

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: CENTURLINK SALES
PRACTICES AND SECURITIES
LITIGATION

)
) File No. 17-MD-2795
) (MJD/KMM)
)
) Minneapolis, Minnesota
) July 11, 2018
) 3:30 to 4:05 p.m.
) **DIGITAL RECORDING**
)
)

BEFORE THE HONORABLE KATHERINE M. MENENDEZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(TELEPHONE CONFERENCE)

TRANSCRIBER:

MARIA V. WEINBECK, RMR-FCRR
Official Court Reporter
1005 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Proceedings recorded by digital recording; transcript
produced by computer.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

For the Plaintiffs: Henninger Garrison Davis, LLC
JAMES MCDONOUGH, III, ESQ.
3621 Vinings Slope
Suite 4320
Atlanta, GA 30339

Hodge & Langley Law Fir, PC
TIMOTHY R. LANGLEY, ESQ.
229 Magnolia Street
Spartanburg, SC 29306

Zimmerman Reed, PLLP
BRIAN C. GUDMUNDSON, ESQ.
1100 IDS Center
80 South Eighth Street
Minneapolis, MN 55402

For the Defendants: Cooley LLP
DOUGLAS P LOBEL, ESQ.
11951 Freedom Drive
Suite 1500
Reston, VA 20190-5656

Winthrop & Weinstine PA
WILLIAM A. MCNAB, ESQ.
225 South 6th Street
Suite 3500
Minneapolis, MN 55402-4629

* * * * *

P R O C E E D I N G S**TELEPHONE CONFERENCE****(3:30 p.m.)**

1 THE COURT: All right. I heard the number of
2 beeps that I was anticipating. Why don't we get started by
3 figuring out if we have everyone necessary on the line and
4 just to let you know, I am recording this call. We are here
5 with respect to an issue that's arisen during depositions
6 with respect for the CenturyLink MDL.
7

8 Do we have Mr. McDonough and Mr. Langley on the
9 line for the plaintiffs? (No response.)
10

11 All right. Do we have anybody on the line for the
12 plaintiffs?
13

14 MR. MCDONOUGH: Jim McDonough, with Heninger
15 Garrison Davis on behalf of the plaintiffs.
16

17 THE COURT: Okay.

18 MR. LANGLEY: Office of Ryan Langley, Your Honor,
19 Hodge & Langley Law Firm, on behalf of the plaintiffs.
20

21 THE COURT: Okay. And where are you two located?
22

23 MR. MCDONOUGH: So I'm based in Atlanta. Right
24 now we are in Colorado taking the deposition of one of the
25 CenturyLink declarants.
26

27 THE COURT: Okay. And Mr. Langley?
28

29 MR. LANGLEY: Yes, ma'am. I'm in the same place.
30 I'm sitting next to Mr. McDonough.
31

1 THE COURT: All right. Who do we have on the line
2 on behalf of the defendants today?

3 MR. LOBEL: Good afternoon, Your Honor. This is
4 Douglas Lobel on behalf of CenturyLink and the proposed
5 intervenors.

6 THE COURT: Okay, and you're in Colorado right
7 now?

8 MR. LOBEL: I am, Your Honor.

9 THE COURT: Okay. Anybody else going to be
10 joining you today?

11 MR. MCNAB: I am on, Your Honor. Bill McNab,
12 Winthrop & Weinstine, I'm here in Minneapolis.

13 THE COURT: Hey, Bill.

14 MR. MCNAB: Good afternoon.

15 THE COURT: All right. Anybody else going to be
16 joining this side with you, Mr. McNab?

17 MR. MCNAB: Nobody else from the defendants as far
18 as I know. I would just note for Your Honor that I did also
19 include the Minneapolis counsel of Brian Gudmundson on the
20 e-mail forwarding Ms. Thobe's instruction, so if they wanted
21 the local counsel on, he at least was made aware of it.

22 UNIDENTIFIED SPEAKER: (Inaudible).

23 THE COURT: Okay, you kind of chopped up there
24 quite a bit. Could you try that one more time for me that
25 last statement?

