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IN RE CI HOST

LAWYER: This court should grant mandamus relief in this case vacating the TC's discovery order, which compels the disclosure of the backup tapes for three reasons. First, the provisions of Title 18 clearly applies to the contents of the electronic communications only backup tape.

O'NEILL: I thought the statute dealt with, at least through the case law, stored items that have not been opened yet, or that were in transmission and not yet received.

LAWYER: Yes. There are actually three protections under the electronic communications privacy act.

O'NEILL: But isn't that an overlay for all the protections?

LAWYER: No. Backup tape protection is specifically protected under the statute 2510.

O'NEILL: Aren't there two types of backup?

LAWYER: No. There are two types of storage. One is temporary, and one is unmarked permanent storage.

HANKINSON: Do you disagree then with the court's decision in Fraser that interpreted backup to also mean backup on communications that were actually in transmission as opposed to permanent storage backup of post-transmission communications?

LAWYER: Yes. Only because that case involved interception, and this case involves disclosure.

HANKINSON: But the court was still interpreting provisions of the act defining what a backup transmission was. Why would it make any sense for the law to be interpreted to protect a post-transmission communication if it's in the backup mode when otherwise it would not be protected? What would be the rationale for making that kind of a distinction given the congressional intent behind this piece of legislation?

LAWYER: First of all, the interception cases, including Fraser and beginning with _____, were all struggling with the overlap between Title 1 and Title 2 under the ECPA. Such that an interception had been originally determined to require that the interception be contemporaneous with that transmission. With regard to why these backup tapes are specifically and uniquely targeted for protection under this statute, it helps to understand the very nature of backup storage. Not only in this case but every e-mail server, all of our e-mail servers have backup tapes for storage of data, and all of them contain e-mail.

HANKINSON: But it seems to me that the case law is very clear that what is intended to be protected are communications that have not, by definition in the statute, are communications that have not yet been opened by the intended recipient. And that's true under the storage communications act as well.

LAWYER: It's not true under the storage communications act. Only the federal wiretap statute, which protects against interception by a person. In fact, that's the whole issue is whether or not the federal wiretap statute actually applies to stored communications. And there have been cases that noted a gap because at this stage it's still unclear whether or not they overlap. But there would be a gap in the protection in this statute by a person who disclosed stored communications because 2702 of the stored communications act applies to electronic communication service providers, such as us.

O'NEILL: But again, in the Fraser case, didn't the court specifically hold that the same restriction applied to the stored communications act?

LAWYER: I don't believe in the Fraser case they were actually determining the disclosure under 27.02.

O'NEILL: They said the stored communications act which prohibits unauthorized access to an electronic communication while it is in electronic storage similarly provides protection for private communication only during the course of transmission. So they adopt the first part of the opinion where they put that restriction on the interception piece of the wiretap part.

LAWYER: Right. For temporarily stored communications.

O'NEILL: But I thought you said that didn't apply and this seems to say the opposite.

LAWYER: The Fraser case involved an interception, such that when - okay, the overall picture with regard to the federal wiretap statute previous to it required some physical trespass in order to have an interception of a transmission or a wire communication to be a violation of the 4th amendment. An e-mail transmission, they happen in seconds, so there has been much discussion about whether or not an interception required contemporaneous transmission with the actual interception of the e-mail since that's virtually impossible.

HANKINSON: I'm a little bit confused. Fraser dealt with a stored e-mail. It did not deal with intercepting a communication while it was being transmitted. And in fact at issue before the court was the interpretation of the storage communications act. Because I thought what had happened in that case was they went back in to backup and were able to pull out an e-mail that had already been transmitted that was stored, and that was the subject of the litigation.

LAWYER: They went into a hard drive and they accessed under 2701 an e-mail communication that was stored before it was opened. But in this particular case we're talking about 30 to 50,000...

HANKINSON: I understand, but I tend to have the same problem that Justice O'Neill has in terms of your effort to distinguish Fraser, because it certainly seems to me that the court was squarely interpreting the statute when it talks about what kinds of communications that are in backup and are subject to protection of the act. It would only include those that have not been opened by the intended recipient. That in fact the backup is intended to cover those that are actually in transmission in the event of system crashes before an e-mail can be retrieved by the intended recipient.

LAWYER: Backup storage is separate and apart from storage on a computer or a hard drive.

HANKINSON: Right. And I'm referring to the part of the opinion that deals with backup storage. The opinion specifically says Part B of the definition refers to what I previously defined as backup protection storage, which protects the communication in the event the system crashes before a transmission is complete, and _____ for purposes of backup protections such communication in the statutory definition makes clear that messages that are in post-transmission storage after transmission is complete are not covered by part B of the definition of electronic storage.

