “unclear”  
7 within the meaning of the Video Act, and additionally, whether Comcast’s billing statements are  
8 accurate with respect to final billing and refund calculations.

9                   **a. Unclear Billing Statements**

10           The clarity, or lack thereof, of Comcast’s billing statements do not present a common  
11 question to the Class. Such a question requires a highly subjective and individualized inquiry which  
12 would invariably differ from one Comcast customer to another, depending on factors such as  
13 knowledge, experience, intuitiveness, etc. *See In re Paxil Litigation*, F.R.D. 539, 541-42 (C.D. Cal.  
14 2003) (the plaintiff sought to certify a class of persons who suffered “severe” withdrawal symptoms  
15 after discontinuing use of the prescription drug Paxil. The Court found that the term “severe” was  
16 inherently subjective, thus failing to create a common issue.) What may be “unclear” to one Comcast  
17 customer may be perfectly clear to another, and vica versa. The Video Act does not require Comcast  
18 to construct or otherwise present their billing statements in a certain way in order to be viewed as  
19 clear or understandable. Furthermore, Plaintiffs have not explained how these billing statements  
20 should be constructed in order to be understandable from the perspective of a reasonable or average  
21 Comcast customer.<sup>18</sup> Without some objective measure of clarity, the Court is without any means to  
22 adjudicate this issue on a class-wide basis.

23                   **b. Inaccurate Billing Statements**

24           Plaintiffs argue the “systematic” and “rampant inaccuracies” in Comcast’s billing statements  
25 create a common question suitable for class-wide determination. This too, however, is not a question  
26 capable of generating common answers. Indeed, at the November 18 hearing, counsel for Plaintiffs

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27                   <sup>18</sup> Even if Plaintiff had undertaken this effort, it is unlikely the Court would be inclined to interpose Plaintiffs’  
28 subjective opinions regarding billing statement clarity into Comcast’s billing practices.

1 acknowledged that there is, at present, no common means for determining whether putative Class  
2 members were in fact overcharged or received an inadequate refund on a common basis. Plaintiffs  
3 maintain that such information exists, and that a common means for ascertaining this information is  
4 possible, but Plaintiffs have nonetheless failed to identify or otherwise articulate how the  
5 inaccuracies of Comcast’s billing statements can be demonstrated on a class-wide basis. *See Stern v.*  
6 *AT&T Mobility Corp.*, No. 05-cv-8842-CAS (CTX), 2008 WL 4382796 (C.D. Cal., Aug. 22, 2008)  
7 (“there is presently no evidence from which it can be determined on a class-wide basis what services  
8 were selected and what services were provided. While such evidence may be available, it has yet to  
9 be provided. Accordingly, the Court finds that plaintiff has at this juncture failed to meet her burden  
10 to establish a plausible class-wide method to prove [liability].”) Like Plaintiffs’ inability to plead a  
11 concrete injury in fact relating to inadequate refunds, Plaintiffs have failed to pose a common  
12 question to ascertain the accuracy of billing statements and refund calculations capable of generating  
13 common answers.

14 **ii. Common Questions Specific to the Porting Class**

15 Plaintiffs argue a question common to the Porting Class relates to Comcast’s practice of  
16 leaving accounts open past the agreed-upon termination date. The Court agrees with Plaintiffs that  
17 this issue presents a common question capable of resulting in common answers driving this  
18 litigation. The evidence indicates Comcast employs a standardized practice of leaving customer  
19 accounts open until porting is confirmed. The evidence further indicates that Comcast continues to  
20 bill its customers while their accounts remain open. Determining whether these common practices  
21 violate the terms of Comcast’s Service Agreement or violate the UCL or CLRA is central to the  
22 validity of each one of the claims in one stroke. This single common question alone is sufficient to  
23 meet the requirements of Rule 23(a)(2) with respect to the Porting Class. *Dukes*, 131 S.Ct. at 2553.  
24 Nonetheless, as explained below, this common question to the Porting Class fails to establish an  
25 injury in fact.

26 **iii. Common Questions Relating to Injury In Fact on Behalf of Both Classes**

27 Plaintiff argues commonality exists for the type of injuries sustained by the Classes. The only  
28 two injuries arguably before the Court are inadequate refunds and bank-imposed overdraft fees.