1 MR. GUDMUNDSON: Yes, Your Honor. This is Brian.
2 I am on the phone (inaudible.)

3 THE COURT: Great. I'm glad you're on the phone.
4 Your connection is not super awesome, so is it your
5 expectation to be talking a lot?

6 MR. GUDMUNDSON: No.

7 THE COURT: Okay. That's probably best, and thank
8 you. That was actually clear.

9 Okay, let's go ahead and get started. Who wants
10 to tell me what's going on?

11 MR. MCDONOUGH: Sure. This is Jim McDonough with
12 the plaintiffs, and I can start. So we are on the first
13 deposition of what is sure to be many depositions over the
14 time of this litigation, and we've run into what we believe
15 is a disparity in what each party believes is proper
16 objection form in the deposition.

17 THE COURT: Okay.

18 MR. MCDONOUGH: So we contend that the current
19 form of objectioning is essentially akin to coaching the
20 witness, and it may not be intentional, but I think it's
21 having that effect. And we believe that speaking objections
22 are generally not permitted. You know, in my experience an
23 objection to form is proper or an instruction not to answer
24 due to the attorney-client privilege, and those are the two
25 instructions.

1 The issue is we're getting all sorts of
2 objections, and I can read a couple of them to you to get a
3 flavor of kind of what we're seeing. And one of them was
4 Mr. Langley, who is doing the examination, asked the
5 witness, he basically said, "my question is a yes or no
6 answer." "Yes or no, can you point me to any letter that,"
7 and then Mr. Lobel objected saying, "Your instruction is
8 improper. He does not have to limit his answers to yes or
9 no. If that's his answer, then that's his answer but you
10 can't tell him to answer yes or no. That's improper."
11 That's one of them.

12 Another objection was stated by Mr. Lobel at
13 10:15. "Objection, lack of foundation, calls for
14 speculation, can't speak to someone who would know from
15 reading a letter," so we were asked a question about a
16 letter.

17 Another one was, "Objection, vague in terms to
18 what link means. I don't understand the question. Can you
19 restate it?" And so that was not the opponent, that was
20 Mr. Lobel asking us to restate the question.

21 And then I'll give one more and then we can move
22 on because I don't want to bore the Court. I believe you'll
23 get a flavor of it. And this one was, "Objection, asked and
24 answered, lack of foundation, calls for speculation,
25 argumentative, and a definition of a designated CenturyLink

1 former company's witness who is going to talk about specific
2 entities involved and these services. This is not a witness
3 who is either on that topic or has the declaration that
4 addresses that, so it's totally improper, and if you
5 continue I'm going to direct not to answer."

6 And so those are a couple of highlights, and so we
7 were seeking guidance from the Court on the extent of
8 objections. It's taking up a lot of our time. We have
9 limited time with this witness today, and we're trying to be
10 as efficient as possible.

11 So with that, that's sort of our chief complaint.
12 I understand that defendant may also have some complaints
13 that I'm sure we'll hear from, but that's our position.

14 THE COURT: Okay. Mr. Lobel?

15 MR. LOBEL: Yes, Your Honor. Well, we do have
16 several issues we would like to raise with you that was just
17 raised. First off, at the outset of the deposition, counsel
18 asked if I would agree to preserve all objections for trial
19 except to form. I said I did not agree to that and that I
20 would be making all appropriate objections.

21 I believe that over four hours or so of deposition
22 today, I have concisely stated objections including
23 objective form many, many times; calls for speculation;
24 asked and answered; vague; compound question; lack of
25 foundation; things of that nature. I don't believe I made a

1 speaking objection. I'm well aware of the rule. I've never
2 been accused of doing so. And I believe I have allowed
3 certainly allowed counsel to conduct their deposition.

4 I will say with respect to yes and no, I did
5 instruct -- I did object, and I told the witness and counsel
6 on the record that if the witness were inclined to answer
7 yes or no, that's fine, but I wanted to make sure the
8 witness knew he was not limited by that instruction to only
9 answer yes or no, but he should answer appropriately, which
10 I think is an appropriate objection and in my experience.

