UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: CENTURYLINK SALES PRACTICES AND SECURITIES LITIGATION	File No. 17-md-2795 (MJD/KMM)
	Minneapolis, Minnesota
	August 20, 2018
	3:00 p.m.
	RECORDED TELEPHONE CONFERENCE

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

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P R O C E E D I N G S

IN CHAMBERS

THE COURT: Okay. Now let's get started by identifying who is here first on behalf of the Plaintiff.

MR. GUDMUNDSON: Good afternoon, Your Honor. This is Brian Gudmundson.

THE COURT: Hey, Mr. Gudmundson, how are you?

MR. GUDMUNDSON: I am well.

THE COURT: Okay. Who else is here on behalf of the Plaintiffs?

MS. LOOBY: Good afternoon, Your Honor. Michelle Looby from Gustafson Gluek.

THE COURT: All right. Welcome. Who else?

MR. GUDMUNDSON: That may be it for the Plaintiffs, Your Honor.

THE COURT: Okay, great. That's an unusually small team.

So -- and let's go with the Defendants. Who do we have on the line?

MR. McNAB: Good afternoon, Judge Menendez. Bill McNab on behalf of the Defendants and the proposed intervenors.

THE COURT: Okay. Who else is with you today? Mr. Lobel?

MR. LOBEL: Yes.

MR. McNAB: There he is. He's not with me, Your Honor. He's somewhere afar.

MR. LOBEL: Good afternoon.

THE COURT: Mr. Lobel, is that you that just beeped in to join us?

MR. LOBEL: Yes, Your Honor, we've had some phone issue here at the firm. I apologize.

THE COURT: That's all right. You're only a moment past 3:00. It's no big deal.

Anybody else expected from your team, Mr. McNab?

MR. McNAB: Mr. Vogel may be participating along with Mr. Lobel.

MR. LOBEL: Yes, Mr. Vogel is here.

THE COURT: Okay. Thank you. Welcome.

Let's go ahead and get started. Let me say a couple of preliminary things so I don't forget them at the end. As I expressed in the e-mail to everyone today, I don't have either the time or I think the preparation to address some of the follow-on issues that were raised by e-mail to me this morning. I'm not criticizing anybody's effort to consolidate our focus and add on things to a phone call. It's just that between my agenda today and the concern of at least one of the parties that those things haven't been fully explored through the meet and confer

process, we're going to postpone those for another day, even if that day is right around the corner. We're not going to address those additional concerns.

The second thing is that your request for more lengthy briefing has to be directed to Judge Davis, not to me. It's briefing that he gets to read so he gets the honor of deciding how much of it there will be. And I told him that that was filed and let him know and he specifically indicated you should bring that request to him.

Any questions about either of those things?

MR. GUDMUNDSON: No, Your Honor. This is Brian Gudmundson. Is the Court expecting a re-filing of those papers, which can easily be handled?

THE COURT: You know, I think it probably wouldn't be a bad idea to call Judge Davis's chambers and ask if they would like the letter to be re-filed or if they would like the order -- I think that we have forwarded -- I think you all sent a proposed order, did you?

MR. GUDMUNDSON: Yes.

THE COURT: And I think we have forwarded that to Judge Davis's chambers. But it's a good idea just to call his team and see what --

MR. GUDMUNDSON: Thank you, Your Honor. And normally I believe that we probably would direct such a motion to Judge Davis. We had been informed that Judge

Davis was out due to a health issue and we wanted to sort of cut the -- not burden his chambers. But it's good to hear that he is entertaining such motions and we will contact his chambers and get them resubmitted according to his preference.

THE COURT: Yeah. And again, there's no -- I think he could have gone either way. But he's ready to go and to hear these things and so I'm sure he wants to make up his mind himself.

MR. GUDMUNDSON: Certainly.

THE COURT: Now let's pivot to the issues that are actually before us on today's call. I think I want to start by hearing from the defense. I'm a little unclear on exactly what you want me to order. I also have to say that I think I've heard enough about the single Plaintiffs who had a clear contradiction between the information provided in the request for admission and the document request. I'm convinced that although that was a clear contradiction, that was also a very isolated issue and I'm not sure it's instructive or illuminating about a broader pattern on the part of the Plaintiffs.

So setting that one aside, tell me, share with me what you think the real problems are and what relief you're seeking.

MR. McNAB: Your Honor, I can assure you that no

part of my presentation addresses -- I think it was Ms. Lawhead's inconsistent positions.

There are three specific concerns or issues that we have with Plaintiffs' response to the Requests for Admission and I'll go through them quickly if I may.

One, they just simply contain improper objections that are flatly contrary to the very rule, Rule 36, itself and other sorts of improper objections.

Number two, because they are subject in all instances to general and specific objections, that renders the response, in particularly the denials, ambiguous.

And three, each of their relatively few admissions contains improper and nonresponsive legal argument.

So those are our issues and, if I may, I think I would like to start with the last issue first because I think it's pretty quick and pretty clear to see.

If I could give as a classic example of what I'm referring to, Mr. Chavez, in response to Request number 3, which I don't know if the Court has the documents in front of it, but it would be --

THE COURT: I do.