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**a. Inadequate Refunds**

Whether putative Class members have suffered an injury in fact resulting from an inadequate refund is not a question capable of generating common answers for the Classes as a whole. Discussed above, *supra* Section IV.A.3.i, Plaintiffs have failed to identify a single non-speculative basis for asserting inadequate refunds on behalf of the Classes. The evidence before the Court indicates that none of the members for either Class have suffered an inadequate refund injury. Even if Plaintiffs had demonstrated an inadequate refund injury in their own right, the evidence currently before the court demonstrates a highly individualized inquiry would be required to determine whether each and every Class member had suffered an inadequate refund injury.

**b. Overdraft Injuries**

Whether putative Class members have suffered an injury in the form of bank-imposed overdraft fees resulting from an improper debit on a Comcast customer account is not a question capable of generating common answers for the Classes as a whole. Plaintiffs have not presented any argument or evidence indicating a common means for ascertaining the answer to this question and, moreover, an individualized inquiry would be required to determine if a customer lacked sufficient funds in their bank account to cover a Comcast debit.

**4. Typicality**

Rule 23(a)(3) requires the claims or defenses of the representative parties be typical of the claims or defenses of the class. Rule 23(a)(3)'s typicality requirement provides that a “class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Keilholtz*, 268 F.R.D. at 337 (quotation omitted). The purpose of Rule 23(a)(3) is “to assure that the interest of the named representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992). The requirement is satisfied where the named plaintiffs have the same or similar injury as the unnamed class members, the action is based on conduct which is not unique to the named plaintiffs, and other class members have been injured by the same course of conduct. *Id.*

Plaintiffs argue that typicality is met because, *inter alia*, Plaintiffs cancelled their Comcast

1 services, returned their Comcast equipment, received “convoluted and inaccurate” billing statements  
2 and continued to be charged after cancellation due to a “porting confirmation.” (Pls. Mot. Class  
3 Cert., 12: 9-21, Doc. 65.) Comcast responds that Plaintiff’s claims are not typical because Plaintiffs  
4 received a complete refund and, as such, Plaintiffs claims are subject to unique defenses, thus  
5 defeating typicality.<sup>19</sup> Comcast additionally argues that Plaintiffs are non-typical of the proposed  
6 Classes’ claims regarding confusing and misleading billing statements because “Plaintiffs understood  
7 their bills well enough to call and protest those charges that were refunded.” (Comcast’s Op., 10: 23-  
8 6, Doc. 75.) Plaintiffs respond that there is no supporting evidence regarding a complete refund from  
9 Comcast and furthermore, Plaintiffs’ scrutinizing of their billing statements was the result of a large  
10 overcharge, not that they understood the billing statements better than the average class member.<sup>20</sup>  
11 (Pls. Reply, 7: 2-10, Doc. 78.)

12 The parties are in disagreement as to whether Comcast has a policy “automatically”  
13 generating refunds. Plaintiffs have argued that there is “ZERO” evidence of such automatic  
14 refunds.(Pls.’ Reply, 1: 17-19, Doc. 78.) Comcast, on the other hand, has cited to various portions of  
15 the evidence in asserting that refunds are generated automatically. (Merryman Decl., Ex. A at 11; Ex.  
16 Q at 141-44; Ex. T at 196-201; Doc. 75.)

17 In *Hanon*, the Ninth Circuit stated that “a named plaintiff’s motion for class certification  
18 should not be granted if “there is a danger that absent class members will suffer if their  
19 representative is preoccupied with defenses unique to it.” *Hanon*, 976 F.2d at 508. There, the Ninth  
20 Circuit found that the named plaintiff did not satisfy Rule 23(a)’s typicality requirement because his  
21 “unique background and factual situation require[d] him to prepare to meet defenses that [we]re not  
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23  
24 <sup>19</sup> This argument is inconsistent with Comcast’s overall position. The majority of Comcast’s briefing attempts to  
25 make the point that refunds are automatically generated and, as such, both the named plaintiffs and putative class members  
would not have any damages. As such, the refund to Plaintiffs, from Comcast’s perspective, would not create a unique  
defense.

26 <sup>20</sup> The Court does not accept Comcast’s argument that Plaintiffs claims relating to “misleading billing statements”  
27 are atypical because they had the wherewithal to call and protest Comcast’s continued billing. The evidence shows that these  
28 calls related to Comcast’s continuing monthly debits after the cancellation date, rather than the clarity of Comcast’s refund  
calculation. Furthermore, the evidence demonstrates Plaintiffs did not, and presently do not, understand the breakdown of  
Comcast’s refund calculation.

1 typical of the defenses which may be raised against other members of the proposed class.” *Id.*; *See*  
2 *also, Ellis*, 657 F.R.D. at 984 (holding that a district court applied the incorrect standard of decision  
3 when holding that “as a generalized matter, individualized defenses do not defeat typicality.”)

4 The Court is persuaded by the evidence at hand that Comcast does in fact have internal  
5 mechanisms for automatically generating refunds. As such, Plaintiffs’ claims, i.e, that the refunds  
6 provided by Comcast are inadequate, are typical of claims that may be asserted by other putative  
7 class members.

#### 8 **5. Adequacy of Representation**

9 Rule 23 requires that a class be certified only if “representative parties will fairly and  
10 adequately protect the interests of the class.” This factor requires that (1) the proposed  
11 representatives do not have conflicts of interest with the proposed class, and (2) that the  
12 representatives and their counsel will vigorously prosecute the action on behalf of the class. *Hanlon*,  
13 159, F.3d at 120.

14 Comcast does not challenge the adequacy of Plaintiffs’ counsel, and there is nothing before  
15 the Court indicating Plaintiffs’ counsel would not vigorously prosecute the action on behalf of the  
16 Classes. Comcast’s only challenge to this aspect of Rule 23 is that Plaintiffs are not adequate  
17 representatives because they lack standing to bring their own claims. (Comcast’s Op., 11: 7-10, Doc.  
18 75.) The Court, however, has determined Plaintiffs have properly stated an injury in fact resulting  
19 from bank overdraft fees. While this type of injury does not present a common question for the  
20 Classes, it nonetheless confers standing for Plaintiffs individual claims. As such, Comcast’s  
21 argument that Plaintiffs are inadequate representatives because they lack individual standing is  
22 rejected. Additionally, there is nothing in the record to suggest that Plaintiffs have any interests  
23 antagonistic to the Classes, or that Plaintiffs have not, or would not continue to vigorously prosecute  
24 the actions on behalf of the Classes. As such, the Court finds the adequacy of representation  
25 requirement satisfied.

#### 26 **C. Rule 23(b)(2) Analysis**

27 Plaintiff’s Notice of Motion and Motion for Class Certification only seek certification under  
28

1 Rule 23(b)(3), however, Plaintiff's Points and Authorities and arguments presented at the November  
2 18 hearing also argue for certification pursuant to Rule 23(b)(2). Under Rule 23(b)(2), a class action  
3 may be maintained if the party opposing the class has acted or refused to act on grounds that apply  
4 generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate  
5 respecting the class as a whole. Fed. R. Civ. P. 23(b)(2).

6 Plaintiffs contend that because Comcast has engaged in practices which "appl[y] across the  
7 board to all members of each Class"- practices which include all Cancellation Class members  
8 receiving the same inaccurate and confusing billing statements and Comcast's failure to comply with  
9 the termination provisions in its Service Contract - injunctive relief is necessary to eliminate these  
10 deceptive practices. (Pls. Mot. 14: 25-8, 15: 1-8, Doc. 65.) Comcast responds that certification  
11 under Rule 23(b)(2) is inappropriate because (1) the acts complained of have ceased, as Comcast has  
12 created new billing statements which cure the deficiencies alleged by Plaintiffs (Op. 16: 20-21, Doc.  
13 75), (2) the members of both Classes, by definition, have cancelled their Comcast services and, as  
14 such, lack standing to seek injunctive relief (Op. 17: 3-13, Doc. 75), (3) Plaintiff's claims for  
15 injunctive relief are secondary to Plaintiff's claims for monetary relief (Op. 17: 14-22, Doc. 75), and  
16 (4) Plaintiffs' monetary claims require an individualized determination, which is prohibited under a  
17 Rule 23(b)(2) certification. *Id.* The Court addresses each of these arguments in turn.