11 I have never coached the witness or suggested an
12 answer and then I think you heard that from counsel.
13 They've taken the most extreme examples and, you know,
14 they're not certainly suggesting the answer to the witness.

15 I will also -- well, so that's with respect to
16 this specific speaking objection issue. There are some
17 other issues, Your Honor, but I'll stop there, and see if
18 Your Honor has questions or followup.

19 THE COURT: Anything else you want to say,
20 Mr. McDonough?

21 MR. MCDONOUGH: I think that my initial argument
22 summarizes it.

23 THE COURT: Okay. All right. Here's my two cents
24 on this. You all can handle this. I encourage you to
25 handle it. I feel like the four examples given are wordier

1 than is generally appropriate. They go beyond just saying
2 objection as to form or objection, you know, beyond the
3 scope of the notice topics and into more speechifying.

4 But I also suspect that, you know, looking through
5 anybody's deposition, you can find a handful of objections
6 that are wordier. And as long as the vast majority of
7 objections are as Mr. Lobel suggests a genuine effort to
8 keep them to, let me put it like this just to give you
9 perspective on my expectations, with the exception of issues
10 related to privilege or the other very narrowly tailored
11 exceptions of, you know, harassment or abuse, you generally
12 are stuck with a very short objection for the record. But
13 it's similar to the objection you would make at trial. And
14 if you were making speaking objections at trial in front of
15 Judge Davis, he will shut you down.

16 So that same temperance has to govern the
17 objections in this case, but if Mr. Lobel is correctly
18 recalling what's passed during the day, the fact that he's
19 gotten a wee bit windy a few times isn't something that I
20 think frankly requires the Court's intervention.

21 If it was every single question and clearly
22 designed to soak up the time for the deposition or to coach
23 and otherwise a prepared witness, I would have greater
24 concerns, but I think you all can self-police this to the
25 greatest of your ability.

1 We only have so much time to get this discovery
2 done. We only have so many opportunities to get these
3 depositions in. We don't want to spend that time with
4 longwinded objections, but at the same time I don't think I
5 need to micromanage this any further.

6 Mr. Lobel, obviously, if it continued or grew or
7 became a consistent pattern of longwinded objections like
8 before that were given as examples, that would cause me
9 concern because they go pretty far beyond the standard
10 speaking objection. But I'm not overly worried if they're
11 isolated, and I just encourage everybody to try to be
12 reasonable and concise and keep going.

13 As to the yes or no thing, that kind of bothers
14 me. I'm not sure that it's appropriate in a deposition to
15 say to a witness that they can only answer yes or no but,
16 you know, but I'm going to stay out of micromanaging this.
17 And I hope that you all can with a deep breath find a way to
18 meet a middle ground here.

19 So my general conclusion is no speaking
20 objections. The four examples given, they are probably
21 pretty speaky, but the fact that there are four among many
22 gives me some reassurance that they're not likely to
23 continue to be a problem.

24 MR. LOBEL: Your Honor, this is Doug Lobel. May I
25 just ask a question for followup?

1 THE COURT: Sure.

2 MR. LOBEL: It's my understanding and my long time
3 practice that an objection such as objection calls for
4 speculation, objection lack of foundation is appropriate,
5 and I don't want to run afoul of the Court's directions. Is
6 that the case that you would find that appropriate?

7 THE COURT: Yes, that is how I understand it to be
8 but, frankly, you've been in many, many more depositions
9 than I have, but that is my understanding of the way these
10 objections should work. And if the objection is this
11 question is beyond the scope of discovery that's permitted
12 right now in this case, which I frankly assumed was going to
13 be the nature of the dispute that led to the phone call,
14 let's find a way to save that concisely. Objection beyond
15 the scope of permissible discovery or whatever it is.

