

IN THE DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA

<b>MARK MERCER</b> , individually;	)	Case No. CI 16 _____
<b>VERA MERCER</b> , individually; and	)	
<b>MERCER MANAGEMENT COMPANY</b> , a	)	
Nebraska Corporation;	)	
	)	
Plaintiffs,	)	
	)	
v.	)	<b>COMPLAINT AND</b>
	)	<b>DEMAND FOR JURY TRIAL</b>
<b>NORTH CENTRAL SERVICES, INC.</b> , a	)	
Minnesota Corporation; and	)	
<b>UNITE PRIVATE NETWORKS, LLC</b> , a	)	
Delaware Limited Liability Company; and	)	
<b>CELLCO PARTNERSHIP D/B/A VERIZON</b>	)	
<b>WIRELESS</b> , a Delaware Partnership;	)	
	)	
Defendants.	)	

Plaintiffs Mark Mercer, Vera Mercer, and Mercer Management Company (“Mercer Management”) (collectively “Plaintiffs”), for their causes of action against defendants North Central Services, Inc. (“North Central”), Unite Private Networks, LLC (“UPN”), and Cellco Partnership d/b/a Verizon Wireless (“Verizon”) state and allege as follows:

**PARTIES**

1. Plaintiff Mark Mercer is an individual residing in Douglas County, Nebraska.
2. Plaintiff Vera Mercer is an individual residing in Douglas County, Nebraska.
3. Plaintiff Mercer Management is a corporation organized and existing under the laws of the State of Nebraska with its principal place of business in Douglas County, Nebraska.
4. Defendant North Central is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business in Bemidji, Minnesota. At all relevant dates and times herein, North Central was transacting business in Nebraska and operating its crew and equipment in Omaha, Nebraska.

5. Defendant UPN is a limited liability company organized and existing under the laws of the State of Delaware. At all relevant dates and times herein, UPN was doing business in Omaha, Nebraska. UPN has two corporate offices located in Nebraska. It owns property, underground cable and other telecommunications equipment throughout Nebraska. UPN conducts operations throughout the State, including in Omaha. UPN employs Nebraska residents. UPN is, in part, employee-owned. Upon information and belief, one or more Nebraska residents are employee/owners of UPN. As such, UPN is considered to be a citizen of Nebraska for purposes of jurisdiction.

6. Defendant Cellco Partnership is doing business in Nebraska as Verizon Wireless. Cellco Partnership is a wholly owned subsidiary of Verizon. Cellco is a partnership organized under the laws of the state of Delaware with its principal place of business located at One Verizon Way, Basking Ridge, New Jersey, 07920. Verizon is a leading provider of wireless telecommunications services to Nebraska residents.

7. Metropolitan Utilities District (“MUD”) is a political subdivision of the State of Nebraska with its principal place of business at 1723 Harney Street in Omaha, Nebraska. MUD is in the business of providing natural gas to consumers in the Old Market of Omaha through a series of underground pipelines. MUD has not yet been made a party to this lawsuit, in compliance with Neb. Rev. Stat. 13-901 *et seq.*, which statute governs the process of filing lawsuits for tort claims against Nebraska subdivisions. Plaintiffs have issued a written demand to MUD dated March 28, 2016, pursuant to the express terms of Neb. Rev. Stat. 13-901 *et seq.* If MUD declines Plaintiffs’ demand, Plaintiffs will add MUD as a Defendant to this lawsuit 180 days after March 28, 2016, and in accordance with Neb. Rev. Stat. § 13-906.

## **JURISDICTION AND VENUE**

8. Jurisdiction is proper in this Court pursuant to Neb. Rev. Stat. §§ 24-302, 25-535, 25-536 and 25-539.

9. Venue is proper in this county pursuant to Neb. Rev. Stat. § 25-403.01(2) and (3), as the events giving rise to these claims occurred in Douglas County, Nebraska.