18 **1. Whether Comcast's New Billing Statements Prevent 23(b)(2) Certification**

19 Comcast claims its new final bills, which include a termination date, have mooted Plaintiff's  
20 request for injunctive relief. Plaintiffs respond that the lack of termination date was just one of  
21 several problems alleged in Comcast's billing statements, and further, Comcast has not changed its  
22 policy with respect to leaving customer accounts open for "porting confirmation." (Pls.' Reply 9: 1-  
23 9, Doc. 78.)

24 The Court agrees with Plaintiffs. With respect to the Porting Class, Comcast's new final bills  
25 have no bearing on the Porting Class's claims. The Porting Class's claims relate to internal  
26 procedures for leaving open accounts after an agreed-upon termination date in order to confirm that  
27 porting has occurred. The revised statements have nothing to do with the Porting Class. With  
28 respect to the Cancellation Class, Plaintiffs challenge more than just the lack of termination date.

1 Plaintiffs also allege that the bills are confusing to the point of being incomprehensible. Comcast  
2 does not claim they have taken measures to cure all these perceived problems, and there is nothing in  
3 the record to suggest such alterations were made. As such, Comcast’s new billing statements do not  
4 moot Plaintiff’s request for injunctive relief.

5 **2. Putative Class Members Lack Standing As They Are No Longer Comcast**  
6 **Customers**

7 Comcast argues that 23(b)(2) certification is not proper because all putative class members  
8 for both Classes are, by definition, former Comcast customers and, as such, lack standing to seek  
9 injunctive relief relating to Comcast’s billing statements or termination policies. (Op. 17: 3-12, Doc.  
10 75.) In response, Plaintiffs argue that “even subscribers who have cancelled Comcast services may  
11 again be at risk for this unlawful behavior should they return as Comcast customers” and  
12 “[m]oreover, all current Comcast customers (including Plaintiffs) who may cancel in the future are at  
13 risk should the Court decline to grant injunctive relief.” (Pls.’ Reply, 9: 10-13, Doc. 78.)

14 The Court agrees with Comcast. *Dukes* presented a similar standing question which is largely  
15 dispositive of this inquiry. In *Dukes*, roughly half of the members of the proposed class were former  
16 employees of WalMart who sought injunctive relief against WalMart’s current employment  
17 practices. *Dukes*, 131 S. Ct. at 2559-60. Citing the general principle that certification under Rule  
18 23(b)(2) is appropriate when “final injunctive relief or corresponding declaratory relief is appropriate  
19 respecting the class *as a whole*” (emphasis added), *Dukes* found that “about half of the members of  
20 the class . . . have no claim for injunctive or declaratory relief at all.” *Id.* at 260.

21 Here, based on the proposed class definitions, the vast majority of class members would have  
22 no claim for injunctive relief, because they are, by definition, *former* Comcast subscribers. The only  
23 class members who would have a claim for injunctive relief are those that are identical to Plaintiff,  
24 i.e., cancelled and then re-subscribed to Comcast’s services. But this would appear to be a tiny  
25 fraction of the proposed classes, and there is nothing in the evidence to suggest otherwise.

26 The Court is not persuaded by Plaintiffs’ argument that former Comcast customers *may*  
27 someday become Comcast customers again, and eventually need relief from Comcast’s current  
28 practices. Such an attenuated interest in the requested injunctive relief is entirely too speculative to

1 confer any legitimate interest in injunctive relief. *See Whitmore*, 495 U.S. at 155-56. Additionally,  
2 the Court is equally unpersuaded by Plaintiffs’ argument that current Comcast customers require the  
3 requested relief, because both Classes are defined to include only *former* Comcast customers. As  
4 such, the vast majority of current Comcast customers, nor their interests, are proposed to be  
5 represented Plaintiffs.