16 So if you need to agree on a shorthand and, you
17 know, take a moment on the record and say here's my concern
18 with this question and say it in 20 seconds but say so that
19 I don't have to repeat that, I'm going to use this
20 convenient shorthand, but I don't want that to become the
21 camel's nose in the tent for longwinded speaking objections.
22 I just want to find a way to get these objections noted on
23 the record and go right on to answering the question.

24 And I think you guys can handle it, and I'm sort
25 of surprised you called me, but I suspect it's just because

1 this is deposition one, and we're trying to work out some of
2 these kinks before they, you know, grow. So I welcome the
3 call, but I really think that with this guidance you all can
4 figure this out.

5 UNIDENTIFIED SPEAKER: Frankly, Your Honor, I
6 appreciate that. And, yes, because it's the first one, and
7 the ground rules I think we all would like to understand
8 them so we don't run afoul.

9 THE COURT: Yeah. Well, let me just say that
10 Judge Davis is the king of this case, and I've tried several
11 cases in front of Judge Davis, and he is not a fan of
12 speaking objections. So to the extent that either he or I
13 separately and based on our own experiences are considering
14 this question would be a less is more ruling, but I think
15 that Mr. Lobel is going to try to adhere to less is more as
16 well.

17 MR. LOBEL: Your Honor, I will as well, but I
18 would like to bring up another issue with the Court.

19 THE COURT: I am done with this issue unless
20 anybody else has any other questions, I think we can view
21 this as an opportunity to get along. So can we pivot to the
22 next issue or Mr. McDonough or Mr. Langley, anything else
23 you want to say about this one?

24 UNIDENTIFIED SPEAKER: I think we can move on to
25 the next issue.

1 THE COURT: Okay, great. And before I pivot to
2 the issue to be raises by the defendants, any other issues
3 on your plate, Mr. McDonough? I'm sure you have responsive
4 issues as to what you think he's going to bring up, but
5 anything that's just your's?

6 MR. MCDONOUGH: No, Your Honor. I'm not exactly
7 sure of the issues he's going to bring up. We haven't
8 discussed it. I have a sense of it based on how the
9 depositions have gone, but I look forward to hearing his
10 perspective on things.

11 THE COURT: Okay, well, let's end the suspense.
12 Mr. Lobel, what's going on?

13 MR. LOBEL: Your Honor, with respect to the
14 conduct at the deposition, I'm afraid that at times this
15 deposition has become abusive, and I don't use that term
16 lightly. Counsel is consistently talking over the witness,
17 cutting the witness off, not allowing the witness to finish
18 his answer. Counsel has asked questions many, many times,
19 the witness recently testified that it was the tenth time
20 that he'd been asked a particular question and counsel will
21 not accept the answer; apparently doesn't like it or for
22 whatever reason, and making the witness quite uncomfortable.

23 Beyond that mode of conduct, what has happened,
24 and I will concede has lessened over the day, counsel is
25 consistently trying to get into class wide discovery issues

1 and waiting until I shut him down by objecting that it
2 exceeds the Court's Order under Rule 30 and then he stopped
3 and moves on. And then he several questions later attempted
4 to get into class wide discovery questions again. I'm
5 consistently policing and attempting to enforce the Court's
6 Order as well as limitations on the scope of this particular
7 witness's testimony.

8 Let me give you three examples. On the class wide
9 issue, there was testimony about alleged inaccuracies in the
10 confirmation of service letters for the 38 plaintiffs.
11 Counsel asked whether any of the five million Internet users
12 have experienced similar inaccuracies or whether in fact the
13 witness has looked into that issue. Counsel said that two
14 of the 38 plaintiffs did not have quick to accepts,
15 calculated that as 5.2 percent of the plaintiffs in the
16 case, and then asked mathematical questions about whether
17 that could be extrapolated to the five million Internet
18 users, and attempted to calculate the number of alleged
19 violations for the entire five million class wide Internet
20 users.

