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2 SUPREME COURT OF THE STATE OF NEW YORK  
3 COUNTY OF NEW YORK: CIVIL TERM PART 48

4 - - - - - X

5 EARTHLINK, LLC,

6 Plaintiff,

7 - against -

INDEX NUMBER:  
654332/20

8

9 CHARTER COMMUNICATIONS OPERATING, LLC,

10

Defendant.

11

12 - - - - - X

13 VIA MICROSOFT TEAMS  
14 New York, New York  
15 September 29, 2022

16

17 BEFORE:

18 HONORABLE ANDREA MASLEY, Justice

19

20

21 APPEARANCES:

22

23 KING & SPALDING  
24 Attorney for the Plaintiff  
25 1185 Avenue of the Americas  
New York New York  
BY: DAMIEN MARSHALL, ESQ.,  
ALEXANDER NOBLE, ESQ.,  
KEN FOWLER, ESQ.,  
SHAILA RAHMAN, ESQ.,  
PRACHEE SAWANT, ESQ.,

26 APPEARANCES CONTINUED:

27

28

*Monica S. Horvath, Senior Court Reporter*

1

2

PATTERSON BELKNAP WEBB & TYLER  
Attorney for the Defendant  
1133 Avenue of the Americas  
New York, New York

3

4

BY: MOHAMMED FARIDI, ESQ.,  
GREGG BAKER, ESQ.  
SAUL SHAPIRO, ESQ.,

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2 THE COURT: Hi, good morning.

3 This is Judge Masley.

4 So, in the matter of Earthlink against Charter,  
5 at 11:01 on Teams.

6 Who is speaking for Earthlink?

7 MR. MARSHALL: Your Honor, this is Damien  
8 Marshall, from King & Spalding.

9 THE COURT: And, is anyone with you?

10 MR. MARSHALL: Yes.

11 So, I have Alexander Noble, in my office, with  
12 me, and, I'm joined by my colleagues, Ken Fowler,  
13 Prachee Sawant, and, Shaila Rahman.

14 THE COURT: Okay, thank you.

15 And, who is speaking for Charter?

16 MR. FARIDI: Good morning, Judge.

17 Muhammad Faridi, from Patterson Belknap, on  
18 behalf of Charter, and I'm joined by my colleagues, Saul  
19 Shapiro, and Gregg Baker, here, as well.

20 THE COURT: Okay, thanks.

21 So, this is motion 04, plaintiff's motion for  
22 spoliation sanctions.

23 And, we have an hour for argument, but, I have  
24 a lot of questions, a lot of questions, so, I'm going to  
25 tell you what my questions are, and, then, after that,

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2 if you want to fill in or summarize your arguments.

3 But, I just want to make sure that before I make this  
4 decision, I have answers to these questions. And, they  
5 are primarily, for Mr. Faridi.

6 How far back do the 104,000 transcripts go?

7 MR. FARIDI: Your Honor, they go back to  
8 November 1, 2019.

9 THE COURT: Okay.

10 And, how did you calculate the 16 million  
11 hours?

12 MR. FARIDI: So, I'm happy to take Your Honor  
13 through the math. I redid it this morning.

14 THE COURT: Well, I did it when I read the  
15 papers and it's not adding up for me.

16 MR. FARIDI: So, Charter, has about 30 million  
17 customers, and, Charter, gets about 140 million calls  
18 from these customers -- I'm sorry -- it gets about  
19 20 million calls on a monthly basis.

20 So, each call, is, approximately, 7 to 8  
21 minutes long. So, the way I think of it is, you know,  
22 if you do the math -- I can pull up the calculator  
23 here -- so, it's 20 million calls per month, and if each  
24 call is, let's say, 8 minutes long, that's 160 million  
25 minutes divided by 60, and that gets you to 2.6 million

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2 hours per month. And, then, if you take -- let's say,  
3 you have a thousand lawyers, who are doing ten hours --

4 THE COURT: Yeah.

5 I'm really just interested in the 16 million  
6 hours of phone calls, which that 16 million is over what  
7 period of time; hours or phone calls, on Page 1 of your  
8 memo?

9 MR. FARIDI: Let me just pull it up, Judge.

10 THE COURT: Or, I can tell you how my math  
11 worked out.

12 And, it worked out to 306,562 calls, and  
13 2.4 million hours per month, which is consistent with  
14 the affidavit you put in.

15 MR. FARIDI: Right.

16 So, it's 16 million hours of phone calls, so  
17 they want phone calls that go back to March 27, 2020,  
18 through October 31, 2020. So, that's a period of,  
19 approximately, March through -- so, that's four months  
20 prior to January 27, 2020 when we got the hold notice,  
21 and, then, three months thereafter, so, that's seven  
22 months. And, if we have seven months worth of calls --

23 THE COURT: I see.

24 Okay.

25 MR. FARIDI: -- at 20 million calls per month,

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2 right, that's how we end up --

3 THE COURT: No, you know, here's one of the  
4 things that I notice.

5 It seems that we are switching between hours  
6 and calls. And, Page 1 of your memo, 16 million hours,  
7 not calls.

8 MR. FARIDI: Right.

9 THE COURT: So, it's 2.4 million hours per  
10 month for seven months. That's how you got the 16  
11 million.

12 MR. FARIDI: Right.

13 THE COURT: Okay.

14 So, it's seven months.

15 MR. FARIDI: That's not the math I did this  
16 morning. I did some other math, not this one.

17 THE COURT: Okay.

18 Now, I understand that number. Okay.

19 And, then, this is the other number I don't  
20 understand, is the 20 million calls per month.

21 If you have 2 million hours -- 2.4 -- million  
22 hours per month, and you divide that by 8 minutes per  
23 call, you get 306,562 calls per month.

24 So, where is the 20 million?

25 MR. FARIDI: Well, the 20 million, is the

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2 number from our client.

3 They reported to us that they got 20 million  
4 calls per month; they have a total of about 30 million  
5 customers throughout the US.