MR. McNAB: Okay. It would be page 12 of the amended responses.

THE COURT: Okay.

MR. McNAB: It's a pretty simple request. "Admit

that you received a Confirmation of Service letter dated February 16, 2017, attached as Exhibit 54 to the Beard Declaration."

The response: Plaintiff begins by incorporating the general objections and, subject to and without waiving those objections, Plaintiff admits that he received a Confirmation of Service letter dated February 17, 2017, but denies the receipt of the Confirmation of Service letter constituting conspicuous notice of or assent to arbitration or a class-action waiver.

And, Your Honor, everything after the word "2017" is improper legal argument. The request didn't mention conspicuous notice, assent to arbitration or class-action waiver, and it certainly did not ask Mr. Chavez to admit conspicuous notice, assent or waiver. It merely --

THE COURT: Let me ask you a question, Mr. McNab. Let me ask you a question and I'm going to direct the same question to opposing counsel, as well.

What difference does it make? I mean, I mean this in all candor, I understand that they gave you an answer to the question you asked which is yes, we got the letter. And then they went into some additional stuff that you say is excessive but arguably irrelevant. It doesn't seem to diminish the value that you can put to the admission that he received the letter. Why does it matter?

MR. McNAB: Well, I think it's just that the rule says that we're entitled to clear, clean admissions of simple facts, not a bunch of legal rhetoric and legal argument.

THE COURT: Does it hamper your ability to use that admission in any way?

MR. McNAB: Well, in a practical way maybe not at this time because, of course, the next person to see it will be Judge Davis. But to the extent that these sorts of admissions end up in front of a jury, then it would even more so become a problem.

THE COURT: And have you deposed Mr. Chavez yet?

MR. McNAB: No, we have not.

THE COURT: Okay. So it's my understanding that what bothers you is that they provided this additional what they described as context or explanation that you say isn't necessary, called for, or appropriate. You say it's irrelevant because you're not asking them for that one way or another in the Request For Admission, so I'm not sure that I can wrap my mind around how it harms you to have the language that you say is unnecessary in there. And I'm trying to be very pragmatic about this.

MR. McNAB: And I understand Your Honor's question. And it's not merely unnecessary but it's improper and we cited the *Xcel* case, the *Stifel*, *Nicolaus* case and

others, that clearly explain that when a party is responding to a plain fact Request For Admission, they are not supposed to consider -- or at least their response isn't supposed to consider any legal implications of the facts. The facts are the facts and they will have the opportunity to argue at some point in the future in their brief and probably at oral argument what the impact of his receipt of this letter may or may not be. What that legal impact may or may not be. It just doesn't belong anywhere in the response to Requests for Admission.

THE COURT: Okay. Go ahead.

MR. McNAB: And, Your Honor, I would just very quickly say that this exact same defect applies to Mr. Fitch, Glodowski, Ms. Lawhead, Ms. O'Donnell and Richman, all on this same subject. These are folks who admitted that they received a letter, but then went on to say but it -- you know, legal consequences.

I won't go through the details, but we have the exact same scenario with respect to folks who were asked to admit that they signed up for certain online services or auto bill pay and we got the same, I admit I signed up for an online account but I deny that registering for an online account constituted conspicuous notice, assent to arbitration, or class-action waiver. And again, it's the exact scenario, and it affects 1, 2, 3, 4, 5, 6, 7, 8, 9,

10, 11, 12 of the respondents for Plaintiffs and, you know, approximately 20 or a little more than 20 of the responses. So we're asking the Court to compel proper responses that don't contain the improper legal argument.

THE COURT: Okay. Thank you. So if we start working backwards through your (1)(c)(3) list, does this bring you to number 2 or are there more that we want to explore on the nonresponsive issue?

MR. McNAB: That's all I have to say about that, Your Honor.

THE COURT: Okay.

MR. McNAB: Our second concern is the ambiguity created by Plaintiffs' conditioning of all its responses on general and in some cases specific objections. This is particularly problematic with respect to denials because it's really unclear whether they are denying a fact or they are denying a request because of an objection, or whether they are denying based on some kind of parsing of the words. It's just not really clear.

And I've got an example or two I'd like to discuss. We didn't mention these in our letter brief. Every single Plaintiff denied clicking to accept various kinds of contracts, and this is significant for two reasons.

First, as we mentioned in our letter, the company has produced contemporaneously created computer-generated

records of 34 of the Plaintiffs specifically clicking to accept, and some of them more than once, down to the day, the time, the hour, the minute that they clicked to accept.

And second, and I think this is maybe more important and more telling because, of course, Plaintiffs want to challenge the efficacy of our record keeping, but, Your Honor, it would have been impossible for Plaintiffs to access these services if they had not clicked. And I'm sure Your Honor is familiar with clicking to accept some kind of terms and conditions. We're all asked to do it all the time. In fact, every time I log on to PACER I'm asked to click to agree that I will comply with the Court's redaction requirements and if I don't click, I don't get in.