21 Counsel also asked the witness whether CenturyLink
22 had policies, and policed, policies about a practice called
23 cramming, which also relates to the entire subscriber base
24 of CenturyLink to all of their customers. In each of those
25 instances, I objected. I shut it down. There was no

1 discussion or argument, and it appeared to me to use the
2 term that the plaintiffs are fond of that it was a
3 catch-us-if-you-can type approach. We're going to keep
4 trying to push the envelope until you stop us and shut us
5 down and limit us.

6 So this I raise. I would not have called the
7 Court on this. I would have handled it myself, but since
8 we've got you on the line, certainly foresee this as being a
9 major issue in every deposition in this summer phase of
10 discovery, and I wanted to raise it with the Court for some
11 reason.

12 THE COURT: I like how you call it the "summer
13 phase of discovery." It sounds like some good Brian Adams
14 song or something far more awesome than what it actually is,
15 you are all in a conference room until the end of time.

16 Okay. Let's hear from you, Mr. McDonough or Mr.
17 Langley.

18 MR. LANGLEY: Yes, Your Honor, this is
19 Mr. Langley. I'll respond since I'm the one taking the
20 deposition. There has been a number of times where the
21 witness has spoken over me, and I've spoken over him.
22 Mr. Lobel has spoken over both of us. And it's like you
23 said earlier, it's an issue that I think we're working out
24 as the deposition has gone along. I've tried to expedite
25 the deposition, and Mr. Lobel makes an extremely long

1 objection that we suggested earlier for the purpose of delay
2 that to circumvent any problems with the question or to
3 instruct the witness on exactly what it is that I'm asking
4 when he begins answering a question that I didn't ask,
5 that's when I've spoken up and said no, that's not what I'm
6 asking. And the whole point is to expedite the deposition
7 and make it move along faster.

8 There's no abuse, that the witness has never said
9 one time that he's uncomfortable. He never asked for a
10 break because he's uncomfortable. We've broken every hour
11 on the hour because the videographer has a one hour tape.
12 So all of this is conjured up these allegations and abuse by
13 Mr. Lobel. None of this has come from the witness directly.
14 So, Your Honor, I reject it wholeheartedly any (inaudible)
15 of abuse.

16 Specific to the class wide discovery, we
17 stipulated on the record that all of our questions about
18 customers to the extent that I say that as opposed to
19 plaintiffs, but what we're talking about is 38 plaintiffs in
20 this case, and Mr. Lobel accepted that stipulation. The
21 reason we got into the policies earlier, this witness has
22 relied on policy to allege that it's impossible for somebody
23 other than, not impossible, but unlikely that it's on the
24 policy that anyone other than the plaintiff actually is
25 quick to accept these agreements that are at the heart of

1 the deposition. And so I asked him to what comparison had
2 he made to the other violations and policies that are
3 alleged in the case, and how those policies were
4 extrapolated over the number of users.

5 And I think it's important to know that if we're
6 going to rely on policies to support these allegations for
7 his declaration and for his testimony in this case, how that
8 compares to other policy violations. I think it's germane
9 specifically to 62 page declaration, Your Honor, with 85
10 exhibits. There's very little that's not included in that
11 declaration.

12 So it's a challenge for me to make sure and what
13 we've tried to endeavor to make sure is that we don't have a
14 circumstance where this witness says, well, I'm not the
15 person to answer that or whatever and then that is played
16 out all along through all the depositions and the can is
17 kicked down the road. So that's the nature of what's taken
18 place. It's not some catch-us-if-you-can scam that or
19 scheme that Mr. Lobel has suggested. Nothing like that.
20 I'm simply trying to make sure that this witness has tested
21 his positions that he's taken in his declaration. I think
22 that's perfectly fair for me to do.

23 THE COURT: And is it your position, Mr. Langley,
24 that these occasions in which you have veered into what we
25 would call class wide, I'm not going to say whether it's

1 violating the class wide discovery order or not. That's the
2 million dollar question. But that you're asking questions
3 about sort of class wide things. Let me make sure I
4 understand your position.

5 Your position is that these questions have to do
6 with things related to the arbitration clause and assertions
7 about CenturyLink policies for that and that you're
8 suggesting that if they are referring what must have
9 happened as to the 38 from a policy, you have a right to
10 test how often that policy has been correct, is that your
11 argument?