10. Nebraska substantive law applies to this dispute.

## **BACKGROUND**

11. Mark Mercer is the sole owner of the historic landmark building at 1102 Howard Street (“Mercer Building”). This lot has been in Mark Mercer’s family for well over a century. Mark Mercer’s grandfather built the Mercer Building in accordance with quality, commercial construction practices at the turn of the century. The Building was designated as an Omaha Landmark in 1985 as part of the Old Market and Wholesale Landmark Heritage District. It was listed in the National Register of Historic Places in 1979. Mark Mercer has continued his family’s mission in developing the Old Market as an Omaha community treasure, with the Mercer Building as a centerpiece in the Heritage District. The Mercer Building, and its business occupants, has been a draw for the people of Omaha and visiting tourists for many decades.

12. Mark Mercer is also the sole owner of a large condo unit, which is divided into two operating business bays, located in the contiguous building at 1108 / 1112 Howard Street (“Howard Street Building”). The Howard Street Building was also included in the Old Market Heritage District in 1985 and listed in the National Register of Historic Places in 1979.

13. Vera Mercer lived in the Mercer Building with her husband Mark Mercer. She is an internationally recognized artist who has been creating exquisite photographic art work for over forty years. Her work has been shown and sold in exclusive art galleries and solo

exhibitions in Mexico, Germany, Italy, Japan, Austria, China and the United States. Her work has been hung in luxury hotels in Tokyo, Kowloon, Seoul, and Hong Kong. Mrs. Mercer owned and operated her art business, and worked in her studio and darkroom, all of which was located in the top floors of the Mercer Building. At the time of the fire Mrs. Mercer kept numerous large works of her art in a finished or near finished state, some of which had been commissioned by restaurants and other business owners for their public spaces. All of this original art work was destroyed. Several hundred books featuring a compilation of Mrs. Mercer's art, published overseas with high-resolution photography on quality paper, were also destroyed. These books were intended for sale to the public at her art shows.

14. Mercer Management was responsible for managing the Mercer Building and the condo business units in the Howard Street Building. As part of its duties and obligations, Mercer Management collected the rents and other compensation from each building's occupants.

15. UPN is a for profit company in the business of providing fiber-optic based communication networks and related services for large telecommunications companies including Verizon. UPN advertised to the public that, as a result of a planned expansion into Nebraska, it will have installed over 2000 route miles of fiber optic cable located underground within this State installed for the business purposes of telecommunications carriers. UPN entered into an Agreement ("Unite Agreement") with the City of Omaha on or about February 8, 2010, which Agreement was adopted by the City as Ordinance 38945. The Unite Agreement and Ordinance 38945 granted Unite permission to use the City's rights of way and public space as a conduit for Unite's optical fiber communication lines, including the fiber optic cable being placed in the Old Market at the time of the fire.

16. Upon information and belief and at all times discussed herein, Verizon contracted with and/or commissioned UPN to install underground fiber optic cable in the Old Market for Verizon's direct benefit. The installation is part of a backhaul network to support Verizon's "macro" and "small cell" operating systems and as a means to increase Verizon's telecommunications service coverage, speed, and network capacity in Omaha, Nebraska. Verizon and/or UPN colluded on the requirements necessary to design, install and operate such an infrastructure in the Old Market in order to benefit Verizon and to connect to Verizon's larger operating network.

17. North Central is a for-profit excavating and construction business which utilizes trenchless excavation and horizontal directional drilling to install fiber optic cables under the ground. Upon information and belief and at all times discussed herein, UPN contracted with North Central for the installation of telecommunications equipment and cable in and around Nebraska in 2015 and 2016.

18. On or about January 9, 2016, UPN, as part of its work for Verizon and in furtherance of the Unite Agreement, directed North Central to excavate and install fiber optic cables underground in the Old Market area in Omaha, including directly in front of the Mercer Building.

19. In order to provide fiber optic service to the Old Market, UPN, through its contractor North Central, conducted underground horizontal directional drilling below the City sidewalk directly in front of, and just feet away from, the Mercer Building.

