

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

) C-05-00037-JW
)
) "THE APPLE IPOD ITUNES
) ANTITRUST LITIGATION".) OCTOBER 5, 2009
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) PAGES 1 - 37
)

THE PROCEEDINGS WERE HELD BEFORE
THE HONORABLE UNITED STATES DISTRICT
JUDGE JAMES WARE

A P P E A R A N C E S:

FOR THE PLAINTIFFS: COUGHLIN, STOIA, GELLER, RUDMAN
& ROBBINS
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THOMAS R. MERRICK
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FOR THE DEFENDANTS: JONES DAY
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OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

SAN JOSE, CALIFORNIA

OCTOBER 5, 2009

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE
FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING CASE NUMBER 05-0037,
THE APPLE IPOD ITUNES ANTITRUST LITIGATION.

TWENTY MINUTES EACH SIDE.

COUNSEL, PLEASE COME FORWARD AND STATE
YOUR APPEARANCES.

MS. SWEENEY: GOOD MORNING, YOUR HONOR.
BONNY SWEENEY FOR THE PLAINTIFFS FROM COUGHLIN,
STOIA, GELLER, RUDMAN & ROBBINS AND WITH ME IS TOM
MERRICK FROM COUGHLIN, STOIA.

MR. MITTELSTAEDT: GOOD MORNING OR
AFTERNOON. BOB MITTELSTAEDT FOR THE DEFENDANT
APPLE.

THE COURT: VERY WELL. MR. MITTELSTAEDT,
THIS IS YOUR CLIENT'S MOTION?

MR. MITTELSTAEDT: YES, YOUR HONOR.

THE CLAIM IN THIS CASE, YOUR HONOR, BOTH
FOR THE BENEFIT OF THE COURT AND THE FUTURE LAWYERS
IN THE AUDIENCE IS A CLAIM THAT APPLE'S IPOD HAS AN
ENHANCED UTILITY, AS YOUR HONOR DESCRIBED IT
EARLIER, IN WORKING WITH MUSIC AND VIDEOS SOLD FROM
APPLE'S ITUNES STORE.

1 THE PLAINTIFFS SAY THAT THAT ENHANCED
2 ABILITY TO PLAY ITUNES MUSIC CONSTITUTES A SECTION
3 1 TYING VIOLATION, SECTION 1 OF THE SHERMAN ACT,
4 AND ALSO CONSTITUTES MONOPOLIZATION OR ATTEMPTED
5 MONOPOLIZATION UNDER SECTION 2 OF THE SHERMAN ACT.

6 NOW, THE LAST TIME AROUND YOUR HONOR
7 RULED THAT THE TYING CLAIM UNDER SECTION 1 WHEN
8 ANALYZED UNDER THE PER SE TEST WAS INVALID AS A
9 MATTER OF LAW BECAUSE IPODS AND ITUNES MUSIC AND
10 VIDEO ARE SEPARATELY AVAILABLE.

11 AND BECAUSE THOSE TWO PRODUCTS ARE
12 SEPARATELY AVAILABLE, THE PLAINTIFFS FAILED TO
13 SATISFY THE THRESHOLD TEST FOR TYING CLAIMS, THAT
14 TEST BEING THAT THERE IS COERCION TO BUY ONE
15 PRODUCT WHEN YOU BUY THE OTHER OR SOME COURTS SAY
16 THAT THE SALE OF ONE PRODUCT IS CONDITIONED ON THE
17 PURCHASE OF THE OTHER.

18 THE ISSUE BEFORE THE COURT TODAY IS
19 WHETHER THAT SAME ANALYSIS APPLIES TO THE TYING
20 CLAIM WHEN JUDGED UNDER THE RULE OF REASON.

21 AND THIS IS THE MOTION THAT THE COURT
22 INVITED WHEN IT RULED ON THE PREVIOUS MOTION.

23 AS WE SET FORTH IN OUR MOTION, THE SAME
24 ANALYSIS DOES APPLY, AND I WANT TO JUST SUMMARIZE
25 BRIEFLY THE THREE REASONS FOR THAT.

1 THE BASIC ISSUE HERE, YOUR HONOR, IS
2 WHETHER THE THRESHOLD ELEMENT OF COERCION, OR A
3 CONDITIONED SALE, THAT THE SALE OF ONE PRODUCT IS
4 CONDITIONED ON THE PURCHASE OF ANOTHER, IS THAT
5 THRESHOLD REQUIREMENT, DOES IT VARY FROM A PER SE
6 TEST TO A RULE OF REASON TEST?

7 AND THE SHORT ANSWER IS THAT IT DOESN'T.
8 THE FIRST STEP IN ANY TYING CLAIM, WHATEVER TEST
9 IT'S ANALYZED UNDER, IS WHETHER THERE'S A
10 CONDITIONED SALE.

11 IF THERE'S NO CONDITIONED SALE, THAT IS,
12 IF THE PRODUCTS ARE SEPARATELY AVAILABLE, THAT IS
13 THE END OF THE INQUIRY. THERE'S NO TYING CLAIM.

14 IT'S ONLY IF THERE'S A CONDITIONED SALE
15 THAT THEN THE LAWFULNESS OF THAT CONDITIONED SALE
16 IS DETERMINED BY ONE OR ANOTHER TEST.

17 AND THE COURTS HAVE FOUND THAT IF THERE'S
18 MARKET POWER AND THERE'S AN APPRECIABLE AMOUNT OF
19 COMMERCE THAT IS AFFECTED THEN IT'S PER SE
20 UNLAWFUL, UNDER THE PER SE TEST.