6 THE COURT: Um hum.

7 MR. FARIDI: And some of the customers are  
8 repeat callers. They have some sort of a customer  
9 service issue. If there is more than one call,  
10 sometimes, multiple calls a day, multiple calls a week  
11 --

12 THE COURT: So, I'm going to interrupt you.

13 Here's how I did the math, I started with  
14 54,500 hours of calls -- I'm sorry -- hours per day of  
15 calls, which is two thirds of the calls that are pulled  
16 by this third-party that is reviewing the phone calls  
17 for training purposes -- and, now, by the way, I want to  
18 thank you so much -- they really are using those calls.  
19 When you call and they say, we are recording for  
20 training purposes, they really are, so -- thank you for  
21 confirming that for me because I never believed it  
22 before.

23 Anyway, so, where was I?

24 MR. FARIDI: That's 54,500 --

25 THE COURT: Yeah.

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2 Are those 54,500, from a particular site, or is  
3 that across all of Charter's phone centers?

4 MR. FARIDI: So, a few qualifications there.

5 One, is, they do it only with respect to two  
6 thirds of the calls that are coming in, they are done on  
7 a random basis.

8 THE COURT: Right.

9 MR. FARIDI: So, that's one.

10 Second, is, they also exclude out calls from  
11 enterprise customers, like, big hotels like Starwood, or  
12 Marriott, so, they apply certain exclusions.

13 After they apply certain exclusions, they  
14 basically report or transcribe calls from two thirds of  
15 the customers. And the 54,500 hours of reporting per  
16 day, that's basically the limit under Charter's contract  
17 with Nixidia, which is a third-party vendor that  
18 Charter, has hired. You can't exceed that. And that  
19 number represents, approximately, two thirds of the  
20 calls that are recorded on a random basis that are  
21 coming in per day, give or take. Sometimes, you may get  
22 more calls.

23 THE COURT: I understand that.

24 But, if you add one third back to that, you end  
25 up with 81,750 hours per day. And, what I'm trying to

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2 understand is, is that per call center or because  
3 there's a really big difference between 81,750 hours per  
4 day and the 20 million calls.

5 And, by the way, it was by doing this math,  
6 that I got the same number as your -- he's not an expert  
7 but -- the employee, or, Mr. Cosan, who does the math on  
8 behalf of Charter, right, and we get to the same number.  
9 He gets 2.3 and I get 2.4 million, hours, per month.

10 So, 20 million calls doesn't make sense.

11 MR. FARIDI: Judge, we will go back while we  
12 are arguing this. I will reconfirm this, and I'm happy  
13 to walk through the math.

14 THE COURT: You know, so -- well, you know, I  
15 like math, if you have been before me, you know, and it  
16 just jumped out to me.

17 So, now, that I have confirmed the 16 million,  
18 I understand where that is coming from. The 20 million,  
19 does not make sense to me. And, you know, it's just  
20 sort of my little way of testing what you are saying in  
21 your papers.

22 So, I would want to know where that number  
23 comes from, because, even if it doesn't include  
24 Starwood, and, other, you know, large organizations or,  
25 you know, like commercial, as opposed to retail calls,

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2 that's a huge number. And, you are asking me to base a  
3 decision on the fact that there are so many phone calls.

4 Anyway, moving on to my next question.

5 MR. FARIDI: But, Judge, just on that point.

6 I'm trying to do the math in my head now.

7 So, if you have about 81,000 hours per day,  
8 once you add a third to the 54,000, right, and, you end  
9 up with 81,000 hours --

10 THE COURT: Right.

11 Per day.

12 MR. FARIDI: -- per day, and, if I multiply that  
13 by 30 --

14 THE COURT: Yeah.

15 MR. FARIDI: -- I got 2.4 million.

16 THE COURT: Correct.

17 MR. FARIDI: And, if you multiply that, so, on  
18 a monthly basis, right, 2.4 million hours on a monthly  
19 basis, and if I multiply that by seven --

20 THE COURT: No.

21 You don't multiply, you divide it by 8 to come  
22 up with the number of calls.

23 Divide the hours -- total hours -- for the  
24 month by 8 minutes per call to figure out how many calls  
25 you have per month. And, the answer is 306,562 calls.

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2 MR. FARIDI: Okay.

3 THE COURT: That's why that 20 million, doesn't  
4 make sense.

5 Anyway, the rest of the numbers are reliable.  
6 That one is not. And, you can tell me about it later.

7 But, my next question, is about what happened  
8 to the tapes that the Nixidia -- what happened to the  
9 tapes that they got, right, because they are the ones  
10 who transcribe them.

11 MR. FARIDI: The tapes, get overwritten after  
12 transcription takes place.

13 So, I'm not sure 100 percent, the process that  
14 Nixidia, takes with the recording.

15 So, what happens, is, the calls come in and  
16 they are transcribed, you know, not instantaneously, or  
17 simultaneously, but, around the same time period that  
18 the calls are coming in and taking place, and, Nixidia,  
19 I believe -- I also confirmed with them -- they also do  
20 not have the tapes.

21 If we had the tapes, we would have been happy  
22 to go get the tapes from Nixidia, and provide them over  
23 to Earthlink. But, Nixidia, also does not have that  
24 information.

25 THE COURT: So, how is it though that two

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2 thirds of those calls are set aside so Nixidia, can  
3 listen to them, or, you know, are they saved on another  
4 server or something for a short period of time for them  
5 to listen and transcribe them?

6 MR. FARIDI: Let me just ask one of my  
7 colleagues in the room with me, Judge.

8 THE COURT: Okay.

9 MR. FARIDI: I want to make sure I get this  
10 right, because it is an important issue.

11 THE COURT: It is.

12 (Whereupon, there was a brief pause in the  
13 proceeding.)

14 (Whereupon, the proceeding, resumes.)

15 MR. FARIDI: So, one third of the calls, are  
16 routed to Nixidia. Not all of the calls are routed to  
17 Nixidia.

18 What needs to be transcribed by Nixidia -- or,  
19 rather, they are routed to Nixidia, and, Nixidia,  
20 transcribes them. And, then, after it transcribes them,  
21 it gets rid of the recordings.