LAWYER: I believe what they are saying is that that communication in that setting was not covered by either definition of storage. If you read it very carefully it does say that really A and B under 25_____(a)(b) neither one applies in that particular case. But again, that goes to the struggle that courts have had in determining temporary stored communications. That was an e-mail that had not been accessed yet, stored on a hard drive. In this particular context, we're dealing with a masked(?) disclosure by an electronic communications service provider of over 2,000,000,000 e-mails that would be in post-transmission to the extent that they are stored on the servers only because they have not been opened yet.

HANKINSON: Maybe I'm just not understanding the terminology. Are you saying that the act protects e-mails that have already been opened by the intended recipient?

LAWYER: No.

HANKINSON: You are only dealing with e-mails that are still being transmitted in that they are being stored until - I think we're saying the same thing.

LAWYER: Yes.

O'NEILL: How do we know that? I don't know what's on the backup tape. How do we know that it's something beyond - we don't know what parts of it were stored in intermediate backup or what parts have been opened or...

LAWYER: It's only one kind of backup. The whole nature of backups, and all servers have this, all of our e-mail servers have very hi-tech backup machines that actually run and record all of the data on these servers. And we're talking over 7,000 gigabyte of stored data on these tapes for the sole purpose of restoring that data to the servers in the event of a crash. So it is permanently stored on there until, and in this particular case, when tapes are rerun.

O'NEILL: Did you just say that none of those e-mails on there have been accessed?

LAWYER: When we open an e-mail on our computer, we have the option of deleting or saving.

O'NEILL: But we don't know whether the recipient has gotten it and opened it or not.

LAWYER: It would only be on there if they hadn't. And that is in the record.

O'NEILL: So we can find on this record that everything that's on this backup tape has not been opened by the intended recipient?

LAWYER: The e-mails that are on here were only saved because they had not been opened yet.

HANKINSON: But again, the question is, having read the record from the proceedings on your objections, where is the testimony to that effect? The testimony is very general by a lawyer who represented CI Host as supposed to someone who had actual personal knowledge of what was on the tape.

LAWYER: Well there is the affidavit of Chris Faulkner, who is the president of the company, and he described the nature of backup tapes and what is on them.

HANKINSON: And that testimony was controverted at the hearing by a former employee.

LAWYER: Only to the extent that - well yes, he did. He contradicted certain items. But to the extent that these tapes contain protective communications he conceded that. He conceded that even if these were not the tapes that he had made, that they would contain data that was confidential, that the customers would not...

O'NEILL: But that's a different issue than whether they've been opened by the intended recipient. Now I didn't see anything in the record that said all e-mail communications in this backup tape have not been opened by the intended recipient. Maybe I missed it in the record. But I didn't see it. And it's that specific.

LAWYER: It's specific to the extent that what the backup tapes actually save is everything on the servers on the day that the backup tapes are made. And to the extent that e-mails are done through servers, unlike ours on our hard drive, they go in and out. We don't. They're not saved on their server. They actually are off of the server once they've been opened. So they wouldn't have been saved.

O'NEILL: So by definition, and this is in the record, any e-mails that have not been opened by the intended recipient, therefore, they are arguably protected under the act. If you were the plaintiff here, and your complaint were that you had not performed on your promise to backup everything that I had, how would you go about discovering whether in fact that information had been

backed up as promised?

LAWYER: In this age of technology things change very quickly. So I would probably make an effort as soon as possible to get information such as server logs which show all the transactions and would show when the servers were down. And the backup tapes would not be discoverable, but...

O'NEILL: But showing when the server is down is not going to help me determine whether you have performed your promise to backup.

LAWYER: Well that's true. But to that extent and the case Huey v. DeShazo by this court where the attorney/client privilege is upheld, it was noted that the plaintiff would not be precluded from obtaining evidence necessary on her claim against the trustee because she could depose the trustee on matters concerning the trust...

O'NEILL: I"m talking about in this area.

LAWYER: We're in a pre-class action certification context. We haven't gotten to merits discovery. But once we do, they could depose persons with relevant knowledge concerning the facts surrounding the crash and the extent of our backup at that time.

HANKINSON: Well already we have a dispute though among witnesses as to who is telling the truth about what the backup procedures were. So how would a litigant then go about being able to prove their case or to know whether they even have a case if they can't access the backup tapes themselves?

LAWYER: If the tapes are produced in this case we're talking about...

HANKINSON: I understand that. Let's just say they are not produced. Isn't that just critical proof in this case?

LAWYER: No. The backup tapes in this particular case aren't proved with any of the underlying claims because they are from March and the crash was in December. And they've been rerun several times since then. So their relevance is even questionable in this case. That's what I'm saying in terms of moving quickly, because you would literally have to probably go in and get a TRO immediately...

O'NEILL: But presuming you had the correct tape, presuming this is the one that would prove it, how would you go about ever proving up a case? It seems to me that this would give a blanket immunity to a company such as yours if there were no ability to prove that you didn't backup as you promised.

LAWYER: To the extent that...

O'NEILL: We're trying to figure how do you protect both interests. It sounds like under

your position there just could never be a claim here or an inability to prove it.

LAWYER: Well no, not necessarily. Because the backup tapes first of all don't necessarily prove whether or not - say for example the crash in this case occurs on Dec. 28 or 29, 1999. In order to get any information we would have had to preserve the backup within that first two week period after the crash in order for it to contain any data from December.

O'NEILL: Presuming that were the tape at issue, presuming we're over relevance, back to my question.

LAWYER: Then we have the problem of whether or not parts of the tape could be segregated, because unfortunately the way the discovery order stands right now, we have to turn over all of the tapes...

O'NEILL: But who's got the burden to talk about how it should be segregated? I think they are saying if it needs to be segregated you can tell us what's on it and what you can and cannot produce.

LAWYER: To the extent that there are e-mails by individuals and businesses who revealed intimate details of their lives and trade secrets and new product development...

O'NEILL: I keep hearing you answer in terms of what's protected. Again, you're the plaintiff and you need to prove a claim that they have not backed up as they promised. How are you going to prove that?

LAWYER: Again, I would work very quickly in trying to...

O'NEILL: Assuming you have the correct tape.

LAWYER: Well there is other information besides the backup tapes that show evidence of down time on servers, such as server logs, which...

O'NEILL: No, but not down time on servers.

LAWYER: Well backup tapes would - I don't know that backup tapes would show down time on servers. This is what happens: when the server shuts down, there is no activity, so it's totally blank. So from the standpoint of backup, yes, there would probably be holes in where the data was restored because there was no activity on the servers. Server logs would establish the same thing. They show the transactions by every person, every customer on those servers for those days during the crash. They would just be completely blank.

And with regard to what happened in terms of how the crash occurred, again, people with knowledge of relevant facts could be depose about that.

O'NEILL: I don't think we've been looking at how it occurred, or whether it occurred.

I think if you're trying to prove a company is not backing up as promised, it's hard for me to figure out how you could that without some access to what the backup system is. And I haven't heard you articulate anyway to get in.

LAWYER: They've asked in this case for directories and indices from the backup tapes, which contain domain names. Without accessing the e-mail communications something like that might be able to be downloaded and printed, which would show all of the customers on there and that they existed, and that they were actually backed up on those days.

OWEN: So you could segregate information off of the backup tapes?

LAWYER: You can actually - say for example, one of our customers was accused of publishing pornography. And we are presented with a properly issued warrant. In that context, we would be authorized to disclose that individual's file and, yes, we could put the tape in, download the information to the server which could then be pulled up on a computer.

OWEN: So if they went in with a precise request on specific items that were not protected, you could get that off the backup tape and give it to them?

LAWYER: With a properly issued warrant. Yes.

RODRIGUEZ: What I've done in other cases was we got a court ordered expert or master to review backup tapes. Is there anything in the act that would prohibit that court ordered expert or master from making...

LAWYER: An in camera inspection sort of speak?

RODRIGUEZ: Correct.

LAWYER: No, I don't believe so. And it's my understanding that the court has the discretion to request an in camera inspection and has not.

RODRIGUEZ: So assuming the relevancy had been met, the backup tape had been retrieved within the two week period of time that that backup tape existed and assuming you got a TRO, that's one way a plaintiff could have been able to prove the case?

LAWYER: Exactly.

HANKINSON: I understood your position in this case was that no one could look at the contents of these communications under the act. Then wouldn't you also have a problem if you turned it over to a judge for in camera inspection or if a special master was appointed? What's the difference between doing that and producing this information under protective order with a limited number of people being available?

LAWYER: I believe an in camera inspection would be limited to review by the judge

only, because then they could determine _____ as to whether or not the contents were protected. Which perhaps should have been done in this case. But to the extent that a protective order could have been done in this case, it would not have served any interests of any of the parties...

HANKINSON: My point is, is that I thought you took the position that under the act that the protection of this material was absolute, which would mean that not even a state trial court judge could look at it because you had to protect the contents in order to avoid liability under the act. And so why would you be able to do that under the act?

LAWYER: The statute doesn't speak to that kind of exception, but if you're going to weigh whether or not we have the right to privacy and these communications should be completely disclosed...

HANKINSON: Do you agree that there is also information on the backup tapes that is not prohibited from being disclosed under the act?

LAWYER: Yes.

HANKINSON: What information is that?

LAWYER: The web pages, which are public information.

HANKINSON: Subscriber information?

LAWYER: The subscriber information can be obtained through business records.

HANKINSON: Is there subscriber information on the tapes?

LAWYER: I'm sure there are customer names and domain names.

HANKINSON: And is it protected by the act?

LAWYER: It is to the extent that it's not in business records, yes. The backup tapes have been described by this snapshot of the entire system on the day that they were made. So if you put a photograph the size of this wall, for example, one paper with 2,000 customers and you put up each of their web pages and all of the communications to and from that website, an attempt to segregate information from these _____ would be like trying to take a pair of scissors and cut out subscriber names and customer names, and you couldn't do it without exposing all of the other communications. We're not talking about one person's file.

HANKINSON: What authority do you have for interpreting the act to protect anything except the contents of the electronic communications, which would be what's in the e-mails.

LAWYER: Because the statute itself says everything is protected. All the contents of the e-mails.

HANKINSON: I understand that you take the position that the contents of the e-mails are protected and that you hang your hat on the language of the statute. And my understanding is is that your opponent does not agree with you on that. Now you're telling us that there are other things that are protected under the act, and I'm not sure what...

LAWYER: I'm sorry. I didn't mean to be misleading. I'm not saying that subscriber information and customer names are protected from these tapes. I'm simply saying that they can be gotten through general business records without exposing the confidentiality of the communications.

HANKINSON: So subscriber info, the web pages. What else is on the backup tapes that is not subject to the act?

LAWYER: I'm not sure.

HANKINSON: There may be other things?

LAWYER: Well I know that the data, the proprietary format for restoring that data is on there. And that may not be covered under the statute. But there may be other objections because of this proprietary and our website has companies that connect their servers differently, so I'm not sure about that.

HANKINSON: But you made no effort to prove any of this up at the hearing on the objections?

LAWYER: No. The issue before this court is solely whether or not the contents are communications.

HANKINSON: I understand. But at the hearing on your objections there was no testimony, no proof offered, nothing on anything else but an effort to show that there were contents under the meaning of the act?

LAWYER: I believe that's correct.

RODRIGUEZ: Did you make privacy objections on behalf of your various third party clients there at the TC?

LAWYER: I think to the extent that it may have been raised, but the statute protects in a consent situation...

RODRIGUEZ: Apart from the act itself, did you raise just privacy concerns?

LAWYER: General privacy concerns. I'm not sure. I don't believe so.

O'NEILL: I guess what bothers me is it seems like - an analogy would be, let's say that a document request was sent out that said: produce all documents your client has, assuming that was

a proper request. And the response was: well there's some privileged information in there so we're not going to produce anything. But isn't it your burden to segregate out what you claim specifically on that date is privileged and what's not, rather than just saying because there's some privileged information on here we're not going to produce anything?

LAWYER: First of all, to get to segregating we would have to vacate this order and go back to the TC and determine what could be segregated. I don't know if we couldn't delete e-mail, or the e-mail communications from it and turn the tapes back over. That's possible. But we would have to entertain more testimony. And we're talking over 7,000 gigabytes of knowledge. We're talking about undue burden and expense on a grand scale.

BAKER: Did you argue that in the TC?

LAWYER: No, I don't believe we did.

BAKER: I understood your response was the request is too broad and it violates the federal statute.

LAWYER: Exactly. And it is over-broad.

BAKER: Earlier in your argument you mentioned relevance. As I understand from the record the TC made the finding that the backup tapes were relevant to the plaintiff's cause of action, but that you haven't objected to that finding. So do we assume that what's on those tapes vis-a-vis their cause of action is relevant?

LAWYER: I don't believe we did make a relevancy.

BAKER: Objects to the size of the relevance issue, we have left to decide the only issue of does the production violate the act?

LAWYER: I need to clarify that.

BAKER: We don't have any argument about overly broad. We don't have any argument about harassment, expense, burdensome. You don't raise a relevance question. So _____ how do we apply the statute to this set of facts?

LAWYER: I may be incorrect on that. Because we did make a lengthy objection in our response to their discovery, which I don't have with me.

BAKER: Why was that when it just says broad in the statute?

LAWYER: It may include relevancy and I'm not quite sure. I would have to look at that.

HANKINSON: Why doesn't the exception contained in §2702(b)(5) apply in this case, which says that a person or entity may divulge the contents of a communication as may be necessarily

incident(?) to the rendition of the service or to the protection of the rights of property of the provider of that service since you've been sued in this case and are trying to protect your rights of property?

LAWYER: To the extent that the way this statute reads with regard to how we have rendered services to the customers, the March 1st backup tapes do not necessarily go to whether or not anything happened in December.

HANKINSON: Assume that they are relevant, then would this exception apply to those backup tapes?

LAWYER: To the extent that we have promised privacy for our customers in our agreement, and to the extent that we could be subject to liability for wrongful disclosure, I'm not sure that it wouldn't be disputable.

HANKINSON: So you're just not sure if the exception applies or are you saying it doesn't apply? I just need to know if you think this exception applies or not.

LAWYER: No, I don't believe it does apply.

HANKINSON: Why not?

LAWYER: Because specifically it pertains to our need to disclose based on maintaining service to our customers. And there's no evidence in the record right now that we need to at this time in order to render...

HANKINSON: How about protecting your rights since you've been sued over the provision of the service. Why wouldn't it then become - assuming it's relevant - fall within that category?

LAWYER: The rights and property that we have established in terms of - I'm not sure I know how to answer that question.

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RESPONDENT

WELLS: I represent the real parties in interest, the plaintiffs in the TC below. We are trying to seek discovery to get information to prove their claims. As pointed out by the court, we need this discovery. There is no question that it is relevant.

HANKINSON: Why are March 1 tapes relevant to anything?

WELLS: The petition as you've pointed out is much broader than just a Dec. 28 crash. There are billing problems. There are issues of whether or not there are in fact backups. It's not just the question of whether there was a backup on Dec. 28. There is a promise here in a representation that backups are made daily. Well we'd love to look at the - if that's the only tapes they have, and remember these are the only tapes that were tendered. We asked for the tapes. All the tapes you

have. First of all, they said it would be 160 something tapes in order to comply with the discovery request. Well, when the court made them produce the tapes, they showed up with 9 tapes. Those are marked. They have exhibit stickers on them. And those tapes according to Mr. Harvey's testimony on what he reviewed as a lawyer, does contain an incredible goldmine of technical information as to whether or not there were ever any backups.

ENOCH: The position of your clients seem to be that the support to keep their websites up and running was not there. And you had a contractual agreement with them that that support would be there. And it seems to me as a matter of a technical expertise the fact that the website wasn't up would be the evidence necessary to show that they did backups because the technology would say but for failing to do the backups like they said, this would not have happened. Do you really have to have a backup tape in order to demonstrate that the website wasn't up and running when it should have been based on the technology that's available?

WELLS: Well if you're only looking at one day, you are correct. But they say they do a backup every day.

ENOCH: But my point is, the undisputed evidence is that the website didn't work like it would have done had they been doing the backups. It seems to me whether or not there's a backup tape that you can look at isn't really necessary for you to have all the evidence from just the fact that your website wasn't working, that their backup wasn't doing what it was supposed to do.

WELLS: And that is true for that one day that we know that it crashed. But what about the other days. Part of the issue here is damages. These people pay service fees. They assume they are getting backups. They assume they are getting some security for their data. What happens if you find out that your server hasn't been doing backups for the last three years? That would have something to do with issues like punitive damages, fraud. It might have a lot of very material and relevant - it brings a lot of material and information to the table.

OWEN: Why do you need all the information on the backup tapes? Why can't you ask for specific categories of information from the backup tapes that have no privacy implications for customers or subscribers?

WELLS: We've taken that position that we don't want to see the discrete e-mails.

OWEN: Why didn't you ask for something less than the full backup tapes?

WELLS: Because that's what trial counsel asked for. It was burden on the relators to come forward with those issues.

OWEN: If they objected, then why didn't you come back and ask for less?

WELLS: We have asked for less. And they don't want to do that. That's a significant thing. They don't want to give us anything. That's the issue.

O'NEILL: It strikes me that you've both taken absolute positions and there hasn't been an attempt to fair it out what would be discoverable and what would not be discoverable. How in the world are we to decide this on these absolute positions that have been taken without a development of the record to show what - we don't even know what's on the tapes. How can we possibly be called upon to make this sort of decision globally?

WELLS: It's a very good question. This is a difficult issue. What we do know, or at least what we think is on the tapes is reflected only by the testimony of Mr. Harvey. And that's in the record. And there is an incredible amount of information there based on what he said. And it is not the discrete information in the e-mails itself. We are happy to do that.

HECHT: To do what?

WELLS: To take the information that is everything but the discrete e-mails. We are not interested in knowing: did you have a date with so and so, or how was your trip. We don't care about that. What we want to know is, how many customers are there? How many of these people have their e-mails backed up.

O'NEILL: How does that relate to whether you're being backed up? There's been a claim made here that you're trying to get names of potential plaintiffs. And what relevance does who subscribes and what their address and phone number is to whether your service is being backed up properly?

WELLS: If this were just a case involving my three individual clients, it may not be. But there is a punitive class. This is pled as a class action. The class representatives are the punitive class representatives...

OWEN: But you're not in merits discovery yet are you? You're precertification stage. So what relevance does merits discovery have to do with people who aren't yet part of the class?

WELLS: Well it certainly has to do with numerosity.

OWEN: Why can't you ask them for their customer lists from their business records?

WELLS: If you will look at the request for production it was incredibly broad. And basically the answer is on most of these were: we don't have it. For example, one of their requests was where are the backup logs? It would be great to get backup logs. The answer is zero.

OWEN: Do you say now you want numerosity. Have you asked for customer lists? Have you been told there is no lists of customers?

WELLS: I believe that's true. I can look back at the request for production. It is ex. J.

JEFFERSON: Well how many customers are we talking about?

WELLS: Thousands.

JEFFERSON: How do you know that?

WELLS: It's what Mr. Harvey says.

JEFFERSON: Well then doesn't that satisfy numerosity...

WELLS: I would think it would. But the other question is, how many of these people don't have their data backed up.

OWEN: But that's merit's discovery isn't it? What's that got to do with who the potential class members are? Why do you need merits discovery to get in to the questions about is there going to be a class or not?