THE COURT: Okay. Let me ask you -- let me ask you this, though, because here's my question about this and you've raised the perfect example of this.

I'm trying to sort out how your frustration isn't with the content of their answer, which is we deny this request. Is it your concern that there is some magic language in the series of objections that renders we deny this request something other than a denial? I mean, it cannot be that because you believe the facts are A, they are not allowed to disagree, right?

MR. McNAB: No, no, I couldn't agree with you more, Your Honor, and I'm not asking to sort of weigh these

fact. Not at all. I'm expressing the basis for our skepticism about the bases for their denial. Is it because of the objection? I mean, we can't fathom how the response "I deny" is based on the fact that they never clicked on a little box on a computer screen because we have this compelling evidence that they must have done so.

So we don't know if they are denying because of something in the objections, or perhaps they are denying because, well, maybe they clicked but they'd like to maintain somehow that they didn't accept something, right? But if that's the case, then they are not complying with the rule that requires that they answer in good faith and admit as much as is true and deny the rest. So even if they have a way that they want to say, Well, I may have clicked but I certainly didn't intend or mean to accept, or I didn't accept or something like that, I think --

THE COURT: (Inaudible.)

MR. McNAB: I think that if there's a way to say that, the rule would allow that. I just don't think that the rule allows this blanket denial if in fact they did click, which obviously we think they must have done.

Now it's hard to understand if they did click what that meant if it didn't mean I accept, but that is for another day. We agree that's for another day. But for now if they clicked, we think they have to admit at least that

much of that request.

THE COURT: Okay. Let me ask you this just so I understand. Let's imagine that they had responded exactly the same way to the click question. Plaintiffs deny this request without all of the noise of the objection. You might not like that answer but we would not be on the phone. Is that right?

MR. McNAB: It would be -- we would not be on the phone on that issue.

THE COURT: I'm trying to understand whether you're complaining about how the fact that you can't fathom how they could answer that or whether you're complaining about the concern that all of the objections have converted that denial into having a different meaning than at face value. If you're complaining about not being able to fathom that that's the answer, I think that that's -- you know, I'm less inclined to do anything about that problem. If you're complaining that there is something that you're concerned that there is something in all of the standard objection language that -- that obfuscates your ability to understand the answer, that I'd like to explore. Do you understand kind of the distinction I'm drawing?

MR. McNAB: Absolutely, absolutely. And if they just flat deny because they have some basis to deny, that would leave us in a different place and we would have to

deal with that through other discovery mechanisms and so on.

Yes, we are in large part concerned that by tieing the responses to general objections, and in some indications specific objections, that renders some ambiguity into the basis for the denial.

THE COURT: Okay.

MR. McNAB: But there's another alternative that I have raised, and I don't know how to get at this. If it's not the objections, then it appears that it would be word parsing that I think would be equally improper. That is to deny the entire request because, well, maybe we clicked but we didn't mean to accept.

THE COURT: You're the one that chose to phrase it as click to accept, right? So if you had chose to phrase it as clicked, when asked to click next to a box that says click to accept, but you're the ones that chose to have them admit or deny that they clicked to accept. So the fact that now you have concerns that they are denying because of the conjunctive nature of the click and the accept, I'm not sure I put that entirely at their feet when you crafted the question.

MR. McNAB: It's difficult to provide enough detail that the question can't be vague and yet not so much detail that it becomes treated as multi-part or conjunctive. So --

THE COURT: Right. But you're worried that hidden in this Plaintiff denies this admission is maybe a willingness to admit a click but not to accept consequences. And you think that if that is the true answer, the answer should be explicit as to Plaintiff admits that he clicked the box but disagrees that it functions to accept. That's what you think would be an acceptable answer.

MR. McNAB: I think that's an answer that the rules would permit, yes.

THE COURT: But somehow that answer is sufficiently distinct from the answer you complained about in the other part where the person is answering that they received a letter but that they disagree with the legal consequences.

MR. McNAB: Sure. Because I think you were referring to, when you say this is a multi-part question, we've got two facts, one that perhaps they are willing to admit and one perhaps that they want to deny, that's different than asserting a bunch of legal arguments.

THE COURT: Okay. Okay. Great. I think I understand it. I have particular concerns that I am going to raise with Plaintiff counsel about how you could make an objection that says that the admission can't be construed in any way as an admission. But I don't think I need particular conversation about any of the specific objections

unless there's some general objections that you think are particularly not permitted.

MR. McNAB: Well, you picked my favorite, Your Honor, and this was the third part so you are anticipating. No, I won't dally here. I will just say that number four also objects to the requests to the extent that they require the application of law to facts. But that's expressly permitted in Rule 36(a)(1)(A). So that's another example that we think is wrong.

So -- but to sum it up, what we're asking for, because that's what you really asked me at the beginning of the call, we're asking for clean admissions that aren't draped in improper legal argument. We're asking for clear answers, whether admissions or denials, that aren't clouded by numerous and often improper objections.

And then finally, if it's the case that we get admissions of so much of each request as in good faith must be admitted. If they clicked, admit they clicked. If they can in good faith deny they accepted, so be it. But we think the rule requires that they fairly meet the substance of the request and admit as much of it as is true.

THE COURT: Okay. Thank you very much.

MR. McNAB: Thank you.

THE COURT: Why don't we turn to Mr. Gudmundson.

MR. GUDMUNDSON: Actually Ms. Looby will be

handling our argument today.

THE COURT: Okay. Great. Thank you.

MS. LOOBY: Yes, Your Honor. So, you know, I think you hit the nail on the head when you were talking to Mr. McNab. What appears to Plaintiffs when reading Defendants' brief is that what Defendants really have an issue with here is not the objections but the fact that they cannot fathom how our denials could be true denials.

And I think, you know, we went through several examples in our brief explaining how there are certain situations where Defendants may believe, you know, it's impossible to fathom how people could deny getting a Confirmation of Service letter. But as we explained, the whole premise of this case is that CenturyLink's system is riddled with errors and, you know, that has been borne out in the discovery we have done to date.

So further on that point in terms of whether the objections are obscuring our responses, you know, we went over this in detail during the meet and confer process and made it very clear that when we denied a request, that it was being denied. And in fact in many instances our denials are actually explained in our RFA responses, which Defendants also take issue with, or even more thoroughly explained in many instances in our interrogatory responses.

THE COURT: Okay. Let's explore one example of

this, just so I understand. They asked if you received a certain letter. You asked if Plaintiffs received a certain letter and one Plaintiff received a letter. Many Plaintiffs say we deny this request. Does that mean that you -- that they are denying that they received the letter?

MS. LOOBY: Correct, Your Honor. So in the instances where a Plaintiff denied receiving a letter, first of all I think if you look at some of the interrogatory responses for some of these Plaintiffs you'll see that perhaps they admitted to receiving a confirmation e-mail. They never received a Confirmation of Service letter.

In other instances a Plaintiff may have recalled receiving some letters but it was not the letter that Defendants have asked about in their RFA response. Again, I think accurately, and as we pointed out in our brief, the case law supports that the Defendant or the propounding party is responsible for how they phrase their requests. So if they are asking about a letter, a Confirmation of Service letter dated on a particular date, if a Plaintiff has no record of receiving that letter, then they denied that request as they had to.

If a Plaintiff, on the other hand, has a copy of that letter in their records or has a recollection of receiving a letter dated that date, we admitted it.

THE COURT: Does your denial include non-memory?

MS. LOOBY: Not necessarily, Your Honor. In terms of non-memory, I guess from the extent that if a Plaintiff has no recollection of receiving a Confirmation of Service letter, they have no basis to admit that they received that letter, and --

THE COURT: So a denial does include non-memory?

MS. LOOBY: In that instance. So -- but just to kind of clarify that a little bit, the interrogatory responses are going to go into detail on that issue. So it isn't a circumstance where a Plaintiff does not remember, that's going to be discussed in the interrogatory response.

THE COURT: Okay. Let me ask another question. What is intended by denial of clicking to accept?

MS. LOOBY: So that is a good example of one of the issues that Defendants have in terms of our objections and I think they term that our "evidentiary objections".

So, for example, one of the RFAs says: "Admit that on October 3rd, 2014, you clicked to accept the Combined Modem and Subscriber Agreement presented to you in the QuickConnect flow, attached as Exhibit 6 to the Beard declaration."

So as Your Honor correctly noted before, this doesn't just say admit that you clicked on some boxes on a certain date. It specifically says admit that you've clicked to accept a particular agreement. If a Plaintiff

did not click to accept a particular agreement, they denied it.

THE COURT: So they might have clicked but not intended to accept an agreement, and you treat that as a denial of that question?

MS. LOOBY: That would be one circumstance. Or if, you know, it wouldn't even have to be the accept. I mean, obviously there's kind of a multi-layer process in responding to this request because first it requires us to remember that we clicked on something. Then that something has to be this very particular agreement. And then on top of that there's a layer of by clicking on it, clicking this particular agreement, it has the legal effect of accepting the agreement. And that's all how -- how Defendants chose to write it and that requires us to answer affirmatively each of those steps in order to admit something.

Again, to the extent Defendants are claiming they have no idea what a denial means there, in almost all these circumstances they have a corresponding interrogatory request where a Plaintiff set forth all the facts as they know them in response to that interrogatory, which often sheds a lot of light on their denial.

And furthermore, Plaintiffs, as we understand it, are all going to be deposed. That's what Defendants have told us their intent is. And we fully expect that

Defendants will again have an opportunity to dig deeper into all of these issues.

THE COURT: Okay. Let me ask you another question, Ms. Looby. You have a lot of these general objections and these specific objections. I'm concerned that in cases where there actually has been a meaningful admission, you know, that the individual Plaintiff was able to admit yes, I got that letter; or yes, I received that e-mail or whatever it is; yes, that they are so larded with these objections that it is guaranteeing -- what's the point of all those objections if you're admitting the answer? What are you trying to accomplish?