22 They also have an override policy that is in  
23 place, which is either 100 percent assisted with the  
24 overwrite policy that Charter has in place. I think it  
25 would be a difference of a few days here, but, they

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2 don't retain those calls either.

3 THE COURT: Okay.

4 So, I understand that this is a lot of data to  
5 be stored somewhere, which is why you have this policy  
6 of getting rid of, or overwriting, and recording the new  
7 calls that come in on this system.

8 What I don't understand, is, why, when you  
9 figure out that your client has this policy of  
10 overwriting calls every 120 days and this is a 2020  
11 case, and you get served with complaints on May 13,  
12 2020, and as soon as you figure out what's going on with  
13 calls, you don't go to the plaintiff, and, say, we  
14 cannot save -- you know, we cannot save all this data.  
15 We do know though, we do have this procedure, where we  
16 can, you know, offload two thirds of the calls, and, so,  
17 you know, you are welcome to setup some system, so that  
18 we can -- we will give you the calls, right, but it's up  
19 to you to setup the system, to save them, and, to, you  
20 know, do what you will with them, obviously, pursuant to  
21 a Confidentiality Agreement, you know, and, you can  
22 listen to the 2 million -- I'm sorry; whatever it is --  
23 2.4 million hours of calls per month for those seven  
24 months. You know, go for it.

25 What I don't understand, is, why that message

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2 was never -- or, option -- was never given to the  
3 plaintiff.

4 I understand that you don't want to be the one  
5 saving seven months of calls.

6 At the moment that you figure out that you have  
7 these call centers, that you are saving -- that you save  
8 the calls for 120 days, who decided that this is just  
9 way too much, we are just not going to do it?

10 MR. FARIDI: Judge, you know, could things have  
11 been done differently here, absolutely, yes.

12 Is there a lesson for us and our client to  
13 learn here, yes. You know, but, did we do that, no.

14 In light of that, are sanctions, warranted;  
15 absolutely not.

16 And, we can go through the various reasons,  
17 Judge, why this is not the type of case for where  
18 sanctions are warranted.

19 They got the transcripts from two thirds of the  
20 calls. If they had the audios, it would have taken them  
21 years, years, to review the audio.

22 THE COURT: Look, the transcripts are awful. I  
23 have seen two. They are awful.

24 MR. FARIDI: The two, Judge, that you have  
25 seen, are the ones that they have hand selected from

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2 104,000 transcripts.

3 They have a team of lawyers, five lawyers,  
4 headed by Mr. Nobel, who is here today, that is sifting  
5 through these transcripts day and night, and they  
6 selected a handful of transcripts that were awful.

7 If you were to take a look at the other  
8 transcripts, I don't think that you would come to the  
9 same conclusion.

10 And, whose to say, that the audios, themselves,  
11 are not awful?

12 I mean, the audios, if we had preserved them,  
13 they likely would have been as awful as the tapes.

14 THE COURT: I don't know though, I don't have  
15 the chance.

16 MR. FARIDI: But, Judge, for instance,  
17 Earthlink, itself, has produced some audios to us. We  
18 have heard those audios. There is issues with the  
19 audios, also, because people are talking over each  
20 other.

21 THE COURT: It's terrible, isn't it, when  
22 people talk over each other?

23 Sorry.

24 MR. FARIDI: I try not to do that, Judge.

25 THE COURT: Not just you.

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2 Believe me, I do it.

3 I try to be respectful though.

4 MR. FARIDI: The other thing, which is so  
5 important here -- and this is a point for hypocrisy,  
6 Judge, which is so potent here -- they are claiming that  
7 we should have preserved all of these audios. We've  
8 asked them, hey, did you preserve the same audios that  
9 you are asking us that we -- that you are telling us  
10 that we should have preserved, because these customers,  
11 they were Earthlink customers, they would call Charter's  
12 service, when it came to internet related issues, but,  
13 for other issues, they called Earthlink's customer  
14 service.

15 Earthlink, sent us a Preservation Notice, on  
16 July 27, 2020. They filed a lawsuit a couple months  
17 later, in, I believe, September 2020.

18 So, when they sent us the Preservation Notice,  
19 you would think that they too would put in to place some  
20 sort of a policy to suspend the order, delete, or,  
21 override policy with respect to their audios.

22 We have been asking them month after month  
23 since this issue came up, and we said, where are your  
24 audios, are you producing all of your audios over to us?

25 They have given us a handful of audios, but

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2 they are refusing to tell us whether they themselves had  
3 an override policy in place.

4 We know why they are refusing to tell us that,  
5 because they likely did not have such a suspension  
6 policy in place. So, it is the kettle, calling the pot,  
7 black.

8 THE COURT: I have to tell you, as arguments  
9 go, my least favorite is, well, what about them. You  
10 know, so, that's not really the best argument.

11 MR. FARIDI: And, I won't dwell on it, Judge,  
12 but, it is about reasonableness, right, what is  
13 reasonable.

14 THE COURT: Look, obviously, I get that this is  
15 a lot of data space, I understand that, but, you can't  
16 just decide that you are going to -- that it is too  
17 much, and, therefore, we are not going to do anything,  
18 and, we are just going to keep going, doing what we are  
19 doing. And, that's the problem that I have with this.

20 Now, with regard to the hypocrisy of it, I  
21 don't like that, you know, well, we are just doing what  
22 they did.

23 But, what that argument does tell me, is that,  
24 if they are arguing the same thing, they have this  
25 override, they understand how much data space it takes

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2 to save, you know, however many hours we were talking  
3 about, 2 million hours, 2.4 million hours per month,  
4 they understood that when they served. Plaintiff, would  
5 have understood that, because they have a call center  
6 too. And, so, they would have known as well the issue  
7 of storing, or, you know, you, storing seven months  
8 worth of 2.4 million hours per month.

9 So, that's definitely a factor that I take in  
10 to consideration, not really in the way that you are  
11 suggesting, but that, what did they know when they made  
12 their request to you in July.

13 And, just for the record, that earlier call  
14 from the executive, saying, hey, you know, we have a few  
15 calls here that are disturbing, or, we have been getting  
16 customer calls and e-mails that are very concerning.  
17 That's Document 140.

18 By the way, there are a handful of NYSCEF  
19 Numbers sprinkled, in Charter's papers -- and, sorry to  
20 focus on Charter, but -- you have been before me before,  
21 there's no rhyme or reason to when there is a NYSCEF  
22 Number and when there isn't, and I just would ask you  
23 again to talk to all of your colleagues at Patterson  
24 Belknap, and, remind them.

25 I'm starting to reject papers, if they are not

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2 using -- I'm rejecting motions and directing people to  
3 file them again, if they don't use them.

4 That didn't happen in this case, because you  
5 kind of sprinkled them in, so, there were a few, but,  
6 not the ones I needed. So, I have to like dig back and  
7 figure out what it is.

8 You don't make it easy for me, let me just say.

9 MR. FARIDI: We apologize about that, Judge.

10 THE COURT: Anyway, I think that's really the  
11 main issue.

12 MR. FARIDI: Should I respond to those issues,  
13 Judge?

14 THE COURT: Yes, please.

15 MR. FARIDI: I mean, the first thing, is, Your  
16 Honor, is the "decision" -- and I put decision in  
17 quotation marks here -- to not suspend the oral deletion  
18 override policy. It wasn't intentional, and there's no  
19 --

20 THE COURT: It was?

21 MR. FARIDI: It was not intentional, okay, and,  
22 I hear you, Judge, but we have a sophisticated client,  
23 with a big Litigation Department inhouse, and, you know,  
24 in retrospect, what we should have done was to go back  
25 and take a look at all of the override, ordered to be

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2 policies in place. They did do that for e-mails, and  
3 other issues, but, this audio thing, is one thing that  
4 just slipped through the cracks. It wasn't something  
5 that was intentionally done.

6 There is no scintilla of evidence in this case,  
7 and they haven't taken any depositions on this in this  
8 case, that this was done in an intentional matter. So,  
9 that's one.

10 The second thing, is, you are right to point  
11 out, the fact that Earthlink, was aware of, or they  
12 claimed to be aware of this issue leading up to the time  
13 when they filed the lawsuit, that Charter customer  
14 service representatives, may have been, according to  
15 them, smearing Earthlink, during the wind down of the  
16 parties' relationship. Earthlink, knew the identity of  
17 those customers, right. They said, look, there are  
18 these 13 people or so who reached out to us, who  
19 indicated to us, that you guys have been smearing us,  
20 but, in that Preservation Notice, that they sent us in  
21 July of 2020, or any time thereafter, did they tell us  
22 the identity of those people, no.

23 So, I just want to point that out. You can  
24 take it for what it's worth, okay. It is a two way  
25 street here. And, we haven't seen the type of

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2 cooperation that one expects from the counter-party, if  
3 they want us to preserve -- if they want us to create a  
4 new data storage room to maintain this information.

5 The third thing -- and I want to go back and I  
6 don't want to belabor this point -- I want to go back to  
7 the quality of the transcripts.

8 If you look at Mr. Nobel's Affidavit, he says,  
9 in the affidavit, that they have reviewed -- his team of  
10 lawyers; all seasoned good lawyers, they have gotten 500  
11 transcripts that we have given them -- and, he says in  
12 the affidavit, that actually they have found information  
13 from those affidavits that actually supports their  
14 claim. I think they identified 13 or so transcripts  
15 that they say support their claim.

16 Now, we disagree as to whether or not those  
17 13 transcripts that support their claim, but they  
18 reviewed 500, and they have identified 13, that they  
19 contend support their claim against Charter here. That  
20 underscores the futility of the transcripts.

21 I hear you, Judge, that these transcripts, not  
22 all of them, are imperfect, that they are as imperfect  
23 in my view as sometimes audio recordings may be, but  
24 these transcripts are sufficient. Their contention is  
25 Charter, had a systemic policy in place to smear

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2 Earthlink.

3 Okay, they have got transcripts, 104,000  
4 transcripts, from almost two thirds of the calls that  
5 were coming in.

6 Going back to November 2019, right, the audio  
7 recordings would only be preserved back to March of  
8 2019, under the Preservation Notice that they sent us.  
9 We got the Preservation Notice, on July 27, 2020, we had  
10 a 120-day override policy in place. If we suspended the  
11 override policy on July 27, 2020, the day we got it,  
12 whether or not that's reasonable or not, that's for a  
13 different day, that would preserve the recordings back  
14 to March 27, 2020. We have given the transcripts going  
15 back to November of 2019. Sixty-six percent of the  
16 transcripts that come in after a few exclusions. Their  
17 position is, Charter, had a systemic policy in place.

18 Well, go through the 104,000 transcripts that  
19 we have given you. If you can find something beyond  
20 smear remarks by Charter's representatives, you would  
21 have a case here, but, they can't. They have looked at  
22 500, and, have identified 13. Go through the others.

23 Another thing I will mention, Judge -- and, I  
24 think this is probably the most important point -- I  
25 hope you get that out of our brief, notwithstanding, the

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2 failure to cite NYSCEF, the audio recordings, they are  
3 not searchable, right, so, if we -- let's say we stored  
4 these recordings, and, we would then have to -- you  
5 know, your staff dealt with this issue earlier, the  
6 Cable Act, redaction issue, right -- before we can turn  
7 anything over to Earthlink, we have to review it to make  
8 sure that we are not turning over any PII, personally,  
9 identifiable information, that we can't turnover under  
10 the Cable Act.

11 What we would have had to do was to review  
12 those audio recordings and apply white noise to the  
13 segments where the customer is revealing PII, and, then,  
14 turn them over to Earthlink. That would have taken us  
15 forever. And, then, they would have had to review them,  
16 listen to those recordings, and figure out what's  
17 relevant or what's not, right.

18 Now, they say we could have applied some sort  
19 of a phonetic search to these recordings. They found  
20 some throwaway lines from a marketing document that  
21 Nixidia, had on its website, where they are talking  
22 about the utility of phonetic searching. But, phonetic  
23 searching, is imperfect, it's not as good as text  
24 searching, and, you would have to test -- you would have  
25 to search in the same tone and tenor, that's what you

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2 would have to do in order to basically get reliable  
3 results.

4 If any searching is done, we know it's done and  
5 there is a lot of innovation, that is taking place in  
6 this industry right now, but, it's imperfect. So, in  
7 fact, they are lucky that they have the transcripts.

8 One other thing, Judge, if we have stored the  
9 audios, and we had not stored the transcripts, we would  
10 have had a similar application from Earthlink, arguing,  
11 that, oh, these audios, are useless because we can't  
12 hear everything. It's going to take us years to hear  
13 it. We need something that's text searchable.

14 So, you know, this is -- yes, did we learn our  
15 lesson here, yes. Did our client learn their lesson  
16 here, yes.

17 Is this an opportunistic motion that is  
18 designed to avoid having to prove up their case,  
19 absolutely, yes. That's what this is.

20 And, look, Judge, take a look at the cases that  
21 they cite in their papers, in the sanctions cases, where  
22 parties have been sanctioned, it's a case from  
23 Justice Freed, the Paul Hastings case, I think, it is  
24 1914 Broadway versus Paul Hastings case. This is a  
25 First Department case, the Room HE case, that everyone

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2 knows about. There is a FaceBook case from Central  
3 District of California. And, if you compare the conduct  
4 at issue in those cases to what we have here, it's a  
5 difference of day and night. It's a difference of day  
6 and night.

7 And, Your Honor, sanctions that turn upon the  
8 fundamental notion of fairness, you have a tremendous  
9 amount of discretion when it comes to dealing with  
10 issues like this, the Trial Court has a tremendous  
11 amount of discretion.

12 This is a case where --

13 THE COURT: Right.

14 I'm going to interrupt you for one second,  
15 because the point, in my view, from my seat, is that  
16 parties should be talking to each other from day one,  
17 and not -- they should be talking to each other from day  
18 one, about these issues. And, any decision I write on  
19 this matter, is going to be making that point. You  
20 can't just decide, I'm going to continue my policy of  
21 overriding every 120 days, because storing it is too  
22 much. I think you have to go to the other side, and,  
23 say, look, do you want to setup a storage facility so  
24 you can store these 120 days, like, here it is, we have  
25 it. I understand there are issues of redacting and

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2 white noise, and, all of that, you can deal with that,  
3 but, the idea of giving them the opportunity to say,  
4 yup, we know how hard it is, we have the same problem,  
5 like, let's put our heads together and figure out. You  
6 know, you are already saving two thirds of the calls for  
7 your third-party training purposes, like, we know how to  
8 do that, you know, can we come up with something  
9 similar. And, I'm stuck on the same thing.

10 I told you from the start, that's my problem.

11 Having said that, I'm going to cut off  
12 Mr. Faridi.

13 Mr. Marshall, you have been so patient -- I'm  
14 sorry -- so, what do you have to say?

15 MR. MARSHALL: Your Honor, thank you, very  
16 much.

17 At the outset, I will just say, this is only  
18 the second time in my career that I have moved for  
19 sanctions for spoliation. And, we didn't do so lightly  
20 here.

21 We felt that the facts here compelled us to do  
22 this to protect our client's interests.

23 This was the unilateral, intentional  
24 destruction, of evidence in the case after the  
25 commencement of the litigation.

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2 According to Charter's papers, the decision was  
3 made in August 2020 to not preserve the call recordings,  
4 because it would have required additional storage  
5 facilities. And that fact was not disclosed to us until  
6 nearly two years later in 2022. This is text book  
7 spoliation, and Charter, should be sanctioned for the  
8 prejudice caused to Earthlink.

9 I'm not going to go --

10 THE COURT: What if Mr. Faridi, is correct,  
11 and, it wasn't -- it was not intentional, it was --

12 MR. MARSHALL: An oversight?

13 THE COURT: Yeah, an oversight. Let's call it  
14 that.

15 MR. MARSHALL: So, first, that would be  
16 incorrect, or would be different than what they have  
17 said in their brief at Page 5, where it says -- the  
18 first full paragraph of Page 5:

19 "Because of the high volume of calls, and the  
20 size of those recordings, Charter's standard  
21 procedure is to override audio recordings after a  
22 period of 120 days.

23 The litigation hold did not affect this  
24 override. This is so because to store millions of  
25 additional recordings, Charter, would have

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2 needed to build an entirely new storage system."

3 THE COURT: Right.

4 MR. MARSHALL: It doesn't say that it was  
5 because of oversight or negligence.

6 It says that the reason they did it was because  
7 they would need to build an entirely new service.

8 Your Honor, that's not unique. You know, in my  
9 practice, I represent plenty of very large companies,  
10 and there is an entire industry of third-party storage,  
11 right. That's what you do, is, you export -- just like  
12 they exported the calls to Nixidia -- you can export the  
13 calls to a third-party storage facility.

14 So, I don't want to sort of belabor all these  
15 points. I think -- you know, I think, Your Honor, you  
16 know, they make an argument that the burden of  
17 preservation excuses the unilateral destruction. And,  
18 in making that argument, they relied on three cases. I  
19 think those cases are fully distinguishable. And, if  
20 you just read the cases, it makes clear that the burden  
21 doesn't absolve them of their necessary requirements.

22 So, the Com Cold case, they draw a distinction  
23 between types of things that need to be preserved, like  
24 e-mails, and types of things that didn't need to be  
25 preserved, like these wave points, that the case spoke

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2 about.

3 And, what they say is:

4 "To be sure, as part of the litigation hold, a  
5 company may be required to cease deleting e-mails  
6 and so disrupt its normal document destruction  
7 protocols, but, e-mails, at least, normally, have a  
8 semi permanent existence. So, do calls. They  
9 are transmitted to others. So, are the calls.  
10 Stored in files. So, are the calls. And, they are  
11 recoverable as active data until deleted either  
12 deliberately or as a consequence of automatic  
13 purging. Just like the calls."

14 They draw a distinction between things like  
15 that, like the calls, and the data at issue in that  
16 case. And the data at issue in that case is by  
17 contrast, the data at issue here is ephemeral. They  
18 exist only until the tuning engineer makes the next  
19 adjustment, and, then, the document changes.

20 No business purpose ever dictated, that they do  
21 the same even briefly. That is simply not the case  
22 here, Your Honor.

23 The next case that they rely upon, is the Louis  
24 Vuitton case. And that case involved the preservation  
25 of chat room transcripts.

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2 And, in that case, the reason that the court  
3 held that there was no duty to preserve was because the  
4 chat room was not open until August 2004, after the  
5 sales of the allegedly infringing back. And, it wasn't  
6 until February 2006, that the defendant installed  
7 software that saved these communications for as long as  
8 two weeks. And, by that time, it was highly unlikely  
9 that any comments by members of the public would have  
10 been pertinent to the lawsuit.

11 So, again, that case is wholly distinguishable,  
12 both upon the fact that the calls here were actually  
13 preserved, and existed, unlike the chat rooms.

14 And, the final case that they rely heavily on,  
15 is John Wiley. And, in John Wiley, Your Honor, there is  
16 two issues that the court holds there is no preservation  
17 requirement.

18 First, the defendant wasn't on notice of the  
19 likelihood of litigation. So, if you look at that case,  
20 -- what's the page number here, Page 7, it says:

21 "Given the circumstances that existed at the  
22 time of the destruction of the books, we cannot  
23 find that litigation over counterfeit books  
24 defendant found in its possession was reasonably  
25 foreseeable."

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2 That's not the case here.

3 Nobody even contests, that they destroyed  
4 documents after they had our complaint. And, more than  
5 after they had our complaint, it was after they had our  
6 document request requesting these calls.

7 Additionally, the other basis upon which the  
8 court held that the preservation didn't apply, is that  
9 it said:

10 "The lack of obligation to preserve is even  
11 more obvious, given the character of the evidence  
12 that plaintiff asserts should have been preserved.  
13 The counterfeit book, as opposed to, for example, a  
14 recording showing the sale of a counterfeit book,  
15 provides little evidence of a actual copyright  
16 violation by the possessor of the book."

17 Here, Your Honor, the contents of the calls, is  
18 the central issue in this case about whether or not the  
19 calls were used to poach.

20 So, finally, I think it is very telling, that  
21 at Page 9 of this case, that Charter relies on heavily,  
22 the court indicates that after the filing of the  
23 litigation and they were on notice there was likely the  
24 requirement to preserve.

25 So, at Page 9, it says:

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2 "The filing of this lawsuit on February 4,  
3 2013, certainly gave notice to the defendants that  
4 they had to preserve any evidence relevant to the  
5 place of this lawsuit.

6 However, plaintiffs did not identify any act of  
7 spoliation of evidence relevant to the claims in  
8 this lawsuit that occurred after February 4, 2013."

9 Here, we know the calls were deleted on an  
10 ongoing basis even after the filing of the complaint,  
11 and the receipt of the document request.

12 Your Honor, so, I think the thing is -- and,  
13 you hit upon it -- the law provides a mechanism here.  
14 The law provides for moving for a Protective Order.

15 And the case that we cite, the Pippins case, is  
16 sort of directly on point on that. That whole case is  
17 KPMG is saying, we don't want to preserve every hard  
18 drive of every audit associate at KPMG, and we would  
19 like to move for a Protective Order to allow for the  
20 destruction of those.

21 And, the court says, you know, why don't the  
22 two of you talk and you figure out -- this is relevant  
23 evidence, it is important -- why don't the two of you  
24 talk, figure out a sampling protocol, figure out  
25 something, but, until you do that, you can't destroy it.

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2 And, what the court says -- and, it's actually,  
3 I think, it is directly on point here, is -- what the  
4 court says -- let me find it here -- so, this is an  
5 appeal from a magistrate judge opinion, as Judge Cox,  
6 appropriately cautioned:

7 "Proportionality -- which is what Charter, is  
8 arguing here; it is just not proportional to  
9 save it -- may prove too amorphous to provide much  
10 comfort to a party deciding what files it may  
11 delete or backup tapes it may recycle before the  
12 party files for a motion for a Protective Order,  
13 seeking to have a court define its preservation  
14 obligations.

15 Accordingly, until a more precise definition is  
16 created by rule, prudence favors retaining all  
17 relevant materials or swiftly moving for a  
18 Protective Order."

19 And, Your Honor, that's exactly what should  
20 have occurred here. Instead, they engaged in self help,  
21 decided that they were going to destroy the documents,  
22 didn't disclose that until two years later, and, we are  
23 prejudiced by that.

24 As you have noted, the transcripts are  
25 terrible. That's why we provided --

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2 THE COURT: Hold on.

3 Sorry to interrupt you on that one.

4 I think, Mr. Faridi, mentioned 14 of the  
5 transcripts, where your lawyers found some evidence.

6 I want to see those 14 transcripts.

7 MR. MARSHALL: Okay, Your Honor.

8 And, what it is, Your Honor, just so it is  
9 clear, it's very much like what we included in our  
10 brief, where there is an excerpt that says Charter, is  
11 out of business, or, Earthlink, is out of business,  
12 Earthlink, doesn't exist, and, everything around it, you  
13 can't tell what they are saying.

14 THE COURT: That's why I want to see.

15 MR. MARSHALL: Okay.

16 And, Your Honor, that's what those --

17 THE COURT: I also have a question for you --  
18 sorry, I don't have as many questions for you, as I did  
19 for Mr. Faridi, but -- why is it that you didn't  
20 identify the 13 -- I think it is -- 13 callers, that you  
21 knew about when you notified Charter?

22 MR. MARSHALL: So, the case is much bigger than  
23 the 13, Your Honor, and, so, from our perspective, the  
24 identity of the 13, we already have evidence as to those  
25 13. It is the other people that switched, that we don't

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2 have evidence as to.

3 So, if someone were to call Earthlink, that was  
4 happenstance, that wasn't a -- they wouldn't be calling  
5 Earthlink, in the regular course for service. Not  
6 everyone had a reason to call Earthlink. And, so, we  
7 don't have like full visibility into all of that. And,  
8 for our customers, that had no other relationship with  
9 Earthlink, other than the Charter brand --

10 THE COURT: Well, but, hold on.

11 So, you get calls to Earthlink, from these 13  
12 people saying, hey, Charter, is telling me, you know,  
13 they are smearing you. So, you have tapes of those  
14 calls that were made to Earthlink, that you can now  
15 produce to Charter?

16 MR. MARSHALL: I believe, we did produce those  
17 calls.

18 THE COURT: Okay, good.

19 But, those 13 people, initially, called  
20 Charter, and, that's when they were told, you know, some  
21 negative statements were made, right. So, I understand  
22 that you have the statements of the 13 calls to  
23 Earthlink, but, wouldn't you want the calls with  
24 Charter, that support what they say, because, otherwise,  
25 it turns into a credibility issue, but, if you have the

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2 tapes, then you have the person testifying, and, you  
3 have the tapes.

4 MR. MARSHALL: So, Your Honor, we would  
5 certainly want that.

6 However, the calls that we -- the 13 people,  
7 right, so, those go back to 2019, the calls would have  
8 been deleted.

9 THE COURT: Right.

10 MR. FARIDI: But, they didn't know that.

11 That's the key issue. They had no idea that  
12 the calls from 2019 were being deleted.

13 The question that you asked, the most important  
14 question, and it goes to the point, Judge, that you were  
15 making about they were making about --

16 MR. MARSHALL: Please, stop interrupting my  
17 argument.

18 THE COURT: You know, it bothers me too, but,  
19 nonetheless, stop, Mr. Faridi, and, you will have time,  
20 okay?

21 MR. MARSHALL: But, Your Honor, the mere fact  
22 that we were asking for those identifiers, when they  
23 knew they didn't have phone calls, that was, to me,  
24 quite -- I don't want to cast aspersions -- that was  
25 shocking to me.

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2 And, so, Your Honor, I think that from my  
3 perspective, sort of all that is left is to talk about  
4 the appropriateness of the sanctions.

5 THE COURT: Um hum.

6 MR. MARSHALL: We have met the elements under  
7 the case law that sanctions are warranted, that the  
8 evidence was in their control, they had to duty to  
9 preserve it, and they did so intentionally, or, at  
10 least, with gross negligence and that the evidence was  
11 relevant.

12 I will turn back to the John Wiley case, that  
13 they cite. And, what the John Wiley case says about the  
14 appropriateness of sanctions is that:

15 "Any sanction imposed by the court should be  
16 designed to:

17 One, deter parties from engaging in  
18 spoliation.

19 Two, place the risk of an erroneous judgment on  
20 the party that wrongfully created that risk.

21 And,

22 Three, restore the prejudiced party to the same  
23 position they would have been in absent the  
24 wrongful destruction of evidence by the opposing  
25 party."

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2 And, Your Honor, here, I think that we haven't  
3 asked for striking the pleadings. I think, we have  
4 asked for an adverse inference as to the contents of the  
5 recordings.

6 I, frankly, think, if the transcripts had been  
7 better, there might have been a different issue with  
8 regard to the prejudice, but, the transcripts, are  
9 largely indecipherable, and, we are where we are.

10 We also think that because of the issues  
11 regarding the calls, and we don't sort of know the  
12 numerator or denominator, there should be a preclusion  
13 as to arguments regarding the numerosity.

14 And, the last point, Your Honor, is, I think  
15 that we have really -- you know, as I said at the  
16 beginning, this was a motion that we didn't bring  
17 lightly; we spent a lot of time on it. I was very  
18 careful in it. I wanted to make sure a lot was  
19 accurate. We spent a lot of time in it. We spent a lot  
20 of time negotiating with Charter over the production of  
21 the documents.

22 THE COURT: I'm just going to cut you off, just  
23 because, it is 11:51, and I have another case on at  
24 twelve.

25 So, Mr. Faridi, did you want to say anything

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2 else, other than your little interruption?

3 MR. FARIDI: I'm sorry about that, Judge.

4 I thought, Mr. Marshall, was done, but, I  
5 apologize.

6 THE COURT: Okay.

7 MR. FARIDI: So, you know, Mr. Marshall, kept  
8 on saying, that this was intentional, we engaged in self  
9 help, we destroyed the documents. There's no proof  
10 whatsoever to support that assertion.

11 At best, what we have here, is negligence,  
12 clear negligence. And that if you look at the cases,  
13 Judge, that's not good enough for sanctions.

14 He quoted from the Pippins versus KPMG case. I  
15 implore Your Honor to read that case, because, in that  
16 case, the judge -- the court -- engaged in  
17 proportionately analysis, and weighed the preservation  
18 obligations against what could have been preserved and  
19 what wasn't preserved, and that case cuts in our favor  
20 solidly.

21 We implore, Your Honor, to also take a look at  
22 the John Wiley case.

23 That case is fully applicable here, because  
24 what you had there was an allegation made by the  
25 plaintiff, that the defendant was engaged in selling of

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2 books that had been pirated, or there is a similar  
3 allegation, and the allegation was that you should have  
4 preserved all of these books, and, the court said, no,  
5 they didn't have to preserve all of these books.

6 Your Honor, you asked the question about, hey,  
7 why is it that you didn't identify those 13 customers  
8 over to Charter, because, I think that is what is  
9 troubling, Your Honor, is the lack of communication  
10 between the parties during the time period when this  
11 preservation demand was sent over.

12 Well, they didn't do it. Mr. Marshall's  
13 response today, is, well, we already had proof from  
14 those customers from the phone calls that they had put  
15 in to Earthlink, but, they didn't know what those  
16 customers had been told by Charter. That's better  
17 proof.

18 They didn't tell us anything about those 13  
19 customers, and it took us a while for us to actually get  
20 that out of them.