12 MR. LANGLEY: Yes, ma'am.

13 THE COURT: It's your position that you're not
14 asking these questions related to service problems or
15 billing problems but they are related specifically to, you
16 know, invocation rejection, acquiescent to the arbitration
17 agreement?

18 MR. LANGLEY: Absolutely, and we stipulated to
19 that on the record. The whole purpose of asking the
20 questions is just as you say, Your Honor, to understand if
21 they're going to rely on these policies, to what extent do
22 they look at violations of the other policies?

23 THE COURT: Of the other policies related to the
24 arbitration agreement? Or other policies? As a, like,
25 other policies broadly as a means of interpolating how often

1 policies are applied generally? Or how often these policies
2 are violated?

3 MR. LANGLEY: Well, it's really, it's a good
4 question. And one of the difficulties has been, and we
5 haven't really gotten into this, but my position is the
6 witness has been purposely evasive in saying, for example,
7 what is the definition of "else?" Literally, that was a 10
8 minute back and forth, at least a five minute discussion
9 because he would not answer a question where I used the word
10 "else." I mean it's like it depends on what the definition
11 of "is" is. That's the level of frustration.

12 So I do not intend to ask for violations of
13 policies globally, but I want to understand that they're
14 going to rely on this policy as never having been violated,
15 for example, for somebody to log in remotely for a
16 technician to log in remotely and click accept on behalf of
17 a plaintiff, they say that could never have happened because
18 their policy says that shouldn't happen. And so what I'm
19 asking now is do they have any other policies in this
20 context that have been violated such that it's not
21 reasonable to rely on that policy or remote installation and
22 acceptance. That's what I'm getting at.

23 THE COURT: And you're saying are there any other
24 CenturyLink policies at all for five million users that have
25 ever been violated because you think that if you're proving

1 the point that policies aren't infallible? Is that the
2 idea?

3 MR. LANGLEY: Well, and, Your Honor, I think this
4 was about three hours ago.

5 THE COURT: Okay.

6 MR. LANGLEY: And we've long moved on from this
7 issue.

8 THE COURT: Okay. Yeah, I'm not trying to pull a
9 mole hill back into focus, so that we can turn it into a
10 mountain. That's not what I'm trying to do. I'm just
11 trying to understand, and I do feel like I've got a sense
12 for the issue.

13 Okay. I'm going to allow Mr. Lobel or Mr. McNab
14 to chime back in on this, and then I'll give you some
15 thoughts.

16 MR. LOBEL: Yes, Your Honor. This is Doug Lobel.
17 This line of questioning that I related to had nothing
18 whatsoever to do with policies. And the stipulation that we
19 entered into was long after these class wide issues were
20 raised by counsel.

21 What counsel did was he identified what he claimed
22 was an inaccuracy in a letter. And the inaccuracy was that
23 the last name was first and the first name was last. And he
24 after a half hour of questioning on that, then asked if that
25 extended to the entire customer base. The point being to

1 try to solve the problem as they see it for class wide
2 purposes. And the questions about the policies over
3 cramming, which is putting on false charges on someone's
4 bill, has nothing to do with the issue of assent to an
5 arbitration agreement. He again asked if that was a
6 companywide or class wide problem. He then attempted to
7 extrapolate.

8 So, again, this is nothing to do with policies.
9 It has the camel's nose under the tent effort to try to get
10 into class issues. And, as I say, he sort of sheepishly
11 shut it down and moved on, but I don't think we want to be
12 in a position where we're constantly enforcing Judge Davis's
13 order. We all understand what the order is and what it
14 isn't. There may be some questions at the margins, but,
15 clearly, those examples are completely improper, and I would
16 ask you to just guide counsel accordingly.

17 THE COURT: Okay. So the way I hear the concerns
18 raised by the defendants are sort of two different issues.
19 One is the issue of verging on abusiveness, and here I'm
20 just going to make a little speech to everyone all together.