21 BUT IF THERE'S NO MARKET POWER, THEN THE
22 RULE IS UNDER THE REASON TEST AND THE COURT WEIGHS
23 THE COMPETITIVE AND ANTICOMPETITIVE PURPOSES OR THE
24 EFFECTS OF THE CONDITIONED SALE.

25 BUT THE KEY POINT IS THAT --

1 THE COURT: IS THAT RIGHT? THAT LAST
2 ONE -- I'VE BEEN FOLLOWING YOU UP UNTIL NOW.

3 MR. MITTELSTAEDT: OKAY.

4 THE COURT: AND SO IF THERE IS NO MARKET
5 POWER THEN YOU USE THE RULE OF REASON?

6 MR. MITTELSTAEDT: THE COURTS'S
7 DECISIONS -- I'M NOT REFERRING TO THIS COURT'S
8 DECISIONS, BUT THE COURT'S DECISIONS GENERALLY ARE
9 UNCLEAR ON THE EXTENT OF MARKET POWER THAT IS
10 NEEDED EITHER FOR THE PER SE TEST OR THE RULE OF
11 REASON TEST.

12 AND INDEED IN THE HONEYWELL CASE THAT WE
13 CITED IN OUR MOTION, THE COURT FOUND THAT THE TWO
14 TESTS HAVE REALLY MERGED.

15 BECAUSE IN SOME OTHER AREAS OF ANTITRUST
16 LAWS THE PER SE TEST IS VERY STRINGENT, AND YOU
17 DON'T INQUIRE INTO ANYTHING. YOU JUST INQUIRE AS
18 TO WHETHER THERE WAS AN AGREEMENT TO FIX PRICES,
19 FOR EXAMPLE.

20 AND WITH AN AGREEMENT TO FIX PRICES
21 THAT'S PER SE UNLAWFUL, REGARDLESS OF MARKET POWER
22 OR ANYTHING ELSE.

23 BUT AS THE PER SE TEST HAS DEVELOPED IN
24 THE TYING AREA, THE COURTS PERMIT THE DEFENDANTS TO
25 OFFER JUSTIFICATIONS, BUSINESS JUSTIFICATIONS, FOR

1 EXAMPLE, AND SO THE HONEYWELL CASE SAYS THAT THOSE
2 TWO TESTS HAVE ESSENTIALLY MERGED.

3 THAT'S A FURTHER REASON BY THE WAY FOR
4 GRANTING THIS MOTION THAT THERE'S VERY LITTLE
5 DIFFERENCE BETWEEN THE RULE OF REASON AND PER SE
6 TEST AS TO THE ELEMENTS ONCE YOU GET BEYOND A
7 CONDITIONED SALE.

8 BUT TO THE EXTENT THAT THERE'S A
9 DIFFERENCE IN THE PER SE AND RULE OF REASON TEST IN
10 DETERMINING THE LEGALITY OF A CONDITIONED SALE,
11 THEY BOTH DEPEND ON THIS THRESHOLD SHOWING OF A
12 CONDITIONED SALE.

13 THE COURT: NOW, THE CASE THAT YOU CITED
14 THE LAST TIME AND THE ONE THAT I KEPT GOING BACK TO
15 HERE IS THIS FOREMOST AND KODAK CASE.

16 KODAK CAME OUT WITH THE 110 CAMERA. THE
17 FILM, THE PAPER, THE CHEMICALS WERE DIFFERENT THAN
18 HAD BEEN PREVIOUSLY ON THE MARKET. YOU DID NOT
19 HAVE TO BUY ALL OF THOSE SUPPLIES. THERE WAS NO
20 COERCION.

21 BUT IN ORDER TO EFFECTIVELY USE THE
22 CAMERA YOU HAD TO BUY FILM, AND THE FILM ONLY FIT
23 THAT CAMERA. AND IN ORDER TO SEE THE -- THIS WAS
24 WAY BEFORE DIGITAL PHOTOGRAPHY, OF COURSE.

25 BEFORE YOU COULD ACTUALLY SEE THE RESULT

1 OF YOUR TAKING PHOTOGRAPHS, YOU HAD TO GO THROUGH
2 THIS DEVELOPMENT PROCESS THAT ALSO WERE SUPPLIES
3 THAT YOU COULD ONLY GET FROM KODAK.

4 WHY ISN'T THAT LIKE THIS?

5 MR. MITTELSTAEDT: WELL, IN THAT CASE --
6 I MEAN, I THINK THIS IS A CASE WHERE THERE IS EVEN
7 LESS COERCION BECAUSE I THINK AS A MATTER OF RECORD
8 THAT THE IPOD WILL WORK WITHOUT ITUNES MUSIC. IT
9 WILL WORK TO PLAY YOUR CD COLLECTION, FOR EXAMPLE.
10 IT WILL WORK TO PLAY MUSIC THAT YOU HAVE BURNED AND
11 RIPPED.

12 LIKewise ITUNES MUSIC WILL PLAY ON
13 DEVICES OTHER THAN AN IPOD. IT WILL PLAY ON A
14 COMPUTER, FOR EXAMPLE. AND IF YOU BURN IT TO A CD
15 IT WILL PLAY ON A CAR RADIO.

16 SO UNLIKE THE FILM AND THE CAMERA IN THE
17 FOREMOST CASE -- AND IN THAT CASE, AS I RECALL IT,
18 YOUR HONOR, YOