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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES WARE

IN RE: APPLE IPHONE 3G PRODUCTS LIABILITY LITIGATION.	NO. 5:09-MD-02045 JW SAN FRANCISCO, CALIFORNIA MONDAY APRIL 9, 2012

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS

DOYLE LOWTHER
10200 WILLOW CREEK ROAD, SUITE 150
SAN DIEGO, CALIFORNIA 92131
BY: JAMES HAIL, ESQUIRE

FARUQI & FARUQI
10866 WILSHIRE BOULEVARD, SUITE 1470
LOS ANGELES, CALIFORNIA 90024
BY: DAVID E. BOWER, ESQUIRE

CONSUMER LAW GROUP OF CALIFORNIA
10020 WILLOW CREEK ROAD, SUITE 160
SAN DIEGO, CALIFORNIA 92131
BY: ALAN M. MANSFIELD, ESQUIRE

(FURTHER APPEARANCES ON FOLLOWING PAGE)

REPORTED BY: JOAN MARIE COLUMBINI, CSR 5435, RPR
OFFICIAL COURT REPORTER, U.S. DISTRICT COURT

APPEARANCES (CONTINUED):

FOR DEFENDANT APPLE, INC.
MORRISON & FOERSTER
425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105
BY: PENELOPE PREOVOLOS, ESQUIRE
SUZANA PACHT BRICKMAN, ESQUIRE

FOR DEFENDANT AT&T MOBILITY
MAYER BROWN
TWO PALO ALTO SQUARE, SUITE 300
PALO ALTO, CALIFORNIA 94306
BY: DONALD M. FALK, ESQUIRE

FOR DEFENDANT AT&T
CROWELL MORING
275 BATTERY STREET
23RD FLOOR
SAN FRANCISCO, CALIFORNIA 94111
BY: JOEL D. SMITH, ESQUIRE

PROCEEDINGS; MONDAY, APRIL 9, 2012

THE CLERK: CALLING CASE 09-2054, IN RE: APPLE IPHONE 3G PRODUCTS LIABILITY LITIGATION.

COUNSEL, PLEASE APPROACH AND STATE YOUR NAMES FOR THE RECORD.

MR. MANSFIELD: GOOD MORNING, YOUR HONOR. ALAN MANSFIELD, COUNSEL FOR PLAINTIFFS.

MR. FALK: GOOD MORNING, YOUR HONOR. DONALD FALK, MAYER BROWN, LLP, COUNSEL FOR DEFENDANT AT&T MOBILITY.

MR. HAIL: GOOD MORNING, YOUR HONOR. JIM HAIL FOR PLAINTIFFS.

MR. BOWER: GOOD MORNING, YOUR HONOR. DAVID BOWER, FARUQI & FARUQI, FOR THE PLAINTIFFS.

MS. PREOVOLOS: GOOD MORNING, YOUR HONOR. PENELOPE PREOVOLOS, MORRISON & FOERSTER, AND MY COLLEAGUE SUZANNA BRICKMAN FOR APPLE, INC.

MR. SMITH: GOOD MORNING, YOUR HONOR. MY NAME IS JOEL SMITH. I'M WITH CROWELL MORING, AND I REPRESENT AT&T.

THE COURT: VERY WELL.

SO BEFORE ME ARE A SERIES OF MOTIONS. THERE'S A MOTION BY DEFENDANT AT&T MOBILITY TO COMPEL ARBITRATION; A MOTION BY APPLE TO COMPEL ARBITRATION; AND A MOTION BY APPLE TO DISMISS.

WHO WANTS TO ADDRESS THE COURT ON BEHALF OF THE

MOVING PARTY?

MR. FALK: GOOD MORNING, YOUR HONOR. DONALD FALK ON BEHALF OF AT&T MOBILITY.

AFTER HAVING APPEARED IN THIS COURT AND ADMITTED IN THEIR COMPLAINT THAT THEY ALL ENTERED INTO THAT ALL PLAINTIFFS ENTERED CONTRACTS WITH AT&T AND THAT ANY MOTION TO COMPEL ARBITRATION WOULD BE A WASTE OF TIME, THEY NOW APPEAR AND SAY NOBODY ACTUALLY ENTERED INTO A BINDING CONTRACT, AND ALL THESE PLAINTIFFS HAVE BEEN RECEIVING SERVICE WITHOUT BEING SUBJECT TO THE NORMAL TERMS AND CONDITIONS.

I THINK OUR REPLY AMPLY REBUTTED THAT CONTENTION WITH REFERENCE TO THE VARIOUS AGREEMENTS THAT PLAINTIFFS HAVE ENTERED INTO, AS WELL AS THE OBSERVATION THAT THIS -- ONE OF THEIR SUBSIDIARY ARGUMENTS THAT LATER AGREEMENTS COULD NOT CREATE BINDING ARBITRATION AGREEMENTS FOR PREEXISTING DISPUTES IS BOTH CONTRARY TO THE PLAIN LANGUAGE OF THE FEDERAL ARBITRATION LANGUAGE AND THE FINDINGS OF SEVERAL COURTS, NOT THE LEAST OF WHICH WAS THE DISTRICT COURT IN *CONCEPCION* ITSELF. THAT ARGUMENT WAS EXPRESSED BEFORE JUDGE SABRAW. IT WAS EXPRESSED IN THE NINTH CIRCUIT AND BEFORE THE SUPREME COURT. JUDGE SABRAW RULED ON IT IN OUR FAVOR, AND THE OTHER COURTS DID NOT EVEN FIND IT WORTHY OF MENTIONING.

WITH THE COURT'S PERMISSION, I WOULD LIKE TO PROVIDE TO THE MAGNUSON-MOSS WARRANTY ACT CLAIMS, UNLESS THE COURT HAS FURTHER QUESTIONS ON CONTRACT FORMATION.

THE COURT: I DON'T. YOU CAN PROCEED TO THAT. ALTHOUGH PERHAPS YOU SHOULD ALLOW YOUR OPPONENT TO PRESS THEIR CASE UNDER THAT FIRST, BUT I WOULD BE HAPPY TO HEAR YOUR RESPONSE.

MR. FALK: I WILL DO IT THE WAY -- IF YOUR HONOR WOULD PREFER, I'M CERTAINLY QUITE HAPPY TO RESERVE MY FIRE ON THE MAGNUSON-MOSS ACT UNTIL REBUTTAL, WHATEVER SUITS YOUR HONOR.

THE COURT: WHY DON'T WE DO THAT?

MR. FALK: THANK YOU, YOUR HONOR.

MS. PREOVOLOS: GOOD MORNING. PENELOPE PREOVOLOS FOR APPLE, INC.

I DON'T KNOW HOW FAR YOU WANT ME TO PROCEED IN TERMS OF THE ARBITRATION ISSUES BEFORE WE TURN TO PLAINTIFFS, BUT WHY DON'T I START, AND THEN YOU CAN -- THE COURT CAN GUIDE ME AS TO WHAT YOU WANT TO HEAR. I'M REALLY HERE TO ADDRESS TWO ISSUES, WHETHER PLAINTIFFS ARE EQUITABLY ESTOPPED FROM REFUSING TO ARBITRATE THEIR CLAIMS WITH APPLE, AND THEN ALSO, OBVIOUSLY, THE MAGNUSON-MOSS ISSUE THAT MR. FALK AVERTED TO. MY SENSE IS I PROBABLY SHOULD ADDRESS EQUITABLE ESTOPPEL NOW BUT RESERVE ANY ARGUMENTS ON MAG-MOSS FOR PLAINTIFFS. DOES THAT MAKE SENSE? OKAY. SO, THAT'S HOW I'LL PROCEED.

YOUR HONOR, I THINK WHAT I WANT TO SAY IS THAT ONE THING EVERYONE HERE CAN AGREE ON IS THAT PLAINTIFFS HAVE HAD A NUMBER OF OPPORTUNITIES TO AMEND THEIR COMPLAINT, AND THAT WHEN

THEY PREPARED THEIR FIFTH AMENDED COMPLAINT, WHICH IS THE OPERATIVE COMPLAINT BEFORE THE COURT, AND INDEED WHEN THEY PREPARED THEIR FOURTH AMENDED COMPLAINT, THEY HAD EVERY OPPORTUNITY TO PLEAD THEIR CLAIMS IN A WAY THAT WOULD AVOID EQUITABLE ESTOPPEL AND A MOTION TO COMPEL ARBITRATION BY APPLE, AND THEY CANNOT DO SO.

AND I THINK THEIR FIFTH AMENDED COMPLAINT MAKES THAT VERY CLEAR FOR VERY MUCH THE SAME REASONS YOUR HONOR HELD IN THE DECEMBER 1ST ORDER, THAT AT&T WAS A NECESSARY PARTY, AND THAT IS SIMPLY THAT THE PLAINTIFFS' CLAIMS RELY ON AT&T'S WIRELESS SERVICES AGREEMENT WHICH CONTAINS THE ARBITRATION CLAUSE. THEY ARE INTERTWINED WITH THE WIRELESS SERVICES AGREEMENT, AND THEY ARE INEXTRICABLY INTERCONNECTED WITH AT&T, ITS NETWORK, THE IPHONE'S PERFORMANCE ON THAT NETWORK, AND MUCH AS THE PLAINTIFFS MAY SEEK TO IGNORE THE FACT THAT THE EMPEROR IS NOT WEARING ANY CLOTHES, THE ADEQUACY OF THAT NETWORK TO SUPPORT THE IPHONE 3G, THE LEVEL OF SPEED AND CONNECTIVITY OF A PLAINTIFF'S REQUIRED, AND YOU CANNOT, TO INDULGE ANOTHER METAPHOR, UNSCRAMBLE THAT PARTICULAR EGG, AND THAT MEANS THAT BECAUSE PLAINTIFFS MUST ARBITRATE AS TO AT&T, THEY MUST ARBITRATE AS TO APPLE.

I WOULD DIRECT THE COURT'S ATTENTION, REALLY, TO A FEW SPECIFIC THINGS IN THE FIFTH AMENDED COMPLAINT BECAUSE I THINK THE PLAINTIFFS' PLEADINGS ARE VERY TELLING. SO I WOULD DIRECT THE COURT'S ATTENTION TO WHAT IS NOW NUMBERED

PARAGRAPH 66. I THINK IT'S MISNUMBERED BECAUSE IT APPEARS BETWEEN PARAGRAPH 63 AND 64 ON PAGE 21 OF THE AMENDED COMPLAINT. IN THE PRIOR COMPLAINT I THINK IT WAS PARAGRAPH 62, AND THE COURT REFERRED TO IT IN REACHING ITS CONCLUSION ON PAGE 6 OF THE DECEMBER 1ST ORDER AND IN FOOTNOTE 10.

THAT PARAGRAPH SAYS IN PERTINENT PART, THAT IS PARAGRAPH 66, THAT THEIR HARM WAS THAT THEY WERE LOCKED INTO THE WIRELESS SERVICES AGREEMENT. I THINK IT'S IMPORTANT BECAUSE, AGAIN, I EMPHASIZE IF THE PLAINTIFFS COULD PLEAD AROUND THIS, THEY WOULD HAVE, AND THEY CAN'T. SO PLAINTIFFS SAY THAT THEY PAID MORE TO RECEIVE ESSENTIALLY THE SAME, IF NOT INFERIOR PERFORMANCE, IN ADDITION TO THE $299 COST OF THE IPHONE 3G, THE CELLULAR CARRIER, AT&TM, CHARGED CONSUMERS $10.00 PER MONTH FOR 24 MONTHS TO SIGN UP FOR 3G NETWORK COVERAGE AND A $28.00 ADDITIONAL EQUIPMENT CHARGE. NOW, THE 24-MONTH SIGN UP IS THE WIRELESS SERVICE AGREEMENT. CUSTOMERS WERE REQUIRED TO ENTER INTO A TWO-YEAR DATA PLAN CONTRACT WITH THE CELLULAR CARRIER -- THAT WOULD BE THE WSA -- TO USE THEIR IPHONE 4G.