21 I hear how high emotions are running. Emotions
22 have been running high in this litigation for many months,
23 and they are at a peak right now because you guys are going
24 to have to be dealing with each other in such an unusually
25 concentrated manner all day every day for weeks, and getting

1 used to one another's styles takes time trying to be as
2 gracious and compassionate to the other side and assume that
3 something that could either be characterized as aggressive
4 or accidental. You know, right now, you're frustrated and
5 you're tending to assume that it's aggressive when a more
6 compassionate read would be accidental. These are hard.
7 And it's only going to get worse, and tensions are only
8 going to get more inflamed.

9 Let me say a couple of things about that. I'm a
10 huge interrupter. It's a historic problem of mine as a
11 lawyer. I get very excited to make points. And I have had
12 to really temper my tendency to interrupt and then I went
13 and became a judge where everybody lets me interrupt, so
14 that's a bad thing. I'm going to be sympathetic to an
15 interrupter, but you can't interrupt because that can also
16 be perceived as sort of relentless and aggressive pervasive
17 controlling behavior, right?

18 So I think some of this is going to get better as
19 people start to realize one another's styles as people try
20 to temper their own worst inclinations. Actually, I had a
21 month long trial in front of Judge Davis once where my
22 number one goal was never to interrupt him at sidebar, and I
23 did it. It took great force of will, and I need you guys to
24 put that force of will here. So if that means that
25 Mr. Langley or Mr. McDonough who has a naturally excitable

1 style that is being perceived as too aggressive needs to
2 take a breath and go slow, that's what it means.

3 It also means that Mr. Lobel and Mr. McNab, when
4 there are two possible interpretations, one of which is
5 malice and the other which is excitable, assume that it is
6 not malice, but that it's just excitable. Let's find a way
7 to not allow the high running emotions between counsel to
8 become high running emotions of the witnesses.

9 Whatever else is true, these witnesses don't
10 deserve to be subject to aggressive conduct on either side
11 or aggressive cites between the two of you. Now, that's
12 easy to say and that's hard to do and I recognize that. So
13 I'm just going to ask for patience and breaks.

14 I do understand the perception that we're on the
15 clock and, frankly, I'm using up your time right now, so I
16 feel bad about that, but that doesn't diminish the fact,
17 Mr. McDonough and Mr. Langley, that your efforts to move
18 things along to expedite things to get to the heart of the
19 matter couldn't be perceived by a nonlawyer witness or even
20 a lawyer witness as sort of relentless and aggressive. And,
21 you know, that's not appropriate for a deposition.

22 So I'll just encourage both sides to try to
23 approach both one another and the witness with patience.
24 That's something I'm going to take really seriously are
25 allegations of, you know, mistreatment of witnesses, but I'm

1 not at all endorsing that that has happened here or
2 rejecting that it's on the cusp. I'm just encouraging
3 everyone to find a way not to let the passions that are
4 infusing the litigation turn into possible questioning.

5 With respect to the questions themselves, I think
6 that you all have demonstrated a difficulty here. The
7 absolute prohibition on class wide discovery is really
8 clear. We talked about it a bunch of times. We're not
9 having classified discovery. That would include, for
10 instance, class wide discovery about cramming practices or
11 billing practice or sales tactics or number of complaints or
12 systems to address number of complaints. Those things are
13 not the subject of the summer of discovery.

14 But what is the subject of the summer of discovery
15 are among other things the validity of these arbitration
16 agreements, and that includes testing if somebody is going
17 to testify that nobody would ever click accept for somebody
18 else's arbitration agreement because we have a policy
19 testing how often that policy is known to have been
20 breached. Seems like there's a difference between how often
21 is the policy about accepting somebody else's arbitration
22 agreement breached, which does seem to fall within the
23 summer of discovery parameters verses how long our other
24 policies that you have about sales practices breached, which
25 seems to fall on the wrong side of the summer of discovery

1 parameters.