MS. LOOBY: You know, so I guess just to take a step back in terms of this general objection, I think if you look at most of those, a lot of those are just stating our rights. Our rights to not produce privileged information, to follow the local rules and things like that. And Defendants have --

THE COURT: Why do you have to say that? I'm not trying to be snarky here. I'm really not. I come from a much more pragmatic practice history where we don't have, like, thousands of objections to every question and then answer it. It's just a very different practice. So I'll acknowledge that I'm not very conversant in the common tendencies of covering the file in civil litigation.

But why do you just -- why -- if you are just articulating things that are true because they are codified in the rules, because they are codified in ideas of privilege, why are you saying them in response to each Request for Admission?

MS. LOOBY: You know, I think that's a very fair question and, you know, I think the response is, you know, practically I agree with you that, you know, and as we told the Defendants, it didn't affect our admissions or denials. I think a lot of the case law the Defendants cite themselves show that it's common practice to include a number of general objections essentially as a kind of cover yourself measure. Even though they perhaps are not necessary under the rules, it's common practice to do so.

I think the two general objections that Mr. McNab raised, we would be willing to withdraw those two objections. But the rest of --

THE COURT: Tell me what those two are. Tell me what those two are.

MS. LOOBY: So those two are objections number 4 and 5.

THE COURT: Okay. And number 5 is the one that kind of says an admission isn't an admission?

MS. LOOBY: Correct, yes.

THE COURT: And number 4 is the one that's about

applying law to facts?

MS. LOOBY: Correct, yes.

THE COURT: So you will agree to withdraw those two objections across the board from all of the both admitted and denied RFAs?

MS. LOOBY: Yes.

THE COURT: Okay. Carry on. I interrupted you. Please continue with whatever else you wanted me to keep in mind.

Ms. Looby, go ahead.

MS. LOOBY: Sorry. So I -- the only other point I wanted -- I wanted to make is this idea of being able to include additional information in our responses and, you know, I would just point the Court to our brief on that issue. There are a number of cases, including the *K-Dur* case that Defendants have cited for another point which explicitly state that the responding party is allowed to explain their answer, particularly in circumstances that are often the case here where if you don't explain your answer an improper inference could be made against the Plaintiff.

And one such inference that Mr. McNab talked about had to do with the inference of, you know, by doing a certain thing, by clicking a certain document, you have agreed to arbitration. And, you know, it's a little bit disingenuous to say that, you know, none of these requests

are going to the issue of arbitration. That's the entire focus of this period of discovery. And as Defendants acknowledged during the last hearing, all of these RFAs and all these discoveries are going to be the heart of arbitrability, which is really the only issue that the parties are -- or at least the primary issue the parties are allowed to take discovery on.

So that is -- that is all I had unless Your Honor had any other questions.

THE COURT: So tell me about objection 3, that you object to the definition instruction and request because it's vague, ambiguous, overbroad, unduly burdensome or duplicative. Why is that in here?

MS. LOOBY: Sure, Your Honor. So a number of these requests, you know, are just -- are very convoluted and very difficult to decipher what exactly Defendants are asking Plaintiffs to admit. I think the example we talked about earlier is probably a good one where Plaintiffs have to go through several steps in order to admit something.

THE COURT: And so you denied those, right?

MS. LOOBY: Correct.

THE COURT: So why not just deny it? Why have a denial combined with an objection? I mean, I'm trying to figure out, my understanding about the role that these requests for admissions play is that if there's an

admission, then that can be used as basically a proven fact by the Defendants in their briefing, in this case their briefing to Judge Davis. If there's a denied admission, it can't be. I am concerned that all of these sort of preserved objections are laying the table for an awful lot to be on Judge Davis's plate with pure admissibility kind of evidentiary kind of questions that shouldn't be on his plate when he's trying to sort out arbitrability.

So is this, in all candor, is this just stock language, or is this actually carving out some space that's going to affect the around-the-corner litigation?

MS. LOOBY: You know, I don't think -- I don't think I'd call it stock language. For each of the objections before, you know, making it, we reviewed the requests and thought, you know, analyzed what we thought, whether it was an objection that needed to be made.

With that said, you know, I think it is fair to say that when we admitted something, as we told Defendants, whether we were admitting or denying, you know, these objections, you know, generally did not come into play. Except of course if they were privilege and issues like that, obviously that we already have the right to, you know, those will come into play.

But, you know, there's nothing funny going on. We're not trying to hide the ball. This is all something

that we made very clear during the meet and confer process which I think is also made pretty clear when you read the interrogatory responses.

You know, Plaintiffs have set forth in very great detail the facts that explain their particular admission or denial. So there's definitely nothing going on here where Plaintiffs are trying to hide the ball. Quite the opposite, I think our interrogatory responses show that we've given all our answers as thoroughly as possible and, of course, we also, you know, have the depositions coming up where Defendants will have another chance to get further clarification to the extent they don't understand certain admissions or denials.

THE COURT: Okay. Thanks, Ms. Looby.

Mr. McNab, I'll give you the last word.

MR. McNAB: Thank you. Just a couple of comments.

First of all, while Ms. Looby said they carefully considered every request in terms of considering every objection, the truth is every single response incorporates every single general objection. So it doesn't strike me that there was sort of a matching that was actually going on.

Second, you asked about what this means for Judge Davis. And Plaintiffs' own letter brief correctly cites the case for the proposition that the purpose of Rule 36 is to

eliminate the necessity for the formal proof of relevant facts and narrowing the issues and conserving resources at trial, or in this case a hearing, right?

So two simple facts. Somebody clicked or they didn't click. Somebody received a letter or they didn't receive a letter.

THE COURT: But, Mr. McNab, let's go to the click to accept. You understand at least the argument that by phrasing the question for them to admit as clicking to accept, that you have imported a conjunction there, a -- unifying two ideas. One is the click and the other is the function accepting. So what they are quibbling about is the accept, and they deny.

MR. McNAB: But that's not what the rule says.

THE COURT: But you have these in a single set of quotation marks. It's not exactly like one of the more clearly disjunctive questions where you would say, you know, admit that you received the letter on such and such date and that the letter had as a consequence X, Y or Z. This is asking them, you know, pretty much a single question. Did you "click to accept?" And I'm afraid that part of the problem is you're kind of stuck with the answer because of phrasing of the question.

MR. McNAB: Well -- and I guess, you know, we have a different view on what the rule allows and requires in

that instance. If there are two separate factual assertions and one must be admitted and one must be denied, then that's what the rule allows.

But I think that Ms. Looby's presentation demonstrated an inherent bias against admitting and in favor of denying because she said, for example, with respect to the lack of memory, Well, there's no basis to admit. What she failed to say is with lack of memory there's also no basis upon which to deny. And the rule accommodates for that as well. When a witness fairly can't answer the question, they are allowed to say they can't and why they can't. But Plaintiffs didn't choose to go that route. They just chose to decide, Well, if I don't remember it, it never happened.

And then they talked about, Well, there's a lot of words in some of these requests because they identify a specific contract to which somebody was clicking to accept or otherwise, right? And so we had to be able to answer affirmatively each of these steps or else deny. Again, that's not what the rule says. If there's one tiny thing somewhere in the request that's deniable, that doesn't mean you get to deny the entire request. The rule says that you have to, you know, in good faith admit so much as true and deny that which is not true, and that's not the approach they have taken.

THE COURT: Let me ask you this, Mr. McNab. Ms. Looby makes a pretty compelling argument that, you know, this is one part of a four-part discovery pursuit. Requests for admissions, interrogatories, document requests, and the ability to depose every single one of these Plaintiffs. And she demonstrates that already when read together the Requests for Admission and the interrogatory responses give you a pretty good idea of what exactly their position is. Why is that not good enough?

MR. McNAB: We sort of agreed, not because we wanted to, per se, but we sort of agreed with Plaintiffs' counsel to take the responses to interrogatories off the table. So I'm at a bit of a disadvantage because I don't necessarily agree with the proposition that reading them in conjunction with or apart from the Requests for Admission clarifies anything. But I'm not going to go there because it's not in front of Your Honor. I'm trying to answer your question without going there.

THE COURT: Sure.

MR. McNAB: But I think that the underlying proposition doesn't necessarily hold.

THE COURT: Okay. Put that aside, because I've read some of these interrogatory responses myself and I see that you can quibble with their adequacy. But my bigger question is this. These are not your only crack at these 38

people. You've got interrogatories, you've got the document requests, you've got the Requests for Admission, and you've got the opportunity to depose them. That's an awful lot of chance to ask the same exact question a bunch of different ways. Why isn't that good enough to be able for you to understand the factual landscape?

MR. McNAB: Only for the very point that Your Honor asked Ms. Looby about before. We could save everyone, including Judge Davis, a lot of time. We will be arguing about the meaning of receiving a Confirmation of Service letter. What is the legal import? There's no question that that will be a legal question that the Judge will have to entertain or the legal implications of having clicked on a little box, whatever it says, accept, contract, whatever it says. We will no doubt be asking the Judge to rule on those legal questions.

Unfortunately it's appearing that we're going to also have to burden the Court with a bunch of fact finding on these evidentiary issues, whether or not somebody clicked and whether or not somebody received a letter and so on. If we were able to get admissions, if the answer really is I received the letter or I clicked, then that would take the factual evidentiary issues off Judge Davis's plate and let the parties focus on the legal issues that we all know are going to be there. That's the why.

THE COURT: Okay. Thank you.

Ms. Looby, anything else you want to add?

MS. LOOBY: No, I would -- just one quick point, Your Honor. In terms of, you know, the idea that we are not following the rules or that the case law does not allow us to answer as passionately as we did, I would just point out that we do have some case law including *Honeycutt versus First Federal Bank* that talks about that the onus is on the propounding party to properly structure their request.

And, you know, I think as Your Honor correctly noted, you know, these perhaps are not just the correct vehicle for a lot of the requests that Defendants are making and, you know, Plaintiffs have -- have the right to respond to the RFAs as they did and they did so properly.

THE COURT: Let me push back on this a little bit because Mr. McNab correctly cites the rule that says that if the truth is part of the question is true and part of the question isn't true, or part of the question that I can admit and part of the question I can't admit for whatever reason, then you're supposed to say that. So if we're in "click to accept" land and it is the position of any of the individual Plaintiffs that they may have clicked but did not accept, doesn't the rule require you to say that?

MS. LOOBY: Yes and no. So in that particular instance in how Defendants have it phrased, I would argue

that that falls under this *Honeycutt* case that I mentioned where it says that, you know, it's on the propounding party to put forth requests that are not objectionable, that do not require lengthy explanations before they can fairly be answered or require inferences.

In that respect, I think we read each request and we admitted or denied based on the request as written. And, like I said, to the extent -- it's not a situation where part of the request is true and part of the request is not true. It's responding to the request as written in a truthful manner. And I think when Defendants look at the interrogatory responses and when they talk to the Plaintiffs, I think it will be borne out that Plaintiffs fully complied with the rule and answered the requests as written.

THE COURT: Okay. All right. I'm prepared to give you guidance. This will be captured in a brief written order that will be issued as soon as possible.

First of all, again, I appreciate the parties bringing this to me through the informal discovery process. I think it's the most efficient way given the extreme time crunch under which we all labor.

I'm going to require that objections 4 and 5 be withdrawn by the Plaintiffs. I share Defendants' concern, particularly I think it was number 5, that you can't both

admit something and say that the admission has absolutely no legal consequence. That sort of subverts the entire paradigm.

I am not going to grant any other relief to the Defendants at this time on the allegations that they have raised. I think that Mr. McNab is spot on that if the Plaintiffs were willing to admit to certain of these things, like that they had received certain letters or accepted certain terms by clicking on certain boxes, it would narrow the questions that Judge Davis has to decide.

But the Plaintiffs have a right not to do that, not to accept, not to agree to things that they persist in claiming that aren't true. They understand, of course, the consequences of a false denial, and I'm not suggesting there is one here. I think that a lot of their frustration that the Defendants articulate is the frustration with the answers more than their frustration with the process.

I think it's probably all over the map in the practice of civil litigation counsel whether to attach general objections to Requests for Admission or not. I have informally surveyed many civil lawyers and gotten contradictory information about that. So I'm not going to find that across the board there is something so out of step with practice about these answers that they have to be rewritten.

I'm also going to note that a big part of my motivation for not requiring these to be re-filed is that these Requests for Admission do not stand alone and that the Defendants have the opportunity to get additional information through interrogatories, document requests, and the deposition of each and every one of these individual Plaintiffs where they can ask, you know, did you click the box? What did you think that meant? Are you denying that you clicked the box? How about the fact that our computer system shows that you clicked the box? And we'll get a much better answer than the lawyered-up answers of the requests for admissions.

So I'm not opining whether these are perfect answers or not, but they are the answers that the Plaintiff gave. It sounds like the Plaintiff gave a lot of thought to each of these answers in what they would be admitting or denying. And there's nothing that I read anywhere in the rules that requires them to admit something just because it makes things easier as long as they are answering them truthfully.

So at this point I won't be requiring the Plaintiffs to re-issue the answers except to the extent that they believe that the striking of objections 4 and 5 necessitates a change. And I'll leave that to you all to work out.

Let's pivot for a moment to the issues that are not yet before me. And I know that's completely hypocritical of me after telling you that they are not before me. I just want to get a sense of timing. Do you all think that we're going to need to talk again this week?

MR. LOBEL: Your Honor, this is Doug Lobel. Let me address that. I wrote Mr. Gudmundson immediately after receiving the Court's e-mail and requested a meet and confer tomorrow. He's proposed a 3 o'clock time. I don't know whether that will go forward or not, but I would say that almost certainly if we cannot resolve this promptly we will ask for the Court's assistance this week. The Court is well aware of the very compressed timeframe that we've got and all the work that we need to do, and we simply can't wait to get schedules. We can't wait to get verifications. And we certainly can't wait to get all these six pages of document deficiencies corrected over several weeks. We feel the urgency every day about completing this process.

And so that's a long way of saying yes, we hope to get the Court's assistance this week for sure if we can't work this out promptly.

THE COURT: Okay. Go ahead, sir.

MR. GUDMUNDSON: Sorry. This is Brian Gudmundson. I just want to address that and just make sure the Court is aware there are no issues of dispute. The issues of dispute

that Mr. Lobel -- and believe me, I sat in their shoes for the last three months trying to get things squared away and worrying about time and so I'm very sensitive to it. I don't mean to make light of it. But there is no issue of dispute, per se. What it is is they are unhappy with the rate in which things are coming in. And I'm not sure I agree with that based on the rates which we received it.

But I can assure you that I'm not aware of any -- I'm not aware of any issues that they are saying we should produce something where we say we should not, or we're in a fight about something that will require the Court's skills and the Judge to resolve. It's more, Well, where is this person's availability. And I think we've provided, like, all but three Plaintiffs' availability. And some people are just -- it's vacation time and they are gone or for some other reason that we have been very candid about.