20. Upon information and belief, UPN and North Central requested location markings through Nebraska811 to determine whether natural gas lines and/or other underground utilities were located in the vicinity of the planned drilling route. Nebraska811 is Nebraska's statewide

one-call notification center. It was created to assist companies like Defendants by coordinating with utility companies in order to identify and locate underground utilities.

21. On information and belief, on or about January 4, 2016, a representative from MUD (or a contractor using information provided by MUD) allegedly marked the approximate location of an MUD natural gas pipeline located underground and in the path of the planned drilling route.

22. On or about January 9, 2016, North Central was using horizontal directional drilling under the sidewalk and in the City right of way when its bore head punctured an MUD gas line located directly in front of the Mercer Building. North Central was aware that it had punctured a gas line.

23. Natural gas began to immediately leak from the punctured line into the underground soil. The gas migrated to a nearby utility closet in the basement of the Mercer Building.

24. At approximately 2:50 p.m. on January 9, 2016, the leaking natural gas ignited. The explosion rocked the Mercer Building and its occupants, including Vera Mercer who was inside her apartment. A tower of fire originated from the basement stairwell in front of the Mercer Building. The leaking natural gas from the punctured pipeline continuously fed the tower of fire, intensifying the fire's strength, speed, power, heat and damage.

25. The tower of fire quickly became a three-alarm fire inside the Mercer Building. As typical with historic buildings, the outside walls and an interior separating wall were constructed of thick brick. The interior floors and improvements were made of wood. This configuration created a chimney effect. As the natural gas continued to leak unabated into the basement of this "chimney," it fed the fire which began to consume the wooden interior floors.

The leaking gas exacerbated the fire's efficiency, intensity, strength, speed, power, heat and damage as it raged within the brick walls unabated. MUD's negligent delay in shutting off the gas prevented Omaha firefighters from entering the burning building for some time after ignition. It took well over 9 hours and 60 Omaha firefighters to get the fire under control. Even then it continued to smolder and burn for a significant time.

26. The fire eventually caused the Mercer Building roof to collapse. The fire completely destroyed all of the interior floors on the north side. It caused instability of the east and north brick walls. It also caused substantial damage to the interior brick wall dividing the north and south sides of the Mercer Building. Smoke and water destroyed the interior of the south side. The exterior and interior of the contiguous Howard Street Building and the condo unit's two business bays were also damaged significantly by smoke and water. The two commercial businesses within the condo unit have ceased operations at this time.

27. As a result of the fire, the home, art business, and many of the possessions of Mark and Vera Mercer were destroyed, including Vera Mercer's priceless art work, books and art equipment. The tenants of commercial units in the Mercer Building and Howard Street Building – M's Pub, Nouvelle Eve, Niche, and The Market House – from whom Mercer Management received rent, were displaced. A centerpiece of the Old Market area of Omaha - the Mercer Building - was destroyed.

**FIRST CLAIM FOR RELIEF**  
**(Negligence – Defendant North Central)**

28. Plaintiffs incorporate Paragraphs 1 through 27 above as though set forth fully below.

29. North Central had a duty to conduct its activities on or about January 9, 2016 in the Old Market in a reasonably careful and prudent manner in order to protect the general public,

including the Plaintiffs, from unreasonable risk of harm arising from their underground excavation work in close proximity to a high-pressure natural gas line.

30. North Central had actual or constructive knowledge of the dangerous propensities of natural gas. North Central had actual or constructive knowledge of the special dangers of damaging underground utilities when engaging in horizontal directional drilling. North Central was obligated to exercise a degree of care commensurate with such special dangers when drilling in close proximity to underground gas pipelines located near the public and property owners.

31. North Central breached its duties to the Plaintiffs and was negligent in one or more of the following respects:

- (a) By failing to prevent the rupture of the underground utility gas line located in front of the Mercer Building;
- (b) By failing to perform a proper inspection of the cable path area prior to directional drilling;
- (c) By failing to properly mark and ascertain the location of underground utility gas lines prior to drilling;
- (d) By failing to ascertain the horizontal and vertical (depth) location of the underground utility gas line by potholing or by another industry recognized safety method;
- (e) By failing to halt directional drilling activities when it became or should have become obvious to Defendant that it was operating in close proximity to an underground utility gas line;
- (f) By failing to train its employees in the proper and safe procedures, standards, regulations, and laws governing underground operations near utility gas lines;
- (g) By failing to follow proper and safe procedures, standards, regulations, and laws governing underground operations near utility gas lines;
- (h) By failing to properly warn the Plaintiffs and the public prior to conducting horizontal drilling near an underground utility gas line located in front of the Mercer Building;



- (i) By failing to properly design and place the cable path a safe distance from underground utility gas lines;
- (j) By failing to adhere to proper safety measures to protect the public;
- (k) By failing to determine and observe a proper horizontal drilling tolerance zone;
- (l) By failing to use hand digging, hand-powered equipment, or other excavation techniques or devices in the horizontal tolerance zone;
- (m) By failing to halt work when it knew or should have known that underground utility gas lines were not sufficiently identified prior to drilling;
- (n) By failing to follow U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) procedures and standards for such work;
- (o) By failing to timely warn emergency responders, the public and Plaintiffs after Defendant knew or should have known that it ruptured an underground utility gas line in close proximity to the public and the Mercer Building;
- (p) By failing to following Omaha Municipal laws, rules, regulations and standards with regard to underground work in public spaces, and
- (q) By failing to timely report a breach of an underground utility pipeline as required by law; and

32. As a result of North Central's acts and omissions, North Central's drilling crew punctured the gas line located in front of the Mercer Building, allowing natural gas to escape and migrate into the Mercer Building where it exploded and burned, destroying the building and its contents, as well as causing smoke and water damage to the contiguous Howard Street Building and its contents.

33. As a direct and proximate result of North Central's acts and omissions, Plaintiffs have sustained property damage, as well as business disruption and economic losses. Mark Mercer and Vera Mercer have also suffered from inconvenience, pain and suffering, and emotional distress.

34. Plaintiffs therefore request direct, special and consequential damages in an amount to be determined at trial.

**SECOND CLAIM FOR RELIEF  
(Strict Liability for Ultrahazardous Activity – Defendant North Central)**

35. Plaintiffs incorporate Paragraphs 1 through 34 above as though set forth fully below.

36. North Central was engaged in an ultrahazardous activity on or about January 9, 2016 when it performed horizontal drilling in, around and near the path of an underground utility gas line.

37. As a direct and proximate result of North Central's activities, Plaintiffs have sustained property damage, as well as business disruption and economic losses. Mark Mercer and Vera Mercer have also suffered from inconvenience, pain and suffering, and emotional distress.

38. Plaintiffs therefore request direct, special and consequential damages in an amount to be determined at trial.

**THIRD CLAIM FOR RELIEF  
(Negligence – Defendant UPN)**

39. Plaintiffs incorporate Paragraphs 1 through 38 above as though set forth fully below.

40. Upon information and belief and at all times mentioned herein, UPN hired North Central to place an underground fiber optic cable system in the Old Market in an area in front of the Mercer Building.

41. North Central's work was performed on UPN's behalf, at UPN's direction, and in furtherance of UPN's business interests.

42. UPN had a legal duty to conduct its work, and the work of its contractor North Central, in a reasonably careful and prudent manner in order to protect the general public, including the Plaintiffs, from unreasonable risk of harm arising from underground excavation work in close proximity to a high-pressure natural gas line.

43. UPN had actual or constructive knowledge of the dangerous propensities of natural gas. UPN had actual or constructive knowledge of the special danger of damaging underground utilities when laying fiber optic cable underground. UPN had a non-delegable duty to exercise a degree of care commensurate with such special danger when working in close proximity to underground utility gas lines located near the public and property owners.