2 So I think you all can figure that out. I think
3 that because this has already been the subject of lots of
4 conversation, there needs to be as good as possible of
5 self-policing by the plaintiffs about this issue. But I
6 also think that it isn't true that every single question
7 about broad practices is automatically off the table if it
8 is really related to the three things that we all know are
9 before the judge in the motion.

10 So I think that just using as a hypothetical the
11 examples that have been given about the five million policy,
12 there's one way in which I can see that question being
13 appropriate, and there's a lot of ways in which I can see
14 that question not being appropriate. And I'm going to need
15 the plaintiffs to do that self-policing to the best of their
16 ability. This will be an area that I'm not going to love
17 hearing from you frequently about, and I know that's
18 difficult because this is an area where the plaintiffs
19 really want more information than Judge Davis is allowing
20 them to have. But at this stage, we just need to be
21 careful. But I don't want that to become a just habit of
22 every time there's an uncomfortable or difficult question,
23 that the defendants can feel free to say, oh, this is about
24 class wide discovery. Some of them actually could be broad
25 but not fall within a class wide discovery prohibition, and

1 I hope that my example of the different two policy examples
2 helps give some guidance around that.

3 I really do think that some of these emotional
4 thoughts about what is too aggressive, what is too much of a
5 speaking objection, we will get over. I'm glad that you
6 brought them to me day one, but I think that with a little
7 self-restraint, everybody can find peace. Otherwise, it's
8 going to be the longest summer of your lives because every
9 day is going to be infused with hostility, and nobody wants
10 that.

11 UNIDENTIFIED SPEAKER: I understand, Your Honor.
12 Thank you.

13 UNIDENTIFIED SPEAKER: Thank you, Your Honor. I
14 appreciate it.

15 THE COURT: All right. I mean I know that all
16 I've done was make a speech, which isn't actually very
17 helpful, but is there anything else that we should talk
18 about either substantively or mood wise or any other way
19 that I can be useful at this point?

20 MR. LOBEL: Not for defendants, Your Honor.

21 MR. MCDONOUGH: Not for the plaintiffs, Your
22 Honor.

23 THE COURT: Okay. Let me just say that I want the
24 very last resort always to be the storming out resort, and I
25 know that's hard. It's better to take a brief break and

1 come back to it. But, you know, when somebody calls an end
2 to a deposition, that is obviously extreme and that's also a
3 gamble because if you gambled that wrong then, you know,
4 that's the one area where I think that the shifting of fees
5 for continuing a deposition or for calling it early or
6 whatever, that becomes a real consideration. And I'm
7 heartened that we don't have at least on this first day any
8 action like that. And I just really encourage you all to
9 keep well short of that sort of response to frustration.

10 So good luck. I know you're going to be spending
11 a lot of time together. I hope the weather is nice in
12 Colorado. Are a lot of these depositions in Colorado? Or
13 are you going to be traveling?

14 MR. LOBEL: A number of them are in Colorado, Your
15 Honor, and other places as well, so scattered.

16 THE COURT: Okay. Well, enjoy it while you -- if
17 you can. Try to go out for a nice dinner tonight. Go find
18 good food in Colorado and hang in there, and let me know if
19 we can be of further assistance.

20 COUNSEL: Thank you, Your Honor.

21 THE COURT: And, incidentally, I will not be
22 issuing an order from this conversation. I don't think it's
23 necessary. Usually I do, as you've seen, but here I will
24 not unless either side needs further clarification.

25 MR. LANGLEY: Not from the plaintiff, Your Honor.

1 MR. LOBEL: Not for defendant, Your Honor.

2 UNIDENTIFIED SPEAKER: Thank you, Judge Menendez.
3 Appreciate it very much.

4 THE COURT: Have a good day. I hope things end on
5 a high note. Thank you, everybody.

6 (End of hearing).

7

8

9

10 * * *

11

12

13 I, Maria V. Weinbeck, certify that the foregoing is
14 a correct transcript from the record of proceedings in the
15 above-entitled matter.

16

17 Certified by: s/ Maria V. Weinbeck

18 Maria V. Weinbeck, RMR-FCRR

19

20

21

22

23

24

25