So I don't want there to be any belief that there's a lot of intransigence going on, I don't think, on either side. I think there's a lot of concern on the defense side that they are going to have enough time and concern on the Plaintiffs' side that we're just working as hard as we can to get it. But if there's anything that comes before Your Honor, it's going to be that. And I imagine it will be sort of a date certain that defense asks you for.

THE COURT: Can I ask a clarifying question?

MR. GUDMUNDSON: Yes.

THE COURT: Is there some overlap between the issues that were first hinted at by Mr. McNab in his e-mail today and the reference in the footnote of the Defendants' brief seeking full and formal briefing on an issue relating to interrogatories? I'm sorry. Are those the same issue?

MR. GUDMUNDSON: No, not to my knowledge.

MR. McNAB: No, Your Honor, there were issues that we had with the interrogatory responses. As Your Honor knows, the Plaintiffs insisted on having formal briefing on those issues. We certainly don't have the time for any formal briefing. We elected to not proceed with that and we don't intend to bring that before the Court because of where we sit in the process right now.

THE COURT: Okay.

MR. McNAB: Although I -- if I can comment, I don't want to get into a big dispute here, but it depends how you define "dispute". We have documents we can't read. We have documents that have one page of a multi-page document. Those are hampering our ability to move forward. We don't have verifications.

We three and a half weeks ago got way out in front of this, Your Honor, and proposed a schedule, asked Mr. Gudmundson for the last three and a half weeks for

availability of the Plaintiffs. And while we know they have been in touch with them repeatedly because of the interrogatory answers and some certification, we only a day or two ago got availability, and we still don't have it for a number of the Plaintiffs.

So we obviously can't schedule depositions when we don't have that availability or the verifications or other things. So it may -- disputes is not the right word -- but we need the Court's intervention to force the Plaintiffs to provide this to allow us to continue and complete the process.

THE COURT: Okay.

MR. GUDMUNDSON: Okay, I'm afraid I have to say something for the record just to correct it. And I, too, don't want to go through all of this. But we've been in constant contact throughout these days and weeks and I've been very candid each time about exactly what we had in hand and what was still needed. And, you know, we talked and he had that by yesterday or by last Friday that I would produce all of what we had on the deposition schedule and that was by agreement of the parties, not because Plaintiffs are sandbagging.

And I think we've got 35 or 33 availabilities to them that should not impact scheduling at all. If there's three that are still outstanding, they should not impact at

all what's going on.

And everything's been very -- I just have to say, even though I'm annoyed a little bit after what I just heard, that we have been very communicative, both sides, with where we are and things. I have been very candid about certain issues. And we think that that's going to lead us to have no disputes for the Court, but we'll have to see.

THE COURT: Okay. I would love to be rendered obsolete. I'm prepared to be here if necessary. Let me tell you that I am, just in terms of availability, I could probably make something work on Thursday afternoon. Frankly, I could probably make something work late Thursday morning if necessary. If you guys are ready in time, I could probably do something late Wednesday, although that feels kind of tight right now.

And I do have time Friday morning, the earlier the better. I do not have availability Friday afternoon. So just keep in mind if it ends up that you aren't able to resolve these things and if we do need to talk Friday morning, Thursday late morning into the afternoon, ideally not Wednesday; but if so, we could probably find a time spot Wednesday afternoon. Does that all make sense?

MR. GUDMUNDSON: It does for the Plaintiff. Although I will say that we're working, as everybody knows, rather hard on three major filings with numerous supporting

papers, so I don't think that much of our team could be making it on Thursday. Friday morning may work. But again, I think that the only issues that could be resolved is when is this stuff coming and what are the consequences if it doesn't come.

THE COURT: Okay. And remind me of the briefing schedule. So you guys have your filing Thursday?

MR. GUDMUNDSON: Yes.

THE COURT: And then when is the Defendants' responsive briefing due?

MR. McNAB: October 23rd, Your Honor.

THE COURT: Okay. So -- go ahead.

MR. McNAB: I was just going to say, so that puts us in a position that we're certainly intending to probably have to take all 30, whatever it is, five, six or seven, there's some question about that now as well. But, you know, all of those depositions around the country are going to have to happen, you know, basically by the end of September.

THE COURT: Okay. So I'm going to leave you two, I know you have plenty to do besides just talk to me, but do let me know if I can be of service with this remaining, whether it's a disagreement or if it's a yet-to-be-reached compromise. That's how I'm going to view it. A yet-to-be-reached compromise. And get in touch with Judge

Davis's team right away about the request for additional words, because I know you're going to need them, at least the Plaintiffs are, with the filing right around the corner.

MR. GUDMUNDSON: Absolutely. I will be contacting Judge Davis's chambers as soon as we hang up here.

THE COURT: Okay. Thank you, everybody. Have a good day.

MR. GUDMUNDSON: Thank you.

MR. McNAB: Thank you, Your Honor.

MR. LOBEL: Thank you, Your Honor.

(Conference adjourned at 3:55 p.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is a correct transcript from the audio record of proceedings in the above-entitled matter, transcribed to the best of my skill and ability.

Certified by: s/Carla R. Bebault
Carla Bebault, RMR, CRR, FCRR