THEN THE SECOND PARAGRAPH I WOULD DRAW THE COURT'S ATTENTION TO, BECAUSE I THINK IT'S THE SECOND SHOE DROPPING, IF YOU WOULD, IS PARAGRAPH 65, WHICH SAYS THAT AS A RESULT OF APPLE'S MATERIAL MISREPRESENTATIONS AND OMISSIONS OF MATERIAL FACTS, PLAINTIFFS AND CLASS MEMBERS ARE, QUOTE, LOCKED INTO A TWO-YEAR SERVICE PLAN. THAT'S THE WSA. WITH, DUE TO HARDWARE

AND/OR SOFTWARE DEFICIENCIES IN THE IPHONE 3G, BUT YOUR HONOR'S HEARD THAT ONE, LIMITED SUSTAINED -- HERE'S WHAT'S IMPORTANT -- LIMITED SUSTAINED 3G CONNECTIVITY AND SPEED.

SO THIS IS THE SAME OLD CLAIM DRESSED UP IN NEW CLOTHING. THE IPHONE DIDN'T HAVE SUFFICIENT SPEED AND CONNECTIVITY ON THE NETWORK; PLAINTIFFS WERE LOCKED INTO THE WSA CONTRACT, WITH THE R CLAUSE; PLAINTIFFS DIDN'T GET WHAT THEY BARGAINED FOR.

AND THE COURT'S CONCLUSION IN THE DECEMBER 1ST ORDER IS EXACTLY RIGHT, AND IT'S NOT CHANGED. THAT WAS REFERRING TO THE REFERENCES TO THE HARDWARE AND SOFTWARE MODIFICATIONS AND APPLE'S SUPPOSED DECEPTIVE ADVERTISING AND SO FORTH, THAT THESE COSMETIC MODIFICATIONS COULD NOT ALTER THE CORE ALLEGATION THAT THE 3G NETWORK COULD NOT ACCOMMODATE IPHONE USERS AND THAT PLAINTIFFS WERE DECEIVED INTO PAYING HIGHER RATES FOR SERVICE WHICH COULD NOT BE DELIVERED ON THE 3G NETWORK.

THAT IS AN ALLEGATION THAT PLAINTIFFS PAID TOO MUCH UNDER THE WSA, THAT THEY DIDN'T GET THE SERVICE THAT THEY BARGAINED FOR UNDER THE WSA, AND IT IS ALL ABOUT AT&T'S NETWORK, AT&T'S SERVICE. THE CLAIMS ABOUT THE PHONE ARE INEXTRICABLY INTERTWINED WITH THE CLAIMS AGAINST AT&T.

LET ME ADD ONE BE OTHER THING.

THE PLAINTIFFS STILL HAVE A RICO CLAIM. THEY DIDN'T DROP IT. THE RICO CLAIM SAYS APPLE AND AT&TM ACTED WITH A COMMON PURPOSE TO CAUSE MORE PEOPLE TO BUY PHONES AND TO SIGN

UP FOR SERVICE UNDER THE WSA. THIS CASE IS PREGNANT WITH THE WSA, AND IT IS PREGNANT WITH ALLEGATIONS OF INTERCONNECTED CONDUCT AGAINST APPLE AND AT&T.

SO, PLAINTIFFS' CLAIM RELY ON THE WSA, IF YOU WILL, UNDER THE FIRST PRONG OF *MUNDI*, OR YOUR HONOR'S DECISION IN THE AT&TM CASE. BUT EVEN WITHOUT RESPECT TO THE FIRST PRONG THEIR CLAIM'S UNDER, THE SECOND PRONG ARE INDUBITABLY INTERTWINED WITH THE WSA.

IT IS NOT POSSIBLE TO ARGUE WITH A STRAIGHT FACE THAT THE CLAIMS AGAINST APPLE AND AT&T M ARE COMPLETELY INTERCONNECTED, INTERTWINED, ALL ABOUT AT&T'S NETWORK, AND YOU CANNOT SEPARATE THE PHONE SPEED FROM SERVICE ON THE NETWORK AND SERVICE UNDER THE WSA.

THE COURT: I UNDERSTAND THAT ARGUMENT. WHY DON'T YOU SAVE THE REST OF YOUR TIME FOR REBUTTAL?

MS. PREOVOLOS: THAT'S FINE, YOUR HONOR.

THE ONE THING I DID WANT TO ADD IS JUST TO REFERENCE OUR FILING OF JUDGE BARBIER'S DECISION IN THE *MMS* MDL, WHICH WAS A DECISION ISSUED AFTER THE BRIEFING IN THIS CASE. JUDGE BARBIER, WHO HAS THE MDL IN THE EASTERN DISTRICT OF LOUISIANA, DEALT WITH PRETTY MUCH EXACTLY THE SAME ISSUES HERE. THE UNDERLYING CLAIM IS A BIT DIFFERENT. THE UNDERLYING CLAIM IS THAT SO-CALLED MOBILE MESSAGES SERVICE, OR MMS, WHICH IS TEXTING PICTURES ON THE PHONE, WAS PROMISED EARLIER THAN IT WAS PROVIDED; THAT BECAUSE THE ORIGINAL CLAIM -- THE ORIGINAL

COMPLAINT, VERY MUCH LIKE THIS ONE, SAID THAT THAT PROBLEM WAS DUE TO INADEQUACIES OF THE AT&TM NETWORK, AND APPLE JUST MISREPRESENTED THOSE INADEQUACIES; PLAINTIFFS BASICALLY TRIED TO GET AWAY FROM THAT, PLED A LOT OF DIFFERENT THINGS, PLED, OH, NO, IT'S ALL ABOUT APPLE ADVERTISING, DISMISSED AT&T. JUDGE BARBIER SAID, NO, AT&T IS A NECESSARY PARTY, BUT I'M NOT GOING TO REQUEST THEY BE JOINED BECAUSE THE CLAIMS AGAINST THEM WOULD BE REQUIRED TO BE ARBITRATED. THEN HE WENT ON AND MADE THE EQUITABLE ESTOPPEL FINDING THAT WE'RE ASKING THE COURT TO MAKE TODAY.

JUDGE BARBIER HELD THAT THE PLAINTIFFS IN THAT CASE WERE EQUITABLY ESTOPPED FROM REFUSING TO ARBITRATE THEIR CLAIMS AGAINST APPLE BECAUSE THEIR CLAIMS WERE INTERTWINED WITH THE WSA AND THEIR CLAIMS AGAINST AT&T AND APPLE WERE INEXTRICABLY INTERCONNECTED. SO JUDGE BARBIER MADE THE FINDING JUST A COUPLE OF WEEKS AGO ON MARCH 21ST THAT WE'RE ASKING THE COURT TO MAKE HERE TODAY.

AND INTERESTINGLY, OR IMPORTANTLY, I THINK, IN LIGHT OF ISSUES THAT WE ARE AWARE OF REGARDING THE *MUNDI* CASE, JUDGE BARBIER FLATLY SAID, BECAUSE HE READ CASES ACROSS THE COUNTRY, THE CASE FOR EQUITABLE ESTOPPEL WAS MUCH STRONGER WHERE ARBITRATION WAS BEING SOUGHT TO BE COMPELLED ON EQUITABLE ESTOPPEL GROUNDS AGAINST A SIGNATORY PLAINTIFF AS OPPOSED TO A NONSIGNATORY PLAINTIFF.

HE NOTED AN EARLIER DECISION IN THE NORTHERN DISTRICT

THE *AMISIL* CASE, AS WELL AS THE BRIDES CASE IN THE FIFTH CIRCUIT, AND OTHER CASES AROUND THE COUNTRY, WHERE EQUITABLE ESTOPPEL PRINCIPLES WERE HELD TO SUPPORT COMPELLING ARBITRATION AGAINST A NONSIGNATORY DEFENDANT WHERE CLAIMS WERE BROUGHT BY A -- TO AFFIRM A COMPELLING ARBITRATION BY A NONSIGNATORY DEFENDANT WHERE PLAINTIFFS WERE PURSUING CLAIMS AGAINST BOTH A SIGNATORY AND NON-SIGNATORY DEFENDANT.

AND HE FINALLY NOTED -- AND I THINK THAT'S IMPORTANT TO THIS CASE. I WILL OBVIOUSLY COMMEND JUDGE BARBIER'S OPINION TO THE COURT. IT'S NOT BINDING, BUT IT'S SQUARE ON POINT. SAME PARTIES EXCEPT FOR THE DIFFERENT PLAINTIFFS.

BUT JUDGE BARBIER EMPHASIZED THE FACT THAT WHETHER AT&T WAS A PARTY OR NOT, THE NATURE OF THE CLAIMS MEANT THAT AT&T WAS GOING TO BE DRAGGED INTO THE CASE, AND THAT RESULT WAS VERY CONSISTENT WITH NOTIONS OF DETRIMENTAL RELIANCE AND -- AND MEANT THAT THE INTENT OF THE FEDERAL ARBITRATION ACT REALLY WOULD BE FRUSTRATED IF THE CLAIMS AGAINST APPLE WERE NOT SENT TO ARBITRATION, BECAUSE THE RESULT THEN WOULD BE THAT A PARTY THAT HAD SIGNED THE AGREEMENT WOULD NOT ENJOY THE BENEFITS OF ARBITRATION BUT WOULD BE PULLED, AT A MINIMUM, INTO DISCOVERY AND LITIGATION.

THE COURT: THANK YOU.

MR. MANSFIELD: GOOD MORNING, YOUR HONOR. ALAN MANSFIELD. I AM GOING TO JUST BRIEFLY ADDRESS THE QUESTION ABOUT THE FORMATION OF THE CONTRACT, AND MR. BOWER IS GOING TO

BE ADDRESSING THE QUESTION OF EQUITABLE ESTOPPEL. MR. -- WHEN WE GET TO THE ISSUE OF *KOLEV* AND ITS IMPLICATIONS, MR. HAIL WILL BE ADDRESSING THAT QUESTION.

AS FAR AS THE FORMATION OF THE CONTRACT, JUST SO WE'RE ALL CLEAR, WHAT OUR POSITION WAS WAS THAT THE LAW OF CALIFORNIA, AS WELL AS THAT OF ARKANSAS, FLORIDA, MARYLAND, NORTH CAROLINA, NEW JERSEY, NEW YORK, AND WASHINGTON, IS THAT ONE JUDGES THE QUESTION OF UNCONSCIONABILITY AT THE TIME OF THE FORMATION OF THE CONTRACT. THE TIME OF THE FORMATION OF THE CONTRACT WAS WHEN THE PERSONS BOUGHT THEIR PHONES, WHICH WAS BETWEEN JULY OF 2008 AND DECEMBER OF 2008.

AT&T SUBSEQUENTLY AMENDED THEIR CONTRACT IN MARCH OF 2009. IN THEIR PAPERS THEY SAY WE DID THAT BY VIRTUE OF A MAILING. THEY DIDN'T SAY IT WAS AS A RESULT OF A MAILING THAT ALL THE PLAINTIFFS RECEIVED, EVEN THOUGH IT'S PRESUMABLY THEY WOULD HAVE THAT INFORMATION, BECAUSE THEY SPECIFICALLY SAID IT WAS ONLY THE PEOPLE WHO WERE RECEIVING THEIR BILLS IN THE MAIL, NOT PEOPLE WHO RECEIVED THEIR BILLS ON LINE, AND THAT IS THE PROVISION THAT WAS BEING DISCUSSED IN CONCEPCION.

SO OUR POSITION THAT WE WERE TRYING TO MAKE CLEAR WAS THAT: DID PEOPLE ENTER INTO A CONTRACT AS PART OF THE REQUIREMENT OF BUYING A PHONE? YES. DID THOSE PEOPLE HAVE THE PROVISION THAT THEY ARE ATTEMPTING -- THAT AT&T IS ATTEMPTING TO ENFORCE? NO. DO YOU JUDGE UNCONSCIONABILITY AT THE TIME THAT THE CONTRACT IS FORMED? YES. THEREFORE, IN LIGHT OF

THAT, ALL OF THE 97 EXHIBITS THAT THEY HAD TO SUBMIT TO TRY TO CONVINCE THIS COURT THERE WAS A CONTRACT ARE IRRELEVANT.

IF THERE WAS, IN FACT, A CLEAR PROVISION, THEY SIMPLY WOULD HAVE SUBMITTED 13 AGREEMENTS; SAID, HERE ARE THE AGREEMENTS, AND THAT'S THE END. INSTEAD, THEY HAD TO BRING OUT ALL THESE OTHER AGREEMENTS TO TRY TO CONVINCE THIS COURT THAT THERE WAS, IN FACT, ONE.

OUR POSITION IS SIMPLY YOU JUDGE UNCONSCIONABILITY AT THE TIME OF THE FORMATION. THAT WOULD HAVE BEEN BEFORE THIS PROVISION WAS IN EFFECT. AND SO, THEREFORE, ALL OF THE OTHER MACHINATIONS THAT AT&T TRIES TO DO TO SAY THIS IS THE RELEVANT PROVISION THAT APPLIES IS FINE.

IF WE WERE TALKING ABOUT THE PRIOR ITERATIONS OF THE PROVISION, THAT WOULD BE A DIFFERENT DISCUSSION, BUT THAT'S NOT WHAT WE'RE TALKING ABOUT.

THAT WAS THE POINT I WANTED TO CLARIFY.

THE COURT: LET ME SEE IF I FOLLOW THAT.

MR. MANSFIELD: SURE.

THE COURT: IS IT YOUR POSITION THAT THIS IS A CIRCUMSTANCE WHERE THE AT&T MOBILITY CONTRACT IS UNCONSCIONABLE?

MR. MANSFIELD: CORRECT. WELL, THAT PROVISION OF IT. THE CLASS ACTION WAIVER PROVISION IS UNCONSCIONABLE.

THE COURT: WHAT DO YOU RELY ON FOR THAT?

MR. MANSFIELD: THAT THE CONTRACT WAIVER PROVISION IS

UNCONSCIONABLE. THE QUESTION THERE IS THAT THE PROVISION THAT WAS DISCUSSED IN CONCEPCION WAS A DIFFERENT PROVISION.

THE COURT: I UNDERSTAND THAT. BUT WHAT IS YOUR POSITION THAT THIS CONTRACT DATING BACK TO WHENEVER --

MR. MANSFIELD: WHENEVER IT WAS?

THE COURT: -- IF I ACCEPT THAT ARGUMENT IS UNCONSCIONABLE.

MR. MANSFIELD: THE QUESTION THERE WAS -- THE POINT THAT WE RAISED WAS IN LIGHT OF THE CONTINUING CASE LAW THAT HAS ADDRESSED THE QUESTION OF CLASS ACTION WAIVERS IN CALIFORNIA AS WHAT LAW HAS BEEN DEVELOPED. IN OTHER WORDS, THERE'S THE QUESTION OF -- THE QUESTION THAT WAS RAISED IN *DISCOVER BANK* WAS A PARTICULAR PROVISION. THE SUPREME COURT IN *CONCEPCION* SAID THAT PROVISION AS IT WAS PHRASED WAS UNCONSCIONABLE.

IT CAME -- AND THAT IS THE MATTER AT&T HAS BEEN ARGUING.

OUR POSITION WAS THE PRIOR PROVISIONS WHICH DIDN'T HAVE SOME THOSE PROTECTIONS THAT SUPPOSEDLY THE COURT FOUND APPROPRIATE IN CONCEPCION PRESENT IN THE ORIGINAL CONTRACT OR AT&T MADE NO ATTEMPT TO SHOW THAT.

THOSE PROVISIONS WERE THE PROVISIONS THAT WE SAID MADE THIS MORE OF A CLASS ACTION WAIVER PROVISION; IN OTHER WORDS, NOT A PROVISION COMPELLING ARBITRATION, BUT A PROVISION THAT SAID IF YOU BRING A CLASS ACTION -- IF THIS PROVISION'S STRUCK DOWN; IN OTHER WORDS, A PROVISION THAT SAYS A CLASS

ACTION WAIVER IS AN UNCONSCIONABLE OR ILLEGAL, THE ENTIRE ARBITRATION CLAUSE GOES A WAY, THAT PROVISION IS WHAT WE WERE SAYING IS UNCONSCIONABLE BECAUSE IT ESSENTIALLY CREATED THE UNFAIR BARGAINING POWER AND THE INABILITY OF AN INDIVIDUAL --

THE COURT: I UNDERSTAND YOUR ARGUMENT. I JUST WAS WONDERING WHAT YOUR AUTHORITY FOR THAT WAS.

MR. MANSFIELD: THE AUTHORITY WOULD BE CASES SUCH AS *BROUGTEN* AND THE OTHER CASES IN THE SUPREME COURT THAT HAVE ADDRESSED THAT ISSUE.

THE COURT: ALL RIGHT.

MR. MANSFIELD: AS FAR AS THE QUESTION -- SORRY.

THE COURT: I UNDERSTAND WHAT YOUR ARGUMENT IS, SO LET'S MOVE ON TO THE OTHER PARTS.

MR. MANSFIELD: THANK YOU, YOUR HONOR.

MR. BOWER: GOOD MORNING, YOUR HONOR. DAVID BOWER, FARUQI & FARUQI. I'M GOING TO TACKLE JUST THE EQUITABLE ESTOPPEL ISSUE AND TRY TO ADDRESS THE POINTS THAT ARE RAISED IN THE REPLY AS WELL AS ORAL ARGUMENTS TODAY.

I WANT TO START PROBABLY FROM THE END OF HER ARGUMENT WHERE SHE TALKED ABOUT JUDGE BARBIER'S DECISION WHICH WAS SUBMITTED TO THE COURT BY THE DEFENSE A FEW DAYS AGO, AND I'M ASSUMING THE COURT'S HAD AN OPPORTUNITY TO READ THAT DECISION.

THAT DECISION PRETTY MUCH POINTS OUT MY POSITION WITH REGARD TO THE CASE, AND THAT'S -- IN THAT CASE THEY FOUND THAT THERE WAS -- THAT EQUITABLE ESTOPPEL DOES APPLY, AND THEY FOUND

IT DOES APPLY BECAUSE OF THE INTERTWINING OF THE CONTRACTS BETWEEN AT&T AND APPLE. BUT IN THAT CASE, THE ISSUE AND THE ONLY ISSUE REALLY BEFORE THAT COURT WAS THE FUNCTIONING OF THE MMS SYSTEM, AND THE MMS SYSTEM IS BASICALLY A WAY TO TAKE YOUR IPHONE AND TRANSMIT A PHOTOGRAPH OR A MOVIE TO SOMEONE ELSE AT A HIGHER RATE OF SPEED THAN YOU COULD BY JUST TEXTING. THAT IS A SYSTEM THAT'S TOTALLY RELIANT ON THE SYSTEM YOU'RE USING. IT WAS TOTALLY RELIANT ON THE AT&T SYSTEM.

IN OTHER WORDS, THE PROBLEM OCCURRED BECAUSE AT&T JUST WASN'T READY FOR THE VOLUME OF MMS THAT WAS BEING USED, AND THEY ADMITTED THAT, AND THAT'S WHERE THAT CASE AROSE FROM. IT AROSE FROM THE FACT THAT AT&T COULDN'T HANDLE THE VOLUME THAT THE IPHONE WAS BEING THRUST UPON THEM.

THE COURT: YOU ARE CITING THAT TO DISTINGUISH IT FROM THIS CASE?

MR. BOWER: THE DIFFERENCE BETWEEN THAT AND OUR CASE IS OUR CASE, WE CITE TO THE FACT THE PHONE ITSELF, EITHER THE HARDWARE AND/OR THE SOFTWARE ITSELF THAT WAS CREATED BY APPLE. AT&T HAD NOTHING TO DO WITH MANUFACTURING THE PHONE. THEY HAD NOTHING TO DO WITH MANUFACTURING THE SOFTWARE. IT'S THE SOFTWARE AND THE HARDWARE OF THE PHONE THAT WAS MALFUNCTIONING WITH REGARD TO OUR CASE. OUR CASE IS NOT A CASE OF HOW THE SYSTEM WORKED ON AT&T'S PLATFORM. IT WOULD HAVE BEEN THE SAME -- WE WOULD HAVE HAD THIS CASE WHETHER OR NOT --

THE COURT: WHERE IN YOUR COMPLAINT DO YOU MAKE THAT

CLEAR? IN OTHER WORDS, WHAT I UNDERSTAND YOU NOW TO BE SAYING IS THAT THIS PHONE CANNOT OPERATE AT THAT THE SPEEDS THAT IT WAS ADVERTISED EVEN IN AN ENVIRONMENT THAT WOULD ALLOW IT TO.

MR. BOWER: CORRECT.

THE COURT: WHERE DO YOU ALLEGE THAT?

MR. BOWER: IT'S SEVERAL PLACES IN OUR COMPLAINT. IF YOU LOOK AT PAGE THREE OF OUR COMPLAINT, PARAGRAPH FIVE, APPLE'S REPRESENTATIONS REGARDING THE IPHONE 3G WERE FALSE AND MISLEADING; THE IPHONE DID NOT RESULT IN THE TREMENDOUS VALUE OR JUMP IN TECHNOLOGY THAT WAS TWICE AS FAST AS APPLE UNIFORMLY PRESENTED TO CONSUMERS.

THE COURT: THAT DOESN'T TELL ME THE REASON HAVING TO DO SOLELY WITH THE HARDWARE OR SOFTWARE THAT IS -- I GUESS IT WOULD BE FIRMWARE.

MR. BOWER: LET ME REFER TO THE PARAGRAPH THAT WAS CITED BY DEFENSE COUNSEL, WHICH IS PARAGRAPH 65 ON PAGE 21. SHE CITED, OF COURSE, TO THE PORTION THAT SAYS, AS A RESULT OF THE MISREPRESENTATIONS BY APPLE AND OMISSIONS OF THE MATERIAL FACTS, PLAINTIFF AND CLASS MEMBERS ARE LOCKED INTO A TWO-YEAR WARRANTY PLAN DUE TO HARDWARE AND/OR SOFTWARE DEFICIENCIES IN THE 3G. SHE DIDN'T POINT OUT THAT. SHE ONLY POINTED OUT WHAT SHE WANTED YOU TO HEAR.

IN THE NEXT SENTENCE, A SUBSTANTIAL FACTOR IN ENTERING INTO THOSE AGREEMENTS WAS THE REPRESENTATION THAT THE IPHONE 3G WOULD OPERATE AS A TRUE 3G INTERNET ACCESS DEVICE.

THE COURT: HOW CAN IT OPERATE --

MR. BOWER: WHICH IT DOES NOT --

THE COURT: HOW CAN IT OPERATE?

MR. BOWER: IT CAN ONLY OPERATE BY WAY OF THE SOFTWARE THAT APPLE PUTS INTO THE PHONE AND BY WAY OF THE PHYSICAL PHONE ITSELF AND HOW IT'S MADE UP.

IT HAS NOTHING TO DO WITH THE NETWORK. WE WOULD HAVE HAD THIS SAME PROBLEM HAD IT BEEN VERIZON, T-MOBILE, SPRINT. IT WOULDN'T HAVE MATTERED WHAT PLATFORM IT WAS ON.

THE COURT: WHERE DO YOU ALLEGE THAT?

MR. BOWER: PARDON ME?

THE COURT: WHERE DO YOU ALLEGE THAT?

MR. BOWER: IT'S ALLEGED HERE THAT THE PROBLEM IS WITH THE PHONE. IT'S NOT WITH THE NETWORK. IT'S NOT -- WE DON'T ALLEGE IN THE COMPLAINT THAT IT'S THE NETWORK PROBLEM OR THAT IT'S A NETWORK PROBLEM.

EVEN WHERE IT'S -- THEY ARGUE IN THEIR REPLY BRIEF THAT WE ARE ALLEGING THAT THERE'S AN INCREASED COST BECAUSE OF THE SLOWNESS OF THE PHONE, AND THAT'S THAT INCREASED COST THAT AT&T WAS ABLE TO CHARGE BECAUSE THE PHONE WAS SLOW OCCURRED BECAUSE THE PHONE WAS SLOW, NOT BECAUSE THEIR NETWORK WAS SLOW.

THE COURT: WHY WOULD AT&T ENTER INTO IT AT ALL THEN?

MR. BOWER: ENTER INTO?

THE COURT: THE CHARGES.

MR. BOWER: AT&T WAS ABLE TO CHARGE MORE BECAUSE WE

WERE ON THEIR SYSTEM LONGER. BUT THAT'S NOT -- WE'RE NOT BLAMING AT&T FOR THAT FACT. WE'RE BLAMING THE PHONE FOR THAT. THAT'S WHAT DRAWS US FAR APART FROM ANY OF THESE OTHER CASES THAT HAVE BEEN CITED. THERE'S JUST --

THE COURT: SO YOU WOULD HAVE AT&T JOIN WITH YOU IN THIS CASE? IN OTHER WORDS, THEY ARE HARMED BECAUSE YOU AREN'T SEEKING A REMEDY -- YOU AREN'T SEEKING ANY MONEY BACK FOR HAVING PAID THE MONEY TO AT&T?

MR. BOWER: WELL, IT'S AN ELEMENT OF DAMAGE THAT WAS -- BUT IT'S NOT BECAUSE OF AT&T. WE WOULD HAVE TO PAY VERIZON MORE. WE WOULD HAVE TO PAY SPRINT MORE. IT WOULDN'T HAVE MATTERED.

THE COURT: HOW DO YOU KNOW?

MR. BOWER: BECAUSE THE PHONE IS DEFECTIVE. THAT'S AN ISSUE FOR A TRIER OF FACT TO DECIDE, YOUR HONOR. AS TO THE PHONE BEING DEFECTIVE IS AN ISSUE FOR A TRIER OF FACT TO DECIDE, BUT ULTIMATELY THAT'S OUR ALLEGATION.

OUR ALLEGATION IS THAT THE PHONE IS DEFECTIVE, NOT THAT AT&T'S NETWORK WAS DEFECTIVE. WE DON'T HAVE -- THERE'S NOWHERE IN THE COMPLAINT WHERE WE ALLEGE THAT AT&T'S NETWORK WAS DETECTIVE AND THAT'S WHY THE PHONE DIDN'T WORK. IT'S TOTALLY THE OPPOSITE WAY.

THE COURT: LET ME ASSUME I UNDERSTAND THAT ARGUMENT. LET'S MOVE ON TO THE MAGNUSON-MOSS PART OF THIS.

MR. HAIL: GOOD MORNING, YOUR HONOR. JIM HAIL FOR

THE PLAINTIFFS.

RECENTLY THE -- IN COUNT FIVE ON PAGE 32 AND 33 OF THE OPERATIVE COMPLAINT, THE PLAINTIFFS ALLEGE A CLAIM FOR MAGNUSON-MOSS, AND RECENTLY THE -- LAST SEPTEMBER, THE NINTH CIRCUIT IN THE *KOLEV VERSUS U MOTORS WEST* DECISION HELD MAGNUSON-MOSS CLAIMS ARE NOT SUBJECT TO PREDISPUTE BINDING ARBITRATION. BASED ON THAT DECISION, WE DO NOT BELIEVE THAT YOUR HONOR CAN SEND OUR MAGNUSON-MOSS CLAIMS TO ARBITRATION.

NOW, THE DEFENDANTS HAVE CLAIMED THAT A SUBSEQUENT SUPREME COURT DECISION, *COMPUCREDIT VERSUS GREENWOOD*, HAS IN EFFECT OVERRULED THE *KOLEV* CASE.

NOW, THE -- THIS IS NOT THE CASE, BUT THE NINTH CIRCUIT IN *MILLER VERSUS GAMMIE* HAS SET FORTH THE STANDARD FOR DETERMINING WHETHER THIS COURT CAN DISREGARD THE *KOLEV* CASE WHICH IS OTHERWISE SQUARE ON POINTS IN THIS CASE. TO DISREGARD *KOLEV*, THERE WOULD HAVE TO BE THE SUBSEQUENT SUPREME COURT HERE. *COMPUCREDIT* WOULD HAVE TO BE CLEARLY IRRECONCILABLE. IT'S NOT CLEARLY IRRECONCILABLE.

THE SITUATION, THE STATUTES ARE DIFFERENT. IN *KOLEV* WE HAVE AN EXPRESSED ALLEGATION OF CONGRESSIONAL AUTHORITY TO THE FTC FOR RULEMAKING AUTHORITIES TO CREATE RULES WITH RESPECT TO INFORMAL DISPUTE RESOLUTION.

I THINK IT'S IMPORTANT TO UNDERSTAND WHAT THE *MILLER* COURT FOUND WOULD BE IRRECONCILABLE CONFLICT FOR THIS COURT TO IGNORE THE *KOLEV* CASE.

IN *MILLER* THE NINTH CIRCUIT HAD A STANDING PRECEDENT THAT PROVIDED BLANKET IMMUNITY FOR 1983 CLAIMS TO CERTAIN SOCIAL WORKERS. NOW, SUBSEQUENT TO THAT DECISION, THERE HAD BEEN SEVERAL SUPREME COURT CASES IN WHICH IT SAYS THAT THE APPROACH FOR DETERMINING ABSOLUTE IMMUNITY WAS A MORE FUNCTIONAL APPROACH AND NOT BLANKET IMMUNITY. THE NINTH CIRCUIT FOUND THAT'S THE TYPE OF DIRECT CONFLICT WITH A SUBSEQUENT SUPREME COURT DECISION THAT WOULD ALLOW A DISTRICT COURT OR ANOTHER PANEL OTHER THAN THE NINTH CIRCUIT TO IGNORE A PRIOR PANEL DECISION.

THE COURT: LET ME CLARIFY YOUR POSITION WITH RESPECT TO YOUR FIFTH COUNT. THIS IS A CIRCUMSTANCE WHERE THE WARRANTY THAT YOU SEEK TO ENFORCE IS A LIMITED WARRANTY RATHER THAN A FULL WARRANTY, CORRECT?

MR. HAIL: IT'S APPLE'S WRITTEN WARRANTY.

THE COURT: BUT IT'S A LIMITED WARRANTY; ALTHOUGH EXPRESS, IT'S A LIMITED WARRANTY.

MR. HAIL: I BELIEVE SO.

THE COURT: ARE THERE ANY STATUTORY PROVISIONS OF MAGNUSON-MOSS OR ANY REGULATIONS UNDER IT THAT SPEAK TO THE NATURE OF A LIMITED WARRANTY CLAIM WITH RESPECT TO THE REMEDIES?

MR. HAIL: I THINK THE IMPORTANT THING WITH THE *KOLEV* CASE, YOUR HONOR, IS THAT IT'S THE PREDISPUTE BINDING ARBITRATION THAT THE CONSUMER CANNOT BE SENT TO WITHOUT HAVING

THE OPPORTUNITY TO CONSENT AFTER THE CASE HAS BEEN DEVELOPED.

THE COURT: I'M NOT SURE YOU'RE ANSWERING MY QUESTION. I'VE READ THE CASE, AND I UNDERSTAND THE LANGUAGE OF IT. I'M NOT SURE THAT IT SPEAKS TO THE ISSUE I'M NOW FACED WITH, WHICH IS THE LIMITED WARRANTY PROVISIONS OF MAGNUSON-MOSS. THEY'RE DIFFERENT FROM THE FULL WARRANTY PROCEDURES THAT ARE SET FORTH IN MAGNUSON-MOSS.

AS I UNDERSTAND IT, WHEN YOU ARE ALLEGING A LIMITED WARRANTY, YOU ARE ESSENTIALLY INCORPORATING INTO THIS FEDERAL STATUTE THE STATE CLAIM, BREACH OF A LIMITED WARRANTY. SO IF YOU INCORPORATE A STATE CLAIM, IS THERE ANYTHING IN MAGNUSON-MOSS OR ITS REGULATIONS THAT SAY YOU DON'T INCORPORATE ALL OF THE LAW THAT AFFECTS THE STATE CLAIM?

THAT'S WHAT I'M TRYING TO FIGURE OUT WITH YOU AND YOUR OPPONENTS AS TO WHETHER OR NOT I'M -- IF THERE WERE A STRAIGHTFORWARD STATE IMPLIED OR LIMITED WARRANTY CLAIM, IT WOULD BE SUBJECT TO ARBITRATION, CORRECT?

MR. HAIL: NO, I THINK, YOUR HONOR, THE MAGNUSON-MOSS DOES INCORPORATE VIOLATIONS OF STATE LAW INTO THE MAGNUSON-MOSS ACT AND BASICALLY -- HAVING THE WRITTEN WARRANTY ITSELF ALONE UNDER *KOLEV*, IT WOULD BE ENOUGH TO PREVENT THE ARBITRATION FROM GOING FORWARD. WE LITIGATE THAT IN THE COURT.

THE COURT: BUT NOWHERE DOES JUDGE REINHARDT SPEAK TO A FULL OR LIMITED WARRANTY AS MAKING A DISTINCTION, AND SO WE'RE FACING FOR THE FIRST TIME IN THIS CASE THAT ISSUE. SO

THAT'S WHAT, AS I SEE IT, IT MIGHT BE A MATTER OF FIRST IMPRESSION.

MR. HAIL: NO, I AGREE WITH YOU, YOUR HONOR. I DON'T BELIEVE THAT JUDGE REINHARDT MENTIONS THAT. BUT BASED ON THE FTC'S RULING AND ITS REGULATION, I DON'T THINK IT MATTERS AS LONG AS THERE'S A WRITTEN WARRANTY.

THE COURT: LET ME ASK YOU THIS: WOULD YOU AGREE THAT THERE ARE CASES WHERE THE STATE LAW CLAIM IS DISMISSED WHERE BOTH A MAGNUSON-MOSS AND A STATE LAW CLAIM ARE ASSERTED, AND, AS A CONSEQUENCE OF THE DISMISSAL OF THE STATE LAW CLAIM, THE MAGNUSON-MOSS CLAIM IS ALSO DISMISSED?

MR. HAIL: I UNDERSTAND THERE ARE CERTAIN PARTS OF MAGNUSON-MOSS THAT INCORPORATE STATE LAW AND THAT MAYBE THE EFFECT. BUT RIGHT HERE WE'RE JUST DISCUSSING THE ISSUE OF WHETHER THE MAGNUSON-MOSS CASES CAN BE SENT TO ARBITRATION IN THE FIRST PLACE. UNDER THE *KOLEV* CASE IT SAYS IT CANNOT BE.

THE COURT: RIGHT, BUT YOU DIDN'T ANSWER THAT QUESTION EITHER.

BUT IT SEEMS TO ME THAT IF I ANSWER THE QUESTION YES, THAT THERE ARE CASES WHERE THE STATE LAW CLAIM HAVING BEEN DISMISSED AUTOMATICALLY RESULTS IN A DISMISSAL OF MAGNUSON-MOSS, THE QUESTION BECOMES THEN HOW FAR DOES THAT TIE GO?

IN OTHER WORDS, IF YOU WOULD ARBITRATE THE STATE LAW CLAIM, WHY CAN'T YOU ARBITRATE THE LIMITED WARRANTY

MAGNUSON-MOSS CLAIM? NOW, I DON'T HAVE AN ANSWER TO THAT. THAT'S WHAT I'M HOPING TO GET FROM YOU.

MR. HAIL: RIGHT. I THINK WE CAN PROCEED WITH THE STATE BREACH OF WARRANTY CASES THAT ARE INCORPORATED THROUGH MAGNUSON-MOSS BECAUSE OF THE EFFECT OF *KOLEV* THAT PREVENTS MAGNUSON-MOSS CASES BEING SENT TO ARBITRATION.

THE COURT: SO YOU WOULD HAVE ME READ MAGNUSON-MOSS AS -- I MEAN, *KOLEV* AS SAYING ALL MAGNUSON-MOSS CLAIMS, WHETHER FULL OR LIMITED WARRANTIES, ARE NOT SUBJECT TO PRELAWSUIT ARBITRATION?

MR. HAIL: YES, YOUR HONOR.

THE COURT: DO YOU HAVE A CASE TO THAT EFFECT?

MR. HAIL: WELL, *KOLEV* ADDRESSES IT BROADLY IN THE SENSE THAT MAGNUSON-MOSS CASES ARE NOT ALLOWED TO GO, AND ADDRESSES THE RULE-MAKING AUTHORITY THAT CONGRESS HAS SENT TO THE FTC, AND THE PURPOSE IS TO PROTECT CONSUMERS, ALLOW THEM TO PURSUE THEIR CLAIMS IN A COURT OF LAW.