WELLS: I think we're entitled to do some merits discovery. We don't get to put everything on hold until we get a class certified. There's not a wall that comes down that keeps us from doing that. And in fact, there's been no objection from the other side on the basis that any of the discovery that we've asked for has been premature. We're trying to find out what the scope of this lawsuit is. What are the facts? Who are the parties that need to be there? And the answer from the other side is, we don't have to give you any of our information.

O'NEILL: But what if you were to say, okay we waive any privilege we might have, but we want every bit of backup you've got out of this tape, just as to my three clients. And from that you determine whether you've been properly backed up. And then you say, we haven't been properly backed up. Now we want a class action. Now we're moving for that and if it is certified as a class, now we are entitled to these names.

WELLS: We know that we were not backed up on one day. We could do that. And certainly the TC and trial counsel can do that. There's a lot of work to be done in this case. Discovery is not complete in this case.

HANKINSON: Turning to the federal statute. If I understand your briefing correctly, you agree that the contents of the unopened e-mails are protected by the statute?

WELLS: Yes. We are not trying to get the contents of the e-mails.

HANKINSON: Is there anything else on the backup tapes that you agree is subject to the act?

WELLS: Not at this point. Everything that we know, everything that Mr. Harvey testified was on there, we believe we're entitled to see. Subscriber information; subfiles; website content; indexes; directories; customer numbers; billing information. We are entitled to get that and the brief sets out for the court...

HANKINSON: Did anybody ask the TC in this case to craft an order that would have in fact

required the production of the backup tapes, backup tapes without protected information on them? I understand you had testimony at the hearing that that could be done.

WELLS: Right. Paul Rushing was a former employee. He said that could be done. Chris Faulkner said it could not be done. The TC, I, guess took the position of Mr. Faulkner and said it couldn't be done, so therefore, produce it. It could be done. We still contend that it could be done.

ENOCH: Does this TC implicate forcing CI Host to violate a federal statute maintaining certain pieces of information confidential?

WELLS: We say no for the reasons set out in the exceptions to the content disclosure.

RODRIGUEZ: But doesn't the exceptions only apply to your three clients?

WELLS: It doesn't say that. I would not take that position.

ENOCH: But agree that unopened e-mails stored are subject to that statute?

WELLS: Right. And apparently there are some of those on there according to Mr. Harvey.

ENOCH: So based on the record we have, and the TC order, there is a violation of the federal statute for CI Host to honor the court order as written?

WELLS: No. We would argue that this falls under the exception especially the one that I think is probably most applicable. We've cited several possibilities. But 2702(b)(5), which is, that this disclosure of this information is absolutely essential to determine whether or not my clients have a cause of action against CI Host.

HECHT: The content of e-mail is absolute?

WELLS: The disclosure of the data. You're right your honor. Until we get in and find out the contents we don't know.

HECHT: Well you say it's on there, and you say you can't get it and Judge Enoch says, well if you have to turn it over doesn't that violate the statute? And you say no, there's an exception but you say it doesn't apply to the content of the e-mail. So isn't the answer to Judge Enoch's question, yes, there's a violation?

WELLS: I'm sorry if I misunderstood. 2702(b)(5) is an exception that allows you to turn over the content.

HECHT: The content of the e-mail?

WELLS: The content of the e-mail. And in some way it may be relevant as to -there's

an incredible amount of data that was lost. Some of these customers, certainly our three, and we hear that others which is not in the record...

OWEN: So anytime you want the content of the server's e-mail, you just sue them and then you say, well you've got to defend yourself, and therefore, you've got to turn over the e-mails?

WELLS: I would not take that position. In this case, I think...

OWEN: Why do you need the contents of the e-mails?

WELLS: It is not the most important thing.

OWEN: Why is it important at all?

WELLS: I can see that it could be important depending on what the content was. For example, if it were a complaint about the service with CI Host, if it were two customers complaining...

OWEN: Why don't you do discovery on the customers, ask them have you complained and why do you get the contents of the e-mail, which you concede is covered by the statute?

WELLS: We think that we are entitled to them. Because of 2702(b)(5).

OWEN: So my point is, anytime you want the contents of the e-mail, you just sue the person that has them and say, you've got to turn them over, we've sued you. In order to defend yourself you've got to turn them over. Is that your argument?

WELLS: I think if that were a bad faith claim, that the TC has absolutely enough ammunition to deal with that if that were the feeling.

OWEN: And where is your good faith claim that you're entitled to the contents of the e-mail?

WELLS: The good faith claim is that it could be that there are things in there. It is perfectly acceptable to us any number of things could happen. We've suggested a protective order. Mr. Harvey looked at a lot of this information. He says he did not look at the contents of the e-mails. There's been some discussion about some confidentiality agreements with customers. There's nothing in the record about customer service agreements. There's nothing in the record about what promises were made to protect confidentiality.

HECHT: But you said earlier yourself that clients assume "they are getting security for their data." You said that in this argument. That's a perfectly reasonable assumption that the e-mail that happens to be on there as you said talking about personal plans or whatever it might be, was not going to be disclosed to anybody under a protective order or anything.

WELLS: My discussion at that point when I made that statement was related to backup security. In other words, if I'm contracting with someone to backup my law firm's computer I want to know it's backed up. It's not a matter of security between my e-mail conversations with my friend. What I was directing that comment to was when I contract with somebody to do backup services, I expect it to be backed up. My business depends on it.

OWEN: Do you expect that your confidential e-mails to your clients, internal confidential e-mails will be produced by your server if they are sued by someone like you who says, I didn't get security will be turned over?

WELLS: I think that that could happen.

OWEN: Without any notice to you?

WELLS: I think that that could happen.

JEFFERSON: So the act just doesn't protect the privacy interests at all then really.

WELLS: It tries to.

JEFFERSON: You've said two different things here. You've accepted the idea that the contents of unopened e-mails are protected by the act, but now you're saying no they are not. You are entitled to go through all of them and they may be relevant to your claim. Which are you arguing?

WELLS: I think the bottom line is that the TC certainly has discretion to a protective order - frankly has plenty of ammunition to protect the legitimate interests, give notice, whatever the court may want to do on this. The other side has not even asked for a protective order. They don't want any conditions imposed. They are not really asking for measures to maintain confidentiality. They just don't want to produce anything.

HANKINSON: As I understand your position, you agree that the unopened e-mails are contents that are protected by definition under the act unless there's an exception that applies and allows otherwise protected communications to be disclosed. Is that what you're saying?

WELLS: Right. Or, unless it's intermediate storage.

HANKINSON: Did they make a relevancy objection in this case?

WELLS: I don't see that. It's ex. J to the appendix to the writ. Their objection to discovery request 27 includes over breath. It says requires information that is confidential trade secret and is beyond the scope of discovery. And then it goes into constitutional rights and says, title 18 of the US Code. It doesn't even cite the section.

HANKINSON: Do you have any idea what percentage of the material on the backup tapes is

unopened e-mails as opposed to other information that would not come within the definition of protected material under the act?

WELLS: We do not know that. Mr. Harvey's testimony is the only nugget we have in terms of what's on there. And he says there is some of that. He doesn't say how much.

O'NEILL: How in the world are we to craft an opinion here? Are we to say that there is evidence in the record that there may be contents, that there may be unopened e-mails and those are covered by the statute, but that's all that's been articulated here. And because we don't know what else might be on there it's all protected or it's all not protected. Without knowing what we're dealing with I don't see how we can craft an opinion here.

WELLS: I think it's clear that the act only covers the contents. And it defines that very discretely. And I think a court's order saying that the contents be segregated and not be disclosed are subject to a protective order, or some type of protection. Maybe to be disclosed at a later time once a class has been certified. There are any number of options that this court and the TC would have to protect legitimate interests that would be covered by the act. But just to completely shut down discovery...

ENOCH: Should this court order the TC to issue some findings on whether or not if the court determines that the e-mail contents is relevant to the case, or do you decide that as a matter of law that this is subject to that kind of exception, or do we simply reverse the TC's order because the federal statute is implicated and say try it again?

WELLS: I think a broad order reversing the TC's decision would be grossly over-broad. If anything, this court's order would need to be very carefully tailored to protect only the unopened e-mails that are the contents, that are protected by the act.

BAKER: Am I correct that the August order is production of backup tapes on all CI Host customers?

WELLS: I think that's what it says.

BAKER: In other words, there is absolutely no exception or segregation of any information that might be on there. They have to produce everything on the backup tape, and that's what you asked for?

WELLS: That's what we asked for.

BAKER: And part of it you concede does violate the statute. It seems to me the simplest order that we say is that we agree that it's too broad and we set aside and y'all can go back and hassle some more, but we don't have to worry about crafting an order, because that's not our business.

WELLS: There's not an adequate record...

BAKER: Well that's another reason why we might just send it back.

WELLS: There's a question about sending it back. To deny the writ and just say no, they no longer have to produce anything is a real problem here.

BAKER: That's what we're saying. What we would be saying is you made a request for everything. They contested it saying it's subject to this act. The TC gave you everything and here we are. And you've conceded that part of it is governed by the act. So it seems like the answer is, the order is too broad because it violates the statute. The TC abused its discretion when it applied the law. End of case.

WELLS: I think the order is over-broad to the extent it includes unopened e-mails.

BAKER: I think we could say that too and set it aside.

WELLS: And we've said this in the brief. We are not trying to get the e-mails. Whatever needs to happen, we're not trying to get the e-mails right now.

BAKER: Well we don't know that from this order.

WELLS: I agree.

OWEN: I thought you just told me you were entitled to them and you wanted them.

WELLS: The exception - until we know more about it, assuming that these are just pure irrelevant conversations of e-mails.

OWEN: You want to see them and then decide if you want them?