44. UPN breached its duties to the Plaintiffs and was negligent in one or more of the following respects:

- (a) By failing to prevent the rupture of the underground utility gas line located in front of the Mercer Building;
- (b) By failing to ascertain a reasonably safe underground cable path located away from the dangers of an underground utility gas line;
- (c) By failing to perform a proper inspection of the of the cable path area prior to directional drilling;
- (d) By failing to properly mark and ascertain the location of underground utility gas lines prior to drilling;
- (e) By failing to instruct its contractor to conduct a proper horizontal and vertical (depth) location of the underground utility gas line by potholing or by another industry recognized safety method;
- (f) By failing to halt, and/or to instruct its contractor to halt, directional drilling activities when it became or should have become obvious that it was operating in close proximity to an underground utility gas line;
- (g) By failing to train its employees and/or direct its contractor to train its employees in the proper and safe procedures, standards, regulations, and laws governing underground operations near utility gas lines;

- (h) By failing to follow proper and safe procedures, standards, regulations, and laws governing underground operations near utility gas lines and/or to ensure its contractor followed proper and safe procedures, standards, regulations, and laws governing underground operations near utility gas lines;
- (i) By failing to properly warn the Plaintiffs and the public prior to conducting horizontal drilling near an underground utility gas line located in front of the Mercer Building;
- (j) By failing to properly design and install its cable path a safe distance from underground utility gas lines;
- (k) By failing to adhere to proper safety measures to protect the public;
- (l) By failing to determine and observe a proper horizontal drilling tolerance zone and/or by failing to instruct its contractor to determine and observe a proper horizontal drilling tolerance zone;
- (m) By failing to use hand digging, hand-powered equipment, or other techniques or devices in the horizontal tolerance zone and/or by failing to instruct its contractor to use hand digging, hand-powered equipment, or other techniques or devices in the horizontal tolerance zone;
- (n) By failing to timely warn emergency responders, the public and Plaintiffs after Defendant knew or should have known that it, or its contractor, ruptured an underground utility gas line in close proximity to the public and the Mercer Building;
- (o) By failing to halt work when it knew or should have known that underground utility gas lines were not sufficiently identified prior to drilling;
- (p) By failing to follow U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) procedures and standards for such work and/or by failing to ensure that its contractor followed U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) procedures and standards for such work;
- (q) By failing to adequately supervise the work of North Central;
- (r) By engaging the services of North Central without reasonable due diligence when it knew or should have known of its prior breaches of underground utility lines;
- (s) By failing to following Omaha Municipal laws, rules and regulations and standards with regard to underground work in public spaces, and also its Statement of Policy and Standard Specifications for Communications Cable on City Property (Rev. 20120);

- (t) By violating City of Omaha Ordinance 38945, which ordinance was adopted to incorporate the terms of the Master Fiber IRU Conveyance and Conduit Sharing Agreement, including but not limited to the requirements set forth in Article V – Use of Rights of Way and Article VIII – Special Indemnification Arising From Facilities wherein UPN agreed to:
- i. Locate its facilities so that none endanger the lives, health or safety of persons;
  - ii. Cause minimum interference with the rights and reasonable convenience of property owners which adjoin the Right of Way;
  - iii. Perform all construction, excavation, maintenance and repair work in a workmanlike ... manner which minimizes inconvenience to the ... general public and individuals;
  - iv. Comply with all codes of the City and State of Nebraska;
  - v. Promptly restore all public and private property disturbed by Unite's activities under the Contract at its expense to substantially its former condition;
  - vi. To design and install all facilities of Unite's so as to cause minimal amount of interference with public property...and natural gas facilities; and
  - vii. To install, construct, maintain and operate its private network in a safe manner providing reasonable protection against injury or damage to any and all persons or property.

42. As a result of UPN's acts and omissions, the gas line located directly in front of the Mercer Building was punctured. Natural gas escaped and migrated into the Mercer Building where it exploded and burned, destroying much of the building and its contents, as well as causing smoke and water damage to the contiguous building.