I WOULD ALSO POINT YOUR HONOR TO WHAT APPLE DOES NOT -- FOOTNOTE TWO. APPLE DOES NOT HAVE AN ARBITRATION AGREEMENT IN ITS WARRANTY AND HAS BEEN TRYING TO PROCEED THROUGH ARBITRATION THROUGH EQUITABLE ESTOPPEL. IN FOOTNOTE TWO IT PROVIDES ANOTHER REASON FOR APPLE TO BE WITHHELD -- TO BE KEPT OUT OF -- OUR CLAIMS AGAINST APPLE TO BE KEPT OUT OF ARBITRATION IN THE SENSE THAT --

THE COURT: DO YOU DISTINGUISH THE CREDIT REPAIR

ORGANIZATION ACT THAT WAS THE SUBJECT OF THE SUPREME COURT'S DECISION IN THIS *COMPUCREDIT VERSUS GREENWOOD* CASE FROM THE CIRCUMSTANCE THAT THE COURT IS FACING NOW WITH MAGNUSON-MOSS?

MR. HAIL: MOST DEFINITELY, YOUR HONOR.

THE COURT: HOW? WHAT IS THE DISTINCTION?

MR. HAIL: FIRST YOU HAVE AN EXPRESSED ALLEGATION OF RULE-MAKING AUTHORITY TO THE FTC. UNDER THAT RULE-MAKING AUTHORITY, THE FTC HAS CREATED RULES THAT PROHIBIT BINDING PREDISPUTE ARBITRATION.

THE COURT: WHERE DOES THE FTC IN ITS RULE MAKING PRECLUDE BINDING PREDISPUTE ARBITRATION OF IMPLIED WARRANTY CLAIMS?

MR. HAIL: WELL, IT'S -- IT DOESN'T BREAK IT DOWN. IT'S WARRANTY UNDER MAGNUSON-MOSS, AND THE MAGNUSON-MOSS CLAIM YOU'VE --

THE COURT: HOW ABOUT, WHERE DOES THE FTC PRECLUDE BINDING PREDISPUTE ARBITRATION OF EXPRESS LIMITED WARRANTY CLAIMS?

MR. HAIL: IT'S SPOKEN BROADLY IN RULE 703, YOUR HONOR.

THE COURT: 703 IS THE ONLY PLACE YOU CAN CITE TO ME? READ THE LANGUAGE OF 703 THAT YOU BELIEVE COVERS EXPRESS LIMITED WARRANTIES.

MR. HAIL: LET ME FIND IT. WELL, I WOULD CITE TO -- REFER YOURSELF TO PAGE 1027 OF *KOLEV* WHERE THE NINTH CIRCUIT

STATED HAD THE FTC'S EXPLANATION -- AND IT'S WITH RESPECT TO ITS 1975 INTERPRETATION OF THE RULE -- CONCLUDED THAT, QUOTE, "REFERENCE WITHIN THE WRITTEN WARRANTY TO ANY BINDING NONJUDICIAL REMEDY IS PROHIBITED BY THE RULE AND THE ACT."

AND IN 1999 IT RESTATED THIS POSITION.

NOW, THE NINTH CIRCUIT GAVE, DUE TO THE TIME BETWEEN THE ORIGINAL INTERPRETATION AND THESE FOLLOW-ON INTERPRETATIONS, A PERIOD OF ABOUT 30 YEARS, IT GAVE SIGNIFICANT DEFERENCE TO THE OPINION OF THE FTC.

THE COURT: WELL, YOU SEE -- YOU KNOW, THAT'S THE DILEMMA. AND I APPRECIATE THAT YOUR ARGUMENT IS UNCLEAR, BECAUSE PERHAPS THIS IS A CASE THAT NEEDS TO BRING CLARITY TO IT, BUT THERE ARE SOME CONGRESSIONAL STATUTES WHICH ON THEIR FACE YOU CAN SEE THE EXPRESS TERMS. HERE WE HAVE A CIRCUMSTANCE WHERE THE MAGNUSON-MOSS ACT ALLOWS CONSUMERS TO ENFORCE WRITTEN AND IMPLIED WARRANTIES IN FEDERAL COURT BY BORROWING STATE LAW CAUSES OF ACTION.

SO WHAT WE'RE DEALING WITH IS, WHAT ARE WE BORROWING WHEN WE BORROW A STATE LAW CAUSE OF ACTION INTO FEDERAL COURT IF THAT STATE LAW CAUSE OF ACTION IS SUBJECT TO ARBITRATION? ARE WE ALSO BORROWING THAT SUBJECTIVITY?

MR. HAIL: NO. I THINK, YOUR HONOR, CONGRESS CAN INCORPORATE STATE LAW INTO THE MAGNUSON-MOSS ACT, AND IT HAS DONE SO FOR CERTAIN WARRANTY PROVISIONS.

WHAT'S IMPORTANT HERE IS THAT THE CONGRESS ALSO

EXPRESSLY DELEGATED RULE-MAKING AUTHORITY TO THE FTC, AND, BASED ON THAT, IT HAS GIVEN ITS CONTRARY CONGRESSIONAL COMMAND THAT FAA DOES NOT OVERRIDE ANOTHER CONGRESSIONAL POLICY AND THESE CLAIMS CANNOT BE SENT TO ARBITRATION.

I'LL POINT YOUR HONOR TO PAGE 1030 OF THE *KOLEV* CASE. NOW, IT WENT THROUGH THE -- A MAJORITY OF THE DECISION GOES THROUGH *KOLEV* DISCUSSES THE FTC'S RULE-MAKING AUTHORITY AND THE RULE IT ADOPTED WITH RESPECT TO THE CHEVRON ANALYSIS.

BUT IT ALSO STATES THAT IT AGREES THE FTC'S LONG-STANDING INTERPRETATION OF MAGNUSON-MOSS AND THAT UNDER THE *MCMAHON* -- UNDER THE SUPREME'S COURT *MCMAHON* TEST, WHICH COMPUCREDIT DID FOLLOW AND DID NOT CHANGE, IT THOUGHT THAT MAGNUSON-MOSS EVINCES IS DIFFERENT RULE AND CONGRESS HAS ALLOWED THESE CASES TO STAY OUT OF ARBITRATION.

THE COURT: SO, WHAT WOULD YOU HAVE ME DO IF INDEED -- BECAUSE WHAT I SEE IN YOUR COUNT FIVE IS INCORPORATING BY REFERENCE YOUR STATE LAW CLAIM. YOU DON'T ALLEGE ANY SEPARATE VIOLATION OF MAGNUSON-MOSS THAT IS INDEPENDENT OF THE STATE LAW CLAIM. YOU INCORPORATE -- ACTUALLY, YOU INCORPORATE EVERYTHING FROM THE PREVIOUS PRECEDING PARAGRAPHS.

SO LET'S ASSUME THAT I WILL AFFIRM MY DECISION TO SEND YOUR STATE LAW CLAIMS TO ARBITRATION, AND LET'S ASSUME FOR THE SAKE OF ARGUMENT THAT YOU CAN OR YOU HAVE STATED A SEPARATE MAGNUSON-MOSS ACT AND THAT THE LAW ALLOWS -- EXEMPTS THAT FROM

ARBITRATION. THEN WHAT? WHAT DOES THE COURT DO NOW AT THIS POINT?

MR. HAIL: WELL, I DON'T BELIEVE YOUR HONOR CAN SEND THOSE, THE MAGNUSON-MOSS CASES, TO ARBITRATION IN THOSE CIRCUMSTANCES.

THE COURT: SO LET'S ASSUME I STAY THOSE HERE AND SEND YOU TO ARBITRATION. IS THAT WHAT YOU WOULD WISH ME TO DO?

MR. HAIL: WE WOULD LIKE TO CONFER WITH OUR CLIENTS ABOUT THAT, IF THAT'S GOING TO BE YOUR DECISION, TO SEE HOW THE CLIENTS WISH TO PROCEED, AND WE CAN CONFER WITH COUNSEL.

THE COURT: I AM GOING TO BE MAKING MY DECISION. BETWEEN NOW AND THE DECISION, I'M NOT GOING TO ASK YOU WHAT YOUR CLIENTS THINK. I'M ASKING WHAT YOUR POSITION IS TODAY AS TO WHAT YOU WOULD WISH ME TO DO.

MR. HAIL: I THINK IT WOULD BE OUR OPPORTUNITY FOR US TO DISCUSS WITH THE CLIENT -- WE WOULD HAVE THE OPPORTUNITY WHETHER WE WANT TO PURSUE IN FEDERAL COURT WITH THE MAGNUSON-MOSS CLAIMS THAT ARE STILL ALIVE IN FEDERAL COURT.

THE COURT: I SEE. ALL RIGHT. LET ME HEAR FROM YOUR OPPONENTS.

MR. HAIL: THANK YOU, YOUR HONOR.

MR. FALK: BRIEFLY, ON THE CONTRACT FORMATION CLAIM, I HAVE TO ADMIT THAT I WAS SHOCKED TO HEAR -- HAVING ARGUED *CONCEPCION* IN THE DISTRICT COURT IN THE SUMMER OF 2008, I WAS SHOCKED TO HEAR THAT *CONCEPCION* APPLIED TO THE 2009 CLAUSE. I

DIDN'T REALIZE THAT EITHER JUDGE SABRAW OR THE SUPREME COURT HAVE SUCH PRESENCE.

THE 2006 CLAUSE WAS AT ISSUE, THE ONE IN ALL OUR DECLARATIONS AND THE ONE THAT APPLIED UP UNTIL EARLY 2009 WAS EXACTLY THE CAUSE AT ISSUE IN *CONCEPCION*.

THE REPORTER: EXCUSE ME, COUNSEL. CAN YOU SLOW DOWN, PLEASE?

THE COURT: YOU ARE ALSO BEING AGGRESSIVE WITH THE MICROPHONE.

MR. FALK: I'LL STAND BACK AND GO MORE SLOWLY.

THE SUPREME COURT IN A FOOTNOTE REFERENCED THE 2009 CLAUSE SAYING IT DID A COUPLE OF OTHER THINGS. BUT WHAT WAS AT ISSUE IN *CONCEPCION* WAS THE CLAUSE THAT WAS IN EFFECT IN 2008. WE WERE NOT ARGUING A CLAUSE THAT HAD NOT COME INTO EFFECT BACK IN SAN DIEGO FOUR YEARS AGO.

TURNING TO *KOLEV*, I THINK YOUR HONOR'S POINT ABOUT THE STATE LAW CLAIMS AND HOW THEY'RE INCORPORATED, AT LEAST IN LIMITED AND IMPLIED WARRANTY SETTING, SIMPLY UNDERSCORES THE LACK OF KIND OF CLEAR STATEMENT THAT IS NECESSARY TO OVERRIDE THE OTHER CLEAR STATEMENT IN THE FEDERAL ARBITRATION ACT THAT SAYS CLAIMS GO TO ARBITRATION UNLESS CONGRESS HAS EXPRESSED AN INTENT OTHERWISE THAT IS DIRECTED AT ARBITRATION UNDER THE FAA, AND THERE IS NOTHING LIKE THAT HERE.

THE *KOLEV* DECISION, WHICH IS STILL SITTING WAITING FOR ITS REHEARING PETITIONS TO BE RESOLVED AND ARE STILL

PENDING AFTER SOME MONTHS, THE MOMENT IT CAME OUT -- BEFORE *COMPUCREDIT* IT WENT INTO CONFLICT WITH TWO CIRCUITS THAT, IN FACT, FOLLOWED THE SAME ANALYSIS AS *COMPUCREDIT* IN SAYING YOU NEED SOMETHING CLEARER THAN THIS.

THERE ARE TWO ASPECTS OF *COMPUCREDIT*, TWO ASPECTS OF *KOLEV* THAT ARE PARTICULARLY UNDERCUT IN A WAY THAT WOULD PERMIT THIS COURT TO DISREGARD IT UNDER *MILLER VERSUS GABNEY*, EVEN IN THE ABSENCE OF THE PROBLEMS THE COURT HAS IDENTIFIED WITH THE OTHER TYPES OF CLAIMS, WHERE IF THERE IS ANY STATEMENT AT ALL, IT CERTAINLY ISN'T CLEAR ENOUGH TO OVERRIDE THE FAA.

THE FIRST PROBLEM IS THAT BOTH THE FTC AND THE NINTH CIRCUIT RELIED EXPRESSLY ON THE FACT THAT A CIVIL ACTION IS PROVIDED IN THE MAGNUSON-MOSS ACT ITSELF, AND THAT *COMPUCREDIT* SQUARELY SAID IS NOT ENOUGH. THAT'S WHAT THE NINTH CIRCUIT SAID IN *COMPUCREDIT*, CITING ALL THE SAME CASES IT CITED IN *KOLEV*. THAT IS WHAT THE SUPREME COURT SAID IS NOT ENOUGH. THAT SIMPLY SAYS THERE'S A RIGHT OF ACTION. IT DOESN'T SAY WHAT FORM IT HAS TO BE PURSUED IN.

THE SECOND ISSUE AND I THINK ONE THAT -- I THINK THAT IS ENOUGH RIGHT THERE, BECAUSE THE FTC RELIED ON THAT IN SAYING, WELL, YOU KNOW, THERE'S A CIVIL ACTION, SO CONGRESS COULDN'T HAVE MEANT TO PERMIT PARTIES TO AGREE TO ARBITRATE THESE CLAIMS. AND THE SUPREME COURT SAID, NO, THAT'S NONSENSE, THAT WOULD MEAN YOU COULD NEVER ARBITRATE A FEDERAL CLAIM FOR WHICH THERE'S AN EXPRESS REMEDY.

THE OTHER ISSUE, THE WHOLE CHEVRON DEFERENCE ISSUE, IS A RED HERRING FOR TWO REASONS. FIRST, YOU NEVER GET PAST STEP ONE OF LOOKING AT THE STATUTE AND SAYING WHAT KIND OF STATEMENT CONGRESS HAS MADE. UNDER *COMPUCREDIT* CONGRESS HAS NOT MADE THE KIND OF STATEMENT IN THE MAGNUSON-MOSS ACT THAT WOULD BE SUFFICIENT TO EVEN ALLOW AN AGENCY REASONABLY TO CONCLUDE THAT CONGRESS HAD PRECLUDED ARBITRATION. AND THE REASON THAT IS SO IS THAT THE VERY LIMITED DELEGATION OF RULE-MAKING AUTHORITY COMES IN A SPECIALIZED PROVISION OF THE REMEDIAL STATUTE OF MAGNUSON-MOSS WHICH, IN FACT, WAS DESIGNED TO ALLOW COMPANIES AND ENCOURAGE COMPANIES TO SET UP NONBINDING INFORMAL DISPUTE RESOLUTION OF A NEW TYPE SUBJECT TO FTC REGULATIONS THAT WOULD BE SOMETHING THE COMPANY COULD MAKE ENFORCEABLE, AND THE STATUTE MAKES IT ENFORCEABLE AS A PREREQUISITE TO FILING A LAWSUIT.

THE COURT: WELL, IS THERE SUCH A PROVISION -- IS IT YOUR ARGUMENT THAT EVEN UNDER A FULL WARRANTY, THAT THE FEDERAL ARBITRATION ACT SUPERSEDES MAGNUSON-MOSS?

MR. FALK: DOESN'T SUPERSEDE IT. MAGNUSON SAID THAT'S GOT IT BACKWARDS. *KOLEV* SORT OF PROCEEDED AS IF WE'RE JUST LOOKING AT MAGNUSON-MOSS AS IF THE FEDERAL ARBITRATION ACT DIDN'T EXIST OR THEY'RE KIND OF AN INCONVENIENCE TO BE BRUSHED ASIDE.

THE COURT: NO, NO. I DIDN'T GET YOUR ANSWER.

IS IT YOUR ARGUMENT THAT THE FEDERAL ARBITRATION ACT

SUPERSEDES THE PROCEDURES SET FORTH UNDER MAGNUSON-MOSS FOR A FULL WARRANTY?

MR. FALK: YES, YOUR HONOR, IT IS. IT DOESN'T SUPERSEDE IT, BUT I GUESS I'M -- THE ANSWER IS YES, THE FEDERAL ARBITRATION ACT CONTROLS. I THINK I TOOK TOO MUCH --

THE COURT: SO YOU BELIEVE THAT *KOLEV* IS WRONGLY DECIDED?

MR. FALK: *KOLEV* IS WRONGLY DECIDED AND IT --

THE COURT: I UNDERSTAND. NOW LET ME ASK A SECONDARY QUESTION.

IF I ASSUME THAT *KOLEV* IS THE OPERATIVE LAW AND ONLY APPLIES TO A FULL WARRANTY, IF I JUST TAKE THAT LIMITED STEP RATHER THAN THE FULL STEP YOU'RE ARGUING FOR, AND I ASSUME THAT MAGNUSON-MOSS HAS A DIFFERENT SET OF PROVISIONS WITH RESPECT TO IMPLIED AND LIMITED WARRANTIES AND THAT UNDER MAGNUSON-MOSS CONSUMERS ARE ALLOWED TO ENFORCE THOSE LIMITED AND IMPLIED WARRANTIES BY BORROWING STATE LAW CAUSES OF ACTION, WHICH IS WHAT I WAS DISCUSSING WITH YOUR OPPONENT, WHAT IS IT TO SAY THAT JUST BECAUSE YOU BORROW THE STATE LAW CAUSE OF ACTION AND DECIDE IT ON THE SAME MERITS, THAT YOU ALSO BORROW THE STATE LAW PROCEDURE, NAMELY ARBITRATION?

IN OTHER WORDS, CAN'T MAGNUSON-MOSS ALLOW FOR A STATE LAW CAUSE OF ACTION SO THAT YOU JUDGE IT BY THE SAME STANDARDS AND THE SAME MERITS BUT PROVIDE ITS OWN PROCESS?

MR. FALK: WELL, I THINK IT COULD DO THAT, AND I

THINK -- BUT IN THAT CASE, I THINK THE ARBITRATION WOULD BE LIKELY TO HAVE, YOU KNOW, THE SAME -- IT WOULD BE LOOKING AT SOME OF THE SAME ISSUES AND THEN WOULD BE GOING FORWARD WHILE THE -- ANY REMAINING FEDERAL CLAIM WAS STAYED OR THE -- ON APPEAL OR, PERHAPS, LITIGATED, DEPENDING ON WHAT -- DEPENDING ON WHAT COURSE THIS COURT CHOSE.

BUT I THINK THE POINT THAT I WAS TRYING TO MAKE IS THAT IT'S NOT THAT THERE'S A SEPARATE PROVISION FOR FEDERAL CLAIMS, WHICH I THINK MAY WELL BE TRUE, AND I THINK IT'S CERTAINLY TRUE AS A MATTER OF CLEAR STATEMENT, BUT THE PROVISION THAT IS THERE IS SOMETHING THAT IS DESIGNED NOT AS AN ALTERNATE ROUTE OF DISPUTE RESOLUTION, LIKE BINDING ARBITRATION, WHICH HAS BEEN AROUND FOR MANY, MANY DECADES BEFORE MAGNUSON-MOSS CAME UP, BUT IS SOMETHING THAT IS EXPLICITLY DESIGNED ONLY AS A PREREQUISITE TO LITIGATION AND, IN FACT, WHAT SECTION 2310 DOES. IT SAYS IF A COMPANY MAKES -- PUTS TOGETHER ONE OF THESE PROCEDURES, AN INFORMAL DISPUTE RESOLUTION MECHANISM, THAT COMPLIES WITH FTC RULES, THEN A CONSUMER CANNOT SUE WITHOUT GOING THROUGH THAT PROCESS FIRST.

IT IS CLEARLY -- THE VERY STRUCTURE OF THE STATUTE IS AIMED AT SOMETHING THAT WINDS UP IN A JUDICIAL FORUM, JUST LIKE SECTION E OF THE SAME SECTION PROVIDES A DIFFERENT PREREQUISITE FOR CLASS ACTIONS, A NOTICE AND CURE, LIKE I'M SURE THIS COURT HAS DEALT WITH PROBABLY A HUNDRED -- PROBABLY A THOUSAND TIMES IN CLRA CLAIMS. THERE'S ONE OF THOSE PROVISIONS IN

MAGNUSON-MOSS FOR CLASS CLAIMS, AND THIS PROVISION IS SOMETHING THAT'S DESIGNED AS AN OPTIONAL -- OPTION TO THE COMPANY TO PROVIDE SORT OF AN INITIAL SORT OF HURDLE FOR CONSUMERS TO GO THROUGH BEFORE THEY CAN SUE.

IT DOES NOT EVEN ON ITS FACE ADDRESS BINDING ARBITRATION UNDER THE FAA AND CANNOT COVER THAT. IT IS ONE THING FOR *KOLEV* TO MAKE THE POINTS IT MADE AND THE DECISION IT REACHED BEFORE *COMPUCREDIT* IMPOSED -- I DON'T THINK IT IMPOSED A HIGHER LEVEL OF CLARITY, BUT IT CONFIRMED YOU NEED SOMETHING REALLY CLEAR THAT ADDRESSES ARBITRATION AND NOT JUST SOMETHING THAT CAN BE BUILT INTO A -- YOU KNOW, A STATUTORY CONSTRUCT THAT SOMEHOW COMES IN CONFLICT WITH ARBITRATION.

CONGRESS HAS TO SAY SOMETHING, AND CONGRESS SAID SOMETHING ABOUT SOMETHING VERY DIFFERENT, A PREREQUISITE TO LITIGATION, NOT AN ALTERNATE FORUM THAT THE FAA PROVIDES.

AND THAT IS WHY UNDER *COMPUCREDIT*, *COMPUCREDIT* MAKES CLEAR THAT THIS PROVISION OF AN ALTERNATE REMEDY AND ALTERNATE PREREQUISITE IS NOT SOMETHING THAT OVERRIDES THE FAA. AND THE FTC DOESN'T HAVE POWER TO DO THAT BECAUSE ITS RULE-MAKING AUTHORITY IS LIMITED TO SETTING RULES FOR THESE INFORMAL DISPUTE RESOLUTION MECHANISMS THAT CAN BE IMPOSED AS PREREQUISITES TO LAWSUITS. IT IS NOT GIVEN POWER TO OVERRIDE THE FAA.

THE WORD "ARBITRATION" WAS NOT SOMETHING THAT WAS UNKNOWN TO CONGRESS IN 1975. IT IS SOMETHING THAT CONGRESS

COULD EASILY HAVE USED THAT WORD. INSTEAD, IT CREATED A NEW PROCEEDING AND EMPOWERED THE FTC TO MAKE THE RULES FOR THAT PROCEEDING. AND THE FTC, AS THE OTHER COURTS OF APPEALS RECOGNIZE EVEN BEFORE *COMPUCREDIT*, OVERSTEPPED ITS BOUNDS.

BUT IF THERE WERE ANY DOUBT BEFORE *COMPUCREDIT*, THERE'S NO DOUBT NOW. AND IN LIGHT OF THAT, THE KEY UNDERPINNINGS OF THE DECISION OF *KOLEV* HAVE BEEN TAKEN AWAY. THERE'S NOTHING LEFT. THERE'S NOTHING LEFT TO SUPPORT THE DECISION.

AND IT IS SIMPLY EVEN A STRONGER CASE WHERE STATE LAW IS INCORPORATED IN THE LIMITED AND IMPLIED WARRANTY CONTEXT AND EVEN STRONGER CASE THAT THERE IS NEITHER A CLEAR STATEMENT IN THE STATUTE, NOR REALLY A CLEAR STATEMENT BY THE FTC OR THE POWER TO MAKE ONE.

THE COURT: SHOULD I WAIT TO SEE WHAT HAPPENS IN *KOLEV*?

MR. FALK: THAT WOULD BE CERTAINLY A POSSIBILITY, YES, YOUR HONOR. I MEAN, AT SOME POINT THEY'RE GOING TO HAVE TO TAKE UP THIS -- THEY'RE GOING TO HAVE TO RULE ON THIS REHEARING PETITION.

WITH ALL CANDOR, IT HAS BEEN LONGER THAN -- I HAD ONE GRANTED AFTER FOUR AND A HALF MONTHS ONCE, AND THIS IS IN MONTH SIX. I THINK IT'S BEEN A WHILE. THEY ARE GOING TO HAVE TO RESOLVE IT AT SOME POINT, BUT THEY HAVEN'T DONE IT YET, AND THE COURT MIGHT WANT TO DO THAT.

THE COURT: YOU DO CONCEDE THAT CONGRESS HAS THE POWER TO CREATE A STATUTORY SCHEME THAT IS INDEPENDENT OF ARBITRATION?

MR. FALK: OH, OF COURSE IT DOES. YES, ABSOLUTELY. IT HAS THE POWER, JUST DID NOT DO SO HERE. IT DID SOMETHING VERY DIFFERENT IN SECTION 2310(A).

THE COURT: HOW DO YOU READ 703? YOUR OPPONENT CITES THAT AS THE PLACE I SHOULD LOOK TO REGULATION THAT EMBRACES ARBITRATION IN THIS --

MR. FALK: IS THAT THE FTC RULE 703? I MEAN, I READ IT -- I THINK IT IS AT BEST AMBIGUOUS ON THAT POINT. AND IF THE FTC WERE EMPOWERED TO OVERRIDE ARBITRATION, IT WOULD NOT HAVE DONE SO EXCEPT TO THE NARROWEST EXTENT SUSTAINABLE UNDER THE WORDS OF THAT STATUTE -- THE WORDS OF THAT RULE, RATHER, WHICH FAR EXCEEDED THE SCOPE OF THE STATUTE.

I WOULD SAY IF IT IS VALID AT ALL WOULD HAVE TO BE VALID ONLY AS TO THE PURELY FEDERAL FULL WARRANTY CLAIMS. BUT BECAUSE THAT -- THAT RULE AS WELL RELIED ON TWO FALSE PREMISES, NOT ONLY THE AVAILABILITY OF A CIVIL REMEDY, BUT EVEN MORE CRITICALLY, ONE OF THE REASONS THE FTC GAVE FOR TRYING TO BAN ARBITRATION IS THAT IT THOUGHT IT COULD NOT COME UP WITH RULES THAT WOULD BE FAIR ENOUGH TO CONSUMERS, AND THAT -- THAT IS A REFLECTION OF THE LINGERING HOSTILITY TOWARDS ARBITRATION THAT THE SUPREME COURT'S INTERVENING DECISIONS SINCE THE '70S, AND INDEED SINCE THE '90S, AGAIN AND AGAIN HAVE MADE CLEAR THAT

ARBITRATION IS NOT SOMETHING TO BE TREATED AS A SECOND-CLASS REMEDY FOR CONSUMERS OR ANYBODY ELSE. AS WELL AS THE *ALLIED TERMINIX* DECISION, THE COURT IT'S A PARTICULARLY VALUABLE FORM OF DISPUTE RESOLUTION. AND IF ANYTHING WAS STILL IN DOUBT, *CONCEPCION* TOOK THOSE DOUBTS AWAY.

THE COURT: LET'S GIVE MS. PREOVOLOS -- SHE HAD A LITTLE BIT OF TIME LEFT -- AN OPPORTUNITY TO SPEAK TO THIS LAST ISSUE.

MR. FALK: THANK YOU.

MS. PREOVOLOS: THANK YOU, YOUR HONOR. I DON'T HAVE A WHOLE LOT TO ADD.

FIRST, WITH RESPECT TO PLAINTIFFS' ARGUMENT ABOUT IT'S JUST ABOUT THE PHONE, I MEANT WHAT I SAID EARLIER, WHICH IS PLAINTIFFS HAVE HAD A NUMBER OF OPPORTUNITIES TO MAKE THAT CLEAR, AND THEY CAN'T DO IT. YOU KNOW, THEIR PLEADING IS ALL ABOUT THE WIRELESS SERVICES AGREEMENT, IT'S ALL ABOUT THE NETWORK.

THE TWO-YEAR AGREEMENT THEY REFER TO IN THE PARAGRAPH COUNSEL WAS TALKING ABOUT IS NOT APPLE'S WARRANTY. APPLE DOESN'T HAVE A TWO-YEAR WARRANTY.

THE COURT: I HEARD HIM SAY TWO-YEAR WARRANTY, WHETHER THERE COULD BE A TWO-YEAR WARRANTY.

MS. PREOVOLOS: THERE COULD BE, BUT THERE ISN'T. IT'S A ONE-YEAR EXPRESS LIMITED WARRANTY, AND THAT'S CLEAR FROM OUR PAPERS.

THE TWO-YEAR AGREEMENT IN THE CONTEXT OF WHAT THE PLAINTIFFS ARE TALKING ABOUT IS THE WIRELESS SERVICES AGREEMENT WITH AT&T.

IF YOU LOOK AT THE REST OF THAT PARAGRAPH, IT TALKS ABOUT THE CUSTOMERS BEING, QUOTE, LOCKED INTO THE TWO-YEAR AGREEMENT WITH AT&T. THERE IS NO TWO-YEAR AGREEMENT WITH APPLE. AS YOUR HONOR POINTS OUT, THERE'S A ONE-YEAR LIMITED WARRANTY.

SO, I THINK -- I MEAN, IN CANDOR, YOUR HONOR POINTED OUT IN THE DECEMBER 1ST OPINION EXACTLY THE PORTIONS OF THE COMPLAINT THAT THE COURT FELT THAT, ALTHOUGH COSMETICALLY MODIFIED, STILL CLEARLY IMPLICATED AT&T'S NETWORK, ITS SERVICE, AND THE WSA, AND THE PLAINTIFFS COULDN'T CHANGE THOSE.

SO TO SAY -- AND APART FROM THAT, I THINK WE TALKED ABOUT THE FACT LAST TIME THAT A PHONE DOESN'T HAVE SPEED WITHOUT A NETWORK. AND THE PLAINTIFFS DON'T ALLEGE THAT IT DOES.

SO I THINK THIS IS SQUARE ON THE TEST, YOU KNOW, WHATEVER CIRCUIT TEST YOU LOOK TO FOR EQUITABLE ESTOPPEL. IT RELIES ON THE WSA, AND IF THEY CAN GET AROUND THAT, IT'S INTERTWINED WITH THE WSA, AND THE INTERCONNECTEDNESS OF THE ALLEGATIONS AGAINST APPLE AND AT&T ARE THERE. AND I THINK THE PLAINTIFFS HAVE HAD MORE THAN SUFFICIENT OPPORTUNITIES TO AMEND THAT ASPECT OF THEIR COMPLAINT, EVEN AFTER BEING EDUCATED BY THE COURT ON THIS PRECISE ISSUE IN BOTH THE DECEMBER OPINION

VERY SQUARELY IN THE TEXT ACCOMPANYING FOOTNOTE TEN, WHICH POINTED TO THOSE VERY ALLEGATIONS AND ELSEWHERE.

AND -- SO I JUST DON'T THINK THERE'S ANY AVOIDING THE FACT THAT WHAT THE PLAINTIFFS ARE SAYING -- WHAT PLAINTIFFS ARE SAYING IS THE PHONE DIDN'T ACHIEVE SUFFICIENT SPEED; THERE WASN'T SUFFICIENT CONNECTIVITY WITHOUT THE NETWORK; AND YOU CAN'T MAKE THOSE -- AND THEY PAID TOO MUCH -- AS A RESULT, THEY PAID TOO MUCH TO AT&T.

AND PLAINTIFFS' ANSWER WAS INTERESTING. WHEN YOU SAID, SO YOU AREN'T CLAIMING DAMAGES FOR WHAT YOU PAID UNDER THE WSA; THEY SAID, YES, WE ARE, BUT THAT'S REALLY ABOUT APPLE. THAT'S NONSENSE, YOUR HONOR. THIS IS REALLY ABOUT BOTH ENTITIES. IT'S ABOUT THE NETWORK.

AND I DID THINK IT WAS ALMOST AMUSING WHEN THE PLAINTIFF SAID, WELL, THE MMS WAS DIFFERENT BECAUSE IT WAS ABOUT THE FACT THAT THE NETWORK WOULDN'T SUPPORT MMS.

I DON'T THINK WE'RE REQUIRED TO BLIND OURSELVES TO WHAT THE PLAINTIFFS HAVE SAID THROUGHOUT, WHICH IS AT&T'S NETWORK WASN'T ADEQUATE TO SUPPORT IPHONE. IT DOESN'T GO AWAY. IT CAN'T MAKE IT GO AWAY. THEY DON'T EVEN REALLY TRY. YOU CAN'T -- AND, AGAIN, I THINK WE COME BACK TO THE SAME POINT, THAT EVEN IF SOMEHOW YOU COULD PROCEED ON THESE CLAIMS AGAINST APPLE ONLY IN A LITIGATION, AT&T WOULD COME IN IN DISCOVERY, AND THAT WOULD COMPROMISE THEIR ARBITRATION RIGHTS.

SO I THINK THERE ARE A NUMBER OF DIFFERENT WAYS THAT

THIS CASE SIMPLY HAS TO GO TO ARBITRATION AS TO APPLE, IF, AS I THINK THERE'S NOT MUCH DISPUTE, IT MUCH GO TO ARBITRATION AGAINST AT&T.

NOW LET ME TURN VERY QUICKLY TO THE MAG-MOSS ARGUMENT AND JUST MAKE A COUPLE OF POINTS.

IF YOU STEP BACK AND LOOK AT RULE 703, IT TALKS ABOUT PREDISPUTE ARBITRATION PROVISIONS -- I'M SORRY, PREDISPUTE --

THE COURT: MECHANISMS.

MS. PREOVOLOS: LET ME TRY THAT. QUOTE, MECHANISMS; CAPITAL M, MECHANISMS. I'LL NEVER GET THE ACRONYM RIGHT. PRELITIGATION DISPUTE PROCEDURES, IF WE WANT THE ACRONYM. MECHANISMS, MECHANISMS IN A WARRANTY AGREEMENT. AND THE COURT -- AND THE FTC SAID IN RULE 703, OKAY? THOSE CAN'T BE THE SUBJECT OF BINDING ARBITRATION.

BUT, YOU KNOW, I THINK IT IS WORTH LOOKING AT THE TWO CIRCUIT COURT OPINIONS -- AND I'M NOT SUGGESTING THIS COURT CAN DIVERGE FROM THE NINTH CIRCUIT, BUT *WALTON* AND *DAVIS* DO LOOK AT RULE 703 IN MORE DETAIL THAN *KOLEV*. AND THEY LOOK AT THE PROVISION OF RULE 703 AND DRAW THE DISTINCTION THAT IT IS ABOUT -- IT IS ABOUT MECHANISMS. AND WE AREN'T DEALING WITH A MECHANISM HERE. WE ARE, AS YOUR HONOR CORRECTLY POINTED OUT, DEALING WITH APPLE'S LIMITED WARRANTY, WHICH DOESN'T HAVE ANY PROCEDURES FOR PRELITIGATION DISPUTE RESOLUTION. THE PLAINTIFFS' CLAIMS ARE ENTIRELY, AS YOUR HONOR NOTES, A CREATURE OF STATE LAW.

SO IF YOU'RE LOOKING FOR SOMETHING UNAMBIGUOUS, IF YOU ARE LOOKING FOR A CLEARLY CONTRARY COMMAND TO THE FAA, YOU JUST DON'T FIND IT HERE, BECAUSE, YOU KNOW, YOU LOOK AT A RULE THAT'S TALKING ABOUT MECHANISMS. THESE AREN'T MECHANISMS. YOU LOOK AT A RULE THAT, AS YOUR HONOR TALKS ABOUT, IS TALKING ABOUT FULL WARRANTIES. BUT I DON'T KNOW THAT WE HAVE THAT HERE. BUT I DON'T KNOW THAT YOU NEED TO GET DOWN TO THAT, BECAUSE I DO THINK *COMPUCREDIT* IS VERY CLEAR. *COMPUCREDIT* SAYS THERE HAS TO BE A CLEARLY CONTRARY CONGRESSIONAL COMMAND.

THE ISSUE WITH *KOLEV* IS -- I DON'T THINK THAT AT&T OR APPLE ARE ASKING YOUR HONOR TO RULE INCONSISTENTLY OR REALLY DIFFERENT THAN *KOLEV*, ALTHOUGH I THINK *KOLEV* WAS WRONGLY DECIDED, BUT *KOLEV* REALLY DIDN'T ASK THE QUESTION -- I GUESS WHAT I'D SAY IS KOLEV DIDN'T ASK OR ANSWER THE *COMPUCREDIT*, BECAUSE *KOLEV* SAID THERE'S DELEGATION TO AN AGENCY AND WE APPLY THE VERY DIFFERENTIAL CHEVRON STANDARD, AND WE ASK IF THE AGENCY INTERPRETATION IS A, QUOTE, REASONABLE INTERPRETATION OF THE STATUTE. THAT'S A VERY DIFFERENTIAL LOW THRESHOLD. THAT'S NOT A CLEARLY CONTRARY CONGRESSIONAL COMMAND. SO I THINK THE PLAINTIFFS HAVE MULTIPLE PROBLEMS.

THE COURT: BUT THEY DIDN'T HAVE A COMPARABLE SET OF REGULATIONS IN THE SUPREME COURT CASE, DID THEY?

MS. PREOVOLOS: WELL, THEY DIDN'T HAVE DELEGATION TO AN AGENCY, BUT -- BUT THEY SAID THERE HAD TO BE A CLEARLY CONTRARY CONGRESSIONAL COMMAND.

THEY DID HAVE LEGISLATIVE HISTORY, THOUGH, VERY SIMILAR TO WHAT THE FTC AND *KOLEV* RELY ON HERE, WHICH IS THE IDEA THAT CONSUMERS HAVE TO HAVE A RIGHT TO GO TO LITIGATION, AND THAT'S WHAT *CONCEPCION* SAYS, NO, THAT'S WRONG UNDER THE FAA.

BUT, I THINK THE POINT IS DELEGATION TO AN AGENCY AND DEFERENCE -- I GUESS WHAT I'D SAY IS THIS -- I'LL SUM UP, AND THEN I'LL BE DONE.

THIS IS AT NUMEROUS REMOVES FROM A CLEAR CONGRESSIONAL COMMAND, WHICH IS WHAT *COMPUCREDIT* SAYS YOU HAVE TO HAVE.

SO LET ME TRY TO BE CLEAR AND FINAL ON THIS.

THERE IS NO CLEAR COMMAND ON THE FACE OF THE STATUTE, MAG-MOSS. THAT'S CLEAR. MAG-MOSS IS SILENT AS TO ARBITRATION, AND EVERYONE CONCEDES THAT. SO THERE IS NO CLEARLY CONTRARY CONGRESSIONAL COMMAND ON THE FACE OF THE STATUTE.

THE FTC -- SO THERE'S DELEGATION.

THE FTC RULE IS AT BEST UNCLEAR, BECAUSE THE SECOND AND FIFTH CIRCUITS HAVE SAID -- AND IF YOU READ THE RULE, I THINK YOU'LL COME AWAY WITH THE VIEW THAT IT TALKS ABOUT MECHANISMS, AND THE NINTH CIRCUIT SORT OF DREW, AT BEST SORT OF DREW AN INFERENCE FROM THAT THAT THEY MEAN IT ABOUT ARBITRATION DIVORCED FROM MECHANISMS. THAT'S AMBIGUITY NUMBER ONE.

AMBIGUITY NUMBER TWO IS IT TALKS ABOUT PREDISPUTE RESOLUTION PROVISIONS WITHIN A WARRANTY. WE DON'T HAVE THOSE

HERE. AMBIGUITY NUMBER TWO.

AND, FINALLY, AND I THINK MOST IMPORTANTLY, KOLEV DID NOT EXAMINE THE LEGISLATIVE HISTORY, WHICH IS BASICALLY SILENT ON THIS ISSUE, EXCEPT FOR THE DELEGATION TO THE FTC OR WHAT THE FTC DID WITH THE CORRECT STANDARD, AND THAT'S BECAUSE THE CORRECT STANDARD HADN'T BEEN CLARIFIED AT THE TIME.

COMPUCREDIT SAYS THERE HAS TO BE A CLEAR CONGRESSIONAL COMMAND, AND THE NINTH CIRCUIT SAID, WELL, THIS IS -- BECAUSE THE STATUTE IS SILENT, WE'RE GOING TO BE DIFFERENTIAL TO THE AGENCY; WE ARE GOING TO ASK IF IT'S A REASONABLE INTERPRETATION. AND THAT'S JUST NOT THE RIGHT QUESTION UNDER *COMPUCREDIT*; IT'S THE WRONG QUESTION.

THE COURT: THANK YOU, COUNSEL.

MS. PREOVOLOS: THANK YOU, YOUR HONOR.

MR. BOWER: YOUR HONOR, COULD I SPEAK JUST FOR A SECOND?

THE COURT: ONE SECOND. THAT MEANS A MINUTE, WHICH PROBABLY ENDS UP BEING FIVE MINUTES.

MR. BOWER: YOUR HONOR HAD ASKED EARLIER WHERE IN THE COMPLAINT ARE OUR ALLEGATIONS REGARDING THE PHONE ITSELF. I WOULD POINT TO PARAGRAPH 69 THROUGH 73 OF THE COMPLAINT WHERE IT REALLY DOES GO INTO A FAIRLY DETAILED EXPLANATION OF IT'S THE IPHONE 3G ITSELF THAT'S INADEQUATE.

THE COURT: IN OTHER WORDS, YOU WOULD ALLEGE THAT THERE ARE PHONES OPERATING ON THE AT&T NETWORK THAT DO OPERATE

AT 3G, IT'S JUST THE APPLE PHONE THAT IS DEFECTIVE AND CANNOT OPERATE AT WHATEVER THAT SPEED, BECAUSE G IS NOT A SPEED -- YOU KNOW, I HAVE HAD THIS CONVERSATION BEFORE. THAT'S YOUR ALLEGATION?

MR. BOWER: YES, IT'S THE PHONE ITSELF AND THE SOFTWARE.

THE COURT: IN OTHER WORDS, IT'S UNIQUE TO THIS PHONE; THIS PHONE IS DEFECTIVE IN THAT WAY?

NOW, I HAVEN'T SEEN THAT LANGUAGE, BUT I'LL LOOK AT THAT LANGUAGE TO SEE IF I CAN FIND IT --

MR. BOWER: WE EVEN TALK ABOUT IN PARAGRAPH 71 --

THE COURT: THAT THE NETWORK IS ROBUST ENOUGH TO HANDLE IT; IT'S JUST THAT THIS PHONE IS NOT.

MR. BOWER: RIGHT. AND APPLE TRIED TO FIX IT, BUT THEY NEVER FIXED IT. THAT'S ALLEGED IN THOSE PARAGRAPHS 71 THROUGH 73.

IN FACT, TO SOLIDIFY MY POINT AS TO THE SEPARATION, IF YOU LOOK AT OUR EXHIBIT 2 TO THE COMPLAINT, AND THAT IS EXCERPTS FROM AT&T'S WEBSITE WHERE THEY -- THERE'S QUESTIONS AND ANSWERS, AND ONE OF THE QUESTIONS IS, "WHAT IF I HAVE A PROBLEM WITH MY IPHONE?" THEY SAY --

THE COURT: IN OTHER WORDS, YOUR ALLEGATION IS THE AT&T 3G NETWORK IS NOT SOME SEPARATE ANIMAL; THAT IT'S JUST AT&T'S NETWORK?

MR. BOWER: YEAH, THEY ALL HAVE 3G NETWORKS AT THIS

POINT. VERIZON HAS THEM --

THE COURT: I'M SORRY. IN OTHER WORDS, IS THE 2G NETWORK SEPARATE FROM A 3G NETWORK?

MR. BOWER: I'M NOT FAMILIAR WITH A 2G, AND THERE'S A 4G NOW.

THE COURT: RIGHT, BUT I'M ASKING THAT. YOU DON'T KNOW?

MR. BOWER: I CAN'T SAY THAT I DO.

THE COURT: AND SO THE 3G PHONE OPERATES ON A NETWORK, BUT YOU'RE NOT SURE WHETHER IT'S A 3G NETWORK?

MR. BOWER: RIGHT. IT'S CALLED THE 3G PHONE. OBVIOUSLY, THEY WANTED TO, I THINK, ADOPT THAT --

THE COURT: BUT THERE IS NO SUCH THING AS A 3G NETWORK?

MR. BOWER: WELL, I DON'T KNOW THAT THERE'S NO SUCH THING AS 3G NETWORK. I MEAN, THERE IS A 3G NETWORK THAT YOU CAN ACCESS FROM OTHER PHONES AS WELL. IT WASN'T CREATED FOR APPLE, THE 3G NETWORK, IF THAT'S WHAT YOU'RE REFERRING TO.

THE COURT: I'M JUST TRYING TO UNDERSTAND IF THERE'S A 3G NETWORK AND A 3G PHONE, HOW DO YOU KNOW WHETHER IT'S THE PHONE OR THE NETWORK THAT'S THE PROBLEM?

MR. BOWER: THE NAME OF THE PHONE AND THE NETWORKS ARE NOT --

THE COURT: BUT YOU HAVE TO SAY I CAN KNOW IT IS THE PROBLEM BECAUSE OTHER 3G PHONES OPERATE AT 3G OVER THIS NETWORK

AND THE APPLE PHONE DOES NOT, AND YOU CAN ALLEGE THAT.

MR. BOWER: AND THAT'S PART OF THE DECEPTIVENESS OF THEIR ADVERTISING.

THE COURT: RIGHT. YOU HAVEN'T ALLEGED THAT, BUT YOU ARE SAYING YOU CAN ALLEGE THAT.

MR. BOWER: RIGHT, IT IS ALLEGED.

THE COURT: I HAVEN'T FOUND IT. I'LL LOOK AT YOUR REFERENCES.

MR. BOWER: BUT LOOK AT THOSE PARAGRAPHS. AND ALSO WITH REGARD TO PARAGRAPH -- OR EXHIBIT 2, WHICH IS EXCERPTS FROM AT&T'S WEBSITE, THEY EVEN SAY, IF YOU HAVE A PROBLEM WITH THIS PHONE, YOU NEED TO LOOK TO APPLE; IF IT'S A APPLE PRODUCT, YOU NEED LOOK TO THEM FOR PROBLEMS WITH YOUR PHONE, DON'T LOOK TO US.

THE COURT: WHAT DOES IT MEAN, A PROBLEM WITH THE PHONE? IF YOU'RE USING THE PHONE IN A NETWORK AND YOU'RE NOT EXPERIENCING THE SPEED THAT YOU WISH, IT COULD BE A COMBINATION OF THE NETWORK AS WELL AS THE PHONE?

MR. BOWER: IT COULD BE, BUT AT&T IS SAYING YOU LOOK TO APPLE IF IT'S A PROBLEM WITH AN IPHONE.

THE COURT: THAT'S TOO GENERAL. IN OTHER WORDS, YOU WOULD HAVE TO SAY IF YOU ARE HAVING A PROBLEM ACHIEVING 3G SPEEDS ON OUR NETWORK WITH AN APPLE PHONE, THEN YOU NEED TO GO TO APPLE BECAUSE OUR NETWORK IS ABLE TO OPERATE AT 3G WITH EVERYTHING ELSE.

MR. BOWER: RIGHT.

THE COURT: THAT WOULD BE MORE SPECIFIC.

MR. BOWER: RIGHT.

THE COURT: THANK YOU.

MR. BOWER: THANK YOU, YOUR HONOR.

MR. HAIL: YOUR HONOR, COULD I MAKE QUICK POINT? YOU ASKED ABOUT THE INCORPORATION OF HOW THE STATE INCORPORATED WARRANTY CLAIMS MAY BE AFFECTED?

THE COURT: YES.

MR. HAIL: I WOULD POINT YOUR HONOR TO PAGE 1025 WHERE THE PLAINTIFF HAS ALLEGED BREACH OF IMPLIED AND EXPRESSED WARRANTS ADVERTISE UNDER MAGNUSON-MOSS. AND THEN THE -- ABOUT THE LAST PARAGRAPH OF JUDGE REINHARDT'S DECISION ON 1031 WHERE HE -- THE LAST SENTENCE, YOUR HONOR -- HE REVERSED AND REMANDED ALL BREACH OF WARRANTY CLAIMS, STATE AS WELL, AS THE BREACH OF IMPLIED AS WELL AS EXPRESS, BACK TO THE DISTRICT COURT. I THINK ON THAT POINT THAT THE STATE-INCORPORATED CLAIMS WOULD BE OUT OF ARBITRATION UNDER *KOLEV*.

THE COURT: VERY WELL -- DECLINED.

MS. PREOVOLOS: YES, YOUR HONOR.

THE COURT: SUBMITTED. THANK YOU.

(PROCEEDINGS ADJOURNED.)

CERTIFICATE OF REPORTER

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN MDL 5-02044 JW, IN RE APPLE IPHONE 3G PRODUCTS LIABILITY LITIGATION, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

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JOAN MARIE COLUMBINI, CSR 5435, RPR

TUESDAY, MAY 8, 2012