WELLS: Right. I want somebody to look at them. We don't know what's in them and we don't know that it's relevant. I certainly don't want to stipulate without seeing anything, without anyone having looked at them, including even Mr. Harvey, whether or not there is information there that might be relevant to the case _____. I will acknowledge that that's a very small part of the issue. The main part, the main problem we have is, we don't have any discovery, and there is a gold mine of information there that they don't want us to get, not because they want to protect confidentiality of the e-mails. They don't want us to see how poorly they performed on their contract.

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REBUTTAL

HANKINSON: Counsel is it your position that you should not be producing the backup tapes at all even though it contains some information protected by the act and some information that is not, or do you agree with your opponent that there's a way for the TC to craft this to protect information protected by the act but allow them access to what they are entitled to? What's your position on

that?

LAWYER: We concede that there is nonconfidential data on these tapes.

HANKINSON: And they should be able to get them?

LAWYER: To the extent that it's _____. It would be quite a daunting task, but yeah, and the TC could take more evidence, and yes that information might possibly be segregated.

HANKINSON: What do you mean the TC just take more evidence? Because you had your chance to have a hearing. In fact, you had more than one hearing. I don't understand.

LAWYER: I'm not sure. It wasn't our burden to prove that the information could be segregated.

HANKINSON: It was your burden to prove any privilege that you asserted. And so if the record reflects that there is information that is not privileged that it's entitled to be discovered, then I don't understand your position.

LAWYER: It was in the context of the court's order ordering us to discover or produce the tapes in their entirety.

HANKINSON: All I want to know is just so we can figure out how to get this resolved. I've heard her say yes, it may be overly broad. And I want to know from your perspective that the relief that you're seeking may be overly broad and there's a way for the TC to craft a resolution of this to protect what needs to be protected in the statute, but let the plaintiffs have their discovery. Do you agree with that?

LAWYER: Yes. And we would be more than happy to work with them.

I just want to address Justice Hankinson your point about the property right exception. At this point, we're in a preclass certification stage with some questions about standing. So to the point that we get to merits discovery and we are actually a class action _____ our property rights may be an issue, that exception might apply.

HANKINSON: So then it might apply and then the contents would be discoverable?

LAWYER: If we get that far yes.

HANKINSON: So it has potential application. You just think it's premature.

LAWYER: Exactly. I think their request for the tapes at this stage is premature.

We did provide discovery in this case. We complied with certain requests for billing and identification information of customers. Some of it was redacted, but the only objections

at issue in this case are over the tapes with regard to what has been produced. The actual concession by the plaintiffs in this case that there is only parts of the tapes are discoverable actually confirms the fact that the tapes in their entirety are not.

ENOCH: _____ talks in terms of this information be confidential and not to release it. Does that necessarily mean that a state court is prohibited from ordering it to be released for purposes of discovery?

LAWYER: Are you distinguishing state court from the federal court?

ENOCH: No. The federal statute just says that this is confidential information not to be released. Does that necessarily mean that in the course of litigation that deprives that state court of authority to order in camera inspection or discovery of those documents, whether it meets an exception or not just the discovery of the documents?

LAWYER: I think this whole area is so new because there is no other case on point in any jurisdiction. But to the extent that - I believe these tapes could be provided for in camera inspection. And we've offered them to you.

ENOCH: What liability does your client face if it loses in this court and we deny the petition or we rule against you or whatever, and you're now under a court order to produce it. What liability do you face for producing information to the court or the other side under the federal statute if any?

LAWYER: Civil damages, no less than $1,000 per person in punitive damages. And since we were talking about 30 - 50,000 customers...

ENOCH: If you are actually compelled by a state court to produce it, the statute would still impose the penalty?

LAWYER: If we were compelled - and there is a distinction. That's an interesting question, because one of the exceptions in this case actually contemplates our good faith reliance on a court order. There is no supporter authority though for the discovery order in this case...

ENOCH: I would suggest that they couldn't argue your lack of good faith if you've gone all the way to the state SC and lost.

LAWYER: And if this court ordered it that might be an entirely different...

ENOCH: You can just show them the transcript in this argument and they could say there was no lack of good faith.

LAWYER: Every section in this entire statute contemplates a search warrant, or the type of order that was gotten from a magistrate after establishing its relevance to a criminal and federal investigation. But that would be an interesting question. And I would like to point out though that

this would have serious ramifications for not just the e-commerce industry but for everybody that e-mails because our server backup tapes would then be vulnerable for random exposure and suits of negligence against our servers.

HANKINSON: The backup tapes in this case are encrypted and in fact can only be read by CI Host servers in the record. Is that accurate or not?

LAWYER: No. I believe that Mr. Harvey felt like it was encrypted because there is computer language. All the proprietary formats(?) that I described earlier for restoring the data, that looks like gibberish and it's not readable.

HANKINSON: He was just mistaken about that?

LAWYER: I believe so. I'm not sure that the actual web pages and the e-mail communications wouldn't be viewable without passwords or encryption. I believe the record supports that.