21 But, the other thing to keep in mind, Judge, is  
22 the sanctions they are seeking here, it is not  
23 proportionate, it is completely disproportionate. It is  
24 effectively the death penalty for Charter in litigation.  
25 It is not going to some peripheral issue in the case, it

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2 is going to the most central, the ultimate issue in the  
3 case. And, that's why all the other evidence points to  
4 the contrary.

5 There's an overwhelming amount of evidence in  
6 this case indicating that Charter, did not have such a  
7 smear campaign policy in place -- in existence, right.

8 We produced to them, e-mails, indicating that  
9 it was Charter's policy not to smear Earthlink, and,  
10 that any comments that were made by the customer service  
11 representatives were smear remarks. And, the sanctions  
12 that they are seeking is designed to negate all of that  
13 other proof, overwhelming proof, that points to the  
14 contrary.

15 And, then, more fundamentally, they are not  
16 left with nothing, Judge. They are left with  
17 transcripts. And, in all the other cases, the e-mails,  
18 were destroyed, the chat rooms were destroyed, whatever  
19 data existed, was destroyed, and, there was no  
20 substitute.

21 Here, you have got a substitute, which is  
22 better than the original. And, Your Honor, you should  
23 see those 13 transcripts. I actually have them here, we  
24 reviewed them.

25 THE COURT: I'm asking for them.

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2 MR. FARIDI: They are here, and we will provide  
3 them to you with a highlight, okay.

4 Those transcripts are clear as day as to the  
5 statements that were made by Charter's customer service  
6 representatives over to the customers, and what the  
7 customers were saying back over to Charter.

8 So, they are not left with nothing. They are  
9 left with the transcripts. And, the transcripts are  
10 better evidence than what the recordings were, because  
11 the recordings would have been as incomprehensible, as  
12 the transcripts, to the extent that the transcript is  
13 found to be problematic, but, to review the recordings,  
14 it would have taken them months, years, decades. It  
15 would have taken us that --

16 THE COURT: But the problem is that that is  
17 their decision to make.

18 If they are going to spend the money, you,  
19 frankly, robbed them of the opportunity to make that  
20 decision.

21 Sorry, I have one more question for  
22 Mr. Marshall, and, not a lot of time.

23 Mr. Marshall, you mentioned the services that  
24 are available, litigation support services that will --

25 MR. MARSHALL: Store data.

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2 THE COURT: -- store the 120 whatever.

3 MR. MARSHALL: Yes.

4 THE COURT: So, this case is a 2020 case, were  
5 those services available in 2020?

6 MR. MARSHALL: Yes.

7 THE COURT: And, how do I know that?

8 MR. MARSHALL: We can provide -- I mean,  
9 Amazon, the Cloud, there's Microsoft Cloud Storage,  
10 there are multiple litigation support firms that have  
11 been around since the 1990's when I was an associate in  
12 dealing with terabytes of data.

13 THE COURT: Okay, well, I was around in the  
14 1990's, and I don't think that's true. At least, on the  
15 big document cases that I was working on.

16 So, you can put something in about that. It  
17 doesn't go back that far though, but, I don't really  
18 care, because the only thing I care about is 2020.

19 MR. MARSHALL: Okay.

20 MR. FARIDI: Judge, may I just ask one quick  
21 thing?

22 THE COURT: Sure.

23 MR. FARIDI: Just one last thing on this. I  
24 know you have to go.

25 Ultimately, I think what this is going to turn

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2 on for you, Justice Masley, is, whether or not the  
3 failure by Charter to reach out to Earthlink, when it  
4 got the Preservation Notice, whether that failure is  
5 sufficient to warrant sanctions here.

6 THE COURT: Right.

7 MR. FARIDI: And, if this was a case where  
8 there were no transcripts, if this is a case where  
9 Earthlink, had perfectly clean hands, perhaps, those  
10 sanctions would be warranted.

11 But, here, you have got Earthlink, which also  
12 refused to engage with Charter, on the issue.  
13 Earthlink, which also did not preserve, as far as we can  
14 tell, its recordings. It is a case where they are left  
15 with transcripts, which I know Your Honor wants to take  
16 a look at the transcripts, in this circumstance, because  
17 we have got all of these other factors, sanctions, are  
18 not warranted.

19 THE COURT: Look, I understand what your  
20 argument is.

21 Mr. Marshall, you have in your papers,  
22 130 Earthlink calls that Charter chose to destroy. I  
23 need for you to show me the calculation for that number  
24 also.

25 MR. MARSHALL: Okay.

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2 THE COURT: Not right now, because I don't have  
3 time. I have two minutes to get to another case.

4 So, just to be clear here, Mr. Marshall, is  
5 going to give me the 14 transcripts, Mr. Faridi, is  
6 going to have somebody explain 20 million calls to me.

7 If you are doing depositions between now and  
8 the time of the decision, then you can inquire about the  
9 decision, who made the decision or whether there was  
10 actually a decision. You can ask about that in  
11 depositions.

12 MR. MARSHALL: Thank you, Your Honor.

13 Also, I think we can report, Your Honor, that  
14 the parties have agreed to a discovery special master,  
15 and we are in the process of preparing him and moving  
16 forward with that.

17 THE COURT: Thank you, so much.

18 Okay, I think that that solves all my  
19 questions.

20 So, you know, obviously, this is an issue that  
21 is near and dear to my heart, and, you know, a really  
22 important one, so, I'm going to take the time to write a  
23 good -- well, I hope it is a good -- decision on it,  
24 and, you know, I will get this additional information  
25 from you, which, I mean, you can have as much time as

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2 you want to give it to me. So, if you can get it to me  
3 in two weeks, that would be helpful.

4 So, I will just give you the date of  
5 October 14th. If, for some reason, you need more time,  
6 you will just let me know.

7 MR. MARSHALL: Yes, Your Honor.

8 THE COURT: And, I think that's it.

9 MR. MARSHALL: Okay, thank you.

10 THE COURT: Nice to see everyone.

11 Have a nice day.

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THE ABOVE IS CERTIFIED TO BE  
A TRUE AND ACCURATE TRANSCRIPT  
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MONICA HORVATH  
SENIOR COURT REPORTER

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