45. As a direct and proximate result of UPN's acts and omissions, Plaintiffs have sustained property damage, as well as business disruption and economic losses. Mark Mercer and Vera Mercer have also suffered from inconvenience, pain and suffering, and emotional distress.

46. Plaintiffs therefore request direct, special and consequential damages in an amount to be determined at trial.

**FOURTH CLAIM FOR RELIEF**  
**(Strict Liability for Ultrahazardous Activity – Defendant UPN)**

47. Plaintiffs incorporate Paragraphs 1 through 46 above as though set forth fully below.

48. UPN individually, and by and through its contractor(s), was engaged in an ultrahazardous activity on or about January 9, 2016 when it performed horizontal drilling in, around, and near the path of an underground utility gas line.

49. As a direct and proximate result of UPN's activities, Plaintiffs have sustained property damage, as well as business disruption and economic losses. Mark Mercer and Vera Mercer have also suffered from inconvenience, pain and suffering, and emotional distress.

50. Plaintiffs therefore request direct, special and consequential damages in an amount to be determined at trial.

**FIFTH CLAIM FOR RELIEF**  
**(Negligence – Defendant Verizon)**

51. Plaintiffs incorporate Paragraphs 1 through 50 above as though set forth fully below.

52. Verizon and UPN were engaged in a joint enterprise by express or implied agreement.

53. The common purpose of the joint enterprise between Verizon and UPN was the installation of underground fiber optic cable in order to enhance Verizon's telecommunications infrastructure in the Old Market of Omaha.

54. Verizon and UPN have a common pecuniary interest in the installation of underground fiber optic cable in order to enhance Verizon's telecommunications infrastructure in the Old Market of Omaha.

55. Verizon jointly directed and/or controlled and/or coordinated with UPN in order to meet Verizon's protocols for the design and/or placement and/or operation of the fiber optic cable infrastructure in the Old Market. The purpose of the Old Market installation is to interconnect with Verizon's operating network for telecommunications in Omaha, Nebraska.

56. By reason of the relationship existing between Verizon and UPN, any negligence of UPN and/or its sub contractor as set forth herein should be imputed to Verizon.

57. As a direct and proximate result of Verizon's imputed negligence, Plaintiffs have sustained property damage, as well as business disruption and economic losses. Mark Mercer and Vera Mercer have also suffered from inconvenience, pain and suffering, and emotional distress.

58. Plaintiffs therefore request direct, special and consequential damages in an amount to be determined at trial.

**SIXTH CLAIM FOR RELIEF  
(Strict Liability for Ultrahazardous Activity – Defendant Verizon)**

59. Plaintiffs incorporate Paragraphs 1 through 58 above as though set forth fully below.

60. Verizon individually, and by and through a joint enterprise with UPN, was engaged in an ultrahazardous activity on or about January 9, 2016 when its sub contractor performed horizontal drilling in, around, and near the path of an underground utility gas line.

61. As a direct and proximate result of Verizon's imputed negligence, Plaintiffs have sustained property damage, as well as business disruption and economic losses. Mark Mercer and Vera Mercer have also suffered from inconvenience, pain and suffering, and emotional distress.

62. Plaintiffs therefore request direct, special and consequential damages in an amount to be determined at trial.

WHEREFORE, Plaintiffs Mark Mercer, Vera Mercer, and Mercer Management individually and collectively request a trial by jury of the actions set forth herein; request judgment in their favor against each Defendant, jointly and severally, in an amount which will fully and fairly compensate Plaintiffs for their injuries and damages and which will make the Plaintiffs whole; for prejudgment interest from the time of January 9, 2016 to final judgment or order; for post judgment interest from the date of judgment or verdict to final payment; for costs, attorney fees and expenses in bringing this action; and for such other relief as may be just in the circumstances and consistent with Nebraska law.

MARK MERCER, VERA MERCER, AND MERCER  
MANAGEMENT, individually and collectively as  
Plaintiffs,

By:  \_\_\_\_\_

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