6 **3. Plaintiffs Claims For Monetary Relief Are Not Incidental To Plaintiffs Claims**  
7 **For Injunctive Relief**

8 Comcast argues that Plaintiffs’ Classes can not be certified under Rule 23(b)(2) because “this  
9 case is solely about monetary relief.” (Op., 17: 15-17, Doc. 75) (Emphasis in original.) In *Dukes*, the  
10 Supreme Court revisited the issue of whether claims for monetary relief could be made under Rule  
11 23(b)(2). *Dukes* concluded that such monetary claims “may not [be certified under Rule 23(b)(2)], at  
12 least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”  
13 *Dukes*, 131 S. Ct. at 2557. In establishing the framework for this analysis, the Supreme Court cited,  
14 with approval, the Fifth Circuit’s decision in *Allison v. Citgo Petroleum Corp.*, 151 F. 3d 402, 415  
15 (5<sup>th</sup> Cir. 1998). *Allison* found that Rule 23(b)(2) allows for the certification of monetary relief that is  
16 “incidental to [the] requested injunctive relief,” which *Allison* defined as “damages that flow directly  
17 from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory  
18 relief.” *Id.* In *Allison*’s view, such “incidental damage should not require additional hearings to  
19 resolve the disparate merits of each individuals case; it should neither introduce new substantial legal  
20 or factual issues, nor entail complex individualized determinations.” *Ibid.*

21 Under this standard, Plaintiffs’ Classes can not be certified under Rule 23(b)(2) for two  
22 reasons. First, the putative Class members (i.e., former Comcast customers) have no interest in the  
23 requested injunctive relief (i.e., relief from Comcast’s practices relating to its current customers).  
24 The monetary claims are indeed the only claims at issue. Second, the damages involved in this case  
25 do not flow directly from liability to the class as a whole. On the contrary, questions of liability and  
26 damages are wholly intertwined, both of which requiring the same individualized analysis.  
27 Therefore, Plaintiffs’ claims for monetary relief are not incidental to Plaintiffs’ claims for injunctive  
28 relief.

1           **4.       Rule 23(b)(2) Certification Is Improper As Individualized Determinations of**  
2                           **Damages Are Required**

3           Plaintiffs’ monetary claims can not be certified under Rule 23(b)(2) because an  
4 individualized determination of damages is required. In *Dukes*, the Supreme Court, while expressing  
5 serious doubt as to whether claims for monetary relief could ever be certified under Rule 23(b)(2),  
6 clarified the circumstances in which a Rule 23(b)(2) class certification is appropriate:

7           The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory  
8 remedy warranted—the notion that the conduct is such that it can be enjoined or  
9 declared unlawful only as to all of the class members or as to none of them.”  
10 (Citation) In other words, Rule 23(b)(2) applies only when a single injunction or  
11 declaratory judgment would provide relief to each member of the class. It does not  
12 authorize class certification when each individual class member would be entitled to a  
13 different injunction or declaratory judgment against the defendant. *Similarly, it does*  
14 *not authorize class certification when each class member would be entitled to an*  
15 *individualized award of monetary damages.*

16 (Internal citations omitted) (emphasis added). Similarly, in *Ellis*, the Ninth Circuit, applying the new  
17 standard enunciated in *Dukes*, clarified that under *Dukes*, the primary objective in the Rule 23(b)(2)  
18 analysis regarding claims for injunctive relief and monetary damages is whether monetary relief  
19 could be granted absent “individualized determinations.” *Ellis*, 657 F.3d at 987. Here, even if there  
20 were currently a means for determining damages on a common class-wide basis, the individual class  
21 member’s damages would differ from one another. As such, individual class member’s damages  
22 will necessarily require “individualized determinations.”

23           Based on the above analysis, class certification under Rule 23(b)(2) is denied. The majority  
24 of Plaintiffs’ proposed class members would lack standing to assert claims for injunctive relief.  
25 Furthermore, Plaintiffs’ claims for monetary relief are not incidental to Plaintiffs’ claims for  
26 injunctive relief, and Plaintiffs’ claims for monetary relief would require individualized  
27 determinations. Accordingly, certification of Plaintiff’s monetary and injunctive claims under Rule  
28 23(b)(2) is not appropriate.

**D.       Rule 23(b)(3) Analysis**

          To certify a class under Rule 23(b)(3), Plaintiff must demonstrate: 1) “questions of law or  
fact common to the members of the class predominate over any questions affecting only individual  
members” (“Predominance”) and 2) a class action is “superior to other available methods for the fair

1 and efficient adjudication of the controversy.” (“Superiority”); Fed. R. Civ. P. 23(b)(3).

2 **1. Predominance**

3 When evaluating damages in the predominance inquiry, “[t]he *amount* of damages is  
4 invariably an individual question and does not defeat class action treatment.” *Blackie v. Barrack*, 524  
5 F.2d 891, 905 (9<sup>th</sup> cir. 1975) (emphasis added); *see also Negrete v. Allianz Life Ins. Co. of North*  
6 *America*, 238 F.R.D. 482 (C.D. Cal. 2002). While determining the *amount* of damages does not  
7 defeat the predominance inquiry, a proposed class action requiring the court to determine  
8 individualized *fact* of damages does not meet the predominance standards of Rule 23(b)(3). *See In*  
9 *re Live Antitrust Litigation*, 247 F.R.D. 98 (C.D. Cal. 2007) (recognizing the distinction between  
10 demonstrating the fact of damages and the amount of damages, and determining that while the latter  
11 does not preclude class certification, the former does.); *Catlin v. Washington Energy Co.*, 791 F.2d  
12 1343, 1350 (9<sup>th</sup> Cir.1986) (“[T]he requirement that plaintiff prove ‘both the fact of damage and the  
13 amount of damage ... are two separate proofs.’”) (internal citation omitted.)

14 While the Ninth Circuit does not appear to have addressed this precise issue, it is generally  
15 accepted that classes should not be certified where “not every member of the proposed classes can  
16 prove with common evidence that they suffered impact.” *Blades v. Monsanto Co.*, 400 F.3d 562, 571  
17 (8<sup>th</sup> Cir. 2005); *Bell v. Atlantic Corp., v. AT&T Corp.*, 339 F.3d 294, 302-03 (5<sup>th</sup> Cir. 2003) (“where  
18 fact of damage cannot be established for every class member through proof common to the class, the  
19 need to establish antitrust liability for individual class members defeats Rule 23(b)(3)  
20 predominance”); *Newton v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 259 F.3d 154, 189 (3d Cir.  
21 2001); *In re Live Antitrust Litigation*, 247 F.R.D. 98 (C.D. Cal. 2007) (citing the above-referenced  
22 cases and adopting their reasoning). Federal courts in California have often refer to this “fact of  
23 damage” inquiry as an evaluation of putative class members Article III standing. *See, e.g., Burdick v.*  
24 *Union Sec. Ins. Co.*, 2009 WL 4798873, \*3 (C.D. Cal. Dec. 9, 2009) (there must be a common means  
25 for asserting injuries in fact for all class members, i.e., there must be for Class members to assert  
26 Article III standing); *Webb v. Carter’s Inc.*, 272 F.R.D. 489 (C.D. Cal. 2011) (denying class  
27 certification on the ground that absent class members lacked standing because they could not show an  
28 injury in fact on a class-wide basis).

1 One element common to all of Plaintiff’s claims, on behalf of both Classes - one which the  
2 Court believes is the primary issue in this litigation - is whether the Class members have suffered an  
3 injury in fact. Plaintiffs argue, both at the November 18 hearing and in their moving papers, that the  
4 Classes should be certified, with Class issues of damages reserved for the post-certification merits  
5 inquiry. In support of this proposition, Plaintiffs cite *Negrete v. Allianz Life Ins. Co. of North*  
6 *America*, 238 F.R.D. 482, 494 (C.D. Cal. 2002).

7 The authority cited by Plaintiffs, however, demonstrates that individual damage inquiries do  
8 not defeat certification only when plaintiffs have shown “across-the-board” impact. *Id.* at 493. In  
9 *Negrete*, the court noted that “[w]ith regard to class-wide proof of damages, plaintiffs contend that the  
10 annuities were *all* worth less than the purchase prices paid for them . . . .” *Id.* at 492 (emphasis  
11 added). In support of this argument, the *Negrete* plaintiffs offered the testimony of an expert who  
12 devised “a methodology to show that all of the [defendants] annuities were worth less than  
13 comparable equally safe investments.” *Id.* Ultimately, *Negrete* concluded that “what is important at  
14 this stage of the proceedings is that plaintiffs have offered a facially plausible method for showing  
15 causation and *impact across-the-board*, so that a class should be certified.” *Id.* at 493 (emphasis  
16 added).

17 Plaintiffs have not presented the Court with an evidentiary method for showing causation and  
18 across-the-board impact. Indeed, counsel for Plaintiffs acknowledged at the November 18 hearing that  
19 no such class-wide method for ascertaining fact of damages presently was available. Furthermore, the  
20 evidence before the Court indicates that the Class members have not suffered any injury. The  
21 evidence indicates a myriad of individual inquiries are required to ascertain the fact of damages for  
22 each Class member. For example, some Class members may have executed the Direct Pay  
23 authorization such as Plaintiffs, and subsequently lost funds when they were overcharged. But for  
24 those Class members who did not use the Direct Pay program, their accounts were never  
25 automatically debited. Rather, they would merely receive a bill requesting payment. There is no  
26 evidence to suggest that these Class members, upon receiving a bill charging them for services past  
27 the cancellation date, actually took the affirmative step of tendering over-payments to Comcast. Even  
28 assuming each proposed Class member was overcharged and overpaid, Plaintiffs have not provided a

1 common means to determine if the refunds provided by Comcast were inadequate. Just as Plaintiffs  
2 can not demonstrate a concrete injury in fact relating to their own claims of inadequate refunds, there  
3 is nothing before the Court evidencing the putative class members have suffered an injury in fact as a  
4 result of Comcast's conduct.

5 The damages determination at issue here is not one that merely seeks to identify the amount of  
6 damages to each putative class member. This determination, rather, is one which requires the Court  
7 to analyze whether Comcast is liable to each and every putative class member at all. Such an  
8 individualized liability determination predominates over any common issues regarding Comcast's  
9 business practices and their relation to the resolution of this lawsuit. Accordingly, Plaintiffs can not  
10 satisfy the Rule 23(b)(3) predominance inquiry for either Class.

## 11 **2. Superiority**

12 The superiority requirement tests whether "class litigation of common issues will reduce  
13 litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227,  
14 1234 (9<sup>th</sup> Cir. 1996). "If each class member has to litigate numerous and substantial separate issues to  
15 establish his or her right to recover individually a class action is not superior" *Zinser*, 253 F.3d at  
16 1192. Rule 23(b)(3) specifies four nonexclusive factors that are "pertinent" to a determination of  
17 whether class certification is the superior method: (1) the class members' interests in individually  
18 controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation  
19 concerning the controversy already begun by or against class members; (3) the desirability or  
20 undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely  
21 difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

22 Assuming the first three factors weigh in favor of class certification, the fourth factor - the  
23 difficulties likely to be encountered in the management of a class action - does not. Because  
24 individualized inquiries predominate over common issues regarding Comcast's liability to the  
25 putative Classes, *see supra* Section IV.D.1, the difficulties in managing Plaintiffs' claims as a class  
26 action are substantial. The Court finds these manageability issues outweigh any other factor with  
27 respect to the superiority analysis.

28

1 **E. Ascertainability**

2 Both parties have acknowledged that in addition to the express requirements of Rule 23, there  
3 is an implied requirement that the proposed classes be ascertainable. (Pls.' Mot., 8: 22-28, Doc. 65;  
4 Comcast's Op., 9: 10-11, Doc. 75.) "An implied prerequisite to certification is that the class must be  
5 sufficiently definite." *Mazur v. ebay Inc.*, 257 F.R.D. 563 (N.D. Cal. 2009). A class is not  
6 ascertainable when the proposed definition includes individuals who were never injured by the  
7 defendant's conduct, *see id.*, or if the proposed definition would require the Court to determine  
8 whether a person is a member of the class by evaluating the merits of the individual claims. *See*  
9 *Rodriguez v. Gates*, 2002 WL 1162675, at \*9 (C.D. Cal. May 30, 2002).

10 Here, Plaintiffs proposed Classes are not ascertainable for two reasons. First, even assuming  
11 there was a common means for determining the adequacy of Comcast's refunds, Plaintiffs' Class  
12 definitions are over broad and include Class members who were never injured by Comcast's conduct.  
13 For instance, only a portion of Comcast customers utilized Direct Pay, as did Plaintiffs. The evidence  
14 does not suggest that Class members who did not use Direct Pay over-paid. *See Mazur v. ebay, Inc.*,  
15 257 F.R.D. 563, 567 (N.D. Cal. 2009) (denying class certification on grounds that the class definition  
16 was over broad and not ascertainable because it included unharmed individuals); *Colpinto v. Esquire*  
17 *Deposition Servs.*, 09-cv-07584, 2011 WL 913251, at \*4 (C.D. Cal., Mar. 8, 2011) (finding no  
18 ascertainable class because definition included members who were reimbursed for payments of  
19 allegedly unlawful and deceptive charges); *Red v. Kraft Foods, Inc.*, 2011 WL 4599833 (C.D. Cal.  
20 2011) (holding that, based on the proposed class definition, it was doubtful that all members of the  
21 proposed class would have Article III standing); *Denny v. Deutsche Bank AG*, 443 F.3d 253, 264 (2<sup>nd</sup>  
22 Cir. 2006); *O'Neill v. Gourmet Sys. Of Minn., Inc.*, 219 F.R.D. 445, 451-52 (W.D. Wis. 2002) (Class  
23 definitions must be construed as to exclude individuals would lack standing). This basis "alone is  
24 sufficient to warrant denial of Plaintiffs Motion for Class Certification." *Colapinto*, 2011 WL 913251  
25 at \*4. While the court has the power to modify the proposed class definitions to make them  
26 sufficiently definite, *see Hagen v. City of Winnemucca*, 108 F.R.D. 61, 64 (D. Nev. 1985), this is not  
27 an instance in which the court deems such a revision appropriate because, as discussed above, the  
28 class certification motion nonetheless fails.

1 Second, Comcast would only be liable to Plaintiffs and the putative Classes upon a finding of  
2 injury in fact. Plaintiffs have failed to identify a common means for establishing injury in fact.  
3 Absent a common method of establishing injury, the Court is required to determine the merits of the  
4 individual claims to evaluate whether a person is a member of the Class. Such circumstances prevent  
5 certification. *See Hanni v. Am. Airlines*, No. 08-cv-00732, 2010 WL 28297, at \*9 (N.D. Cal. Jan. 15,  
6 2010) (“A class definition is inadequate if a court must make a determination of the merits of the  
7 individual claims to determine whether a person is a member of the class.”); *Rodriguez v. Gates*, 2002  
8 WL 1162675 at \*9 (C.D. Cal. 2002) (There “is no objective way to determine who is a member of the  
9 class proposed by [the plaintiff] without first deciding the merits of each putative class member’s  
10 claim.”); *Brazil v. Dell*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (definition which included  
11 persons that “Dell falsely advertised” was not presently ascertainable”). Therefore, the Court finds the  
12 two Classes are not ascertainable.

13 **CONCLUSION AND RECOMMENDATIONS**

14 Having considered the moving, opposition and reply papers, the declarations and exhibits  
15 attached thereto, arguments presented at the November 18, 2011 hearing, as well as the Court’s file,  
16 the Court RECOMMENDS that Plaintiffs’ Motion for Class Certification be DENIED.

17 These findings and recommendations are submitted to the district judge assigned to this  
18 action, pursuant to Title 28 of the United States Code section 636(b)(1)(B) and this Court’s Local  
19 Rule 304. Within fifteen (15) days of service of this recommendation, any party may file written  
20 objections to these findings and recommendations with the Court and serve a copy on all parties.  
21 Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
22 Recommendations.” The district judge will review the magistrate judge’s findings and  
23 recommendations pursuant to Title 28 of the United States Code section 636(b)(1)(C). The parties  
24 are advised that failure to file objections within the specified time may waive the right to appeal the  
25 district judge’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

26 IT IS SO ORDERED.

27 **Dated: January 3, 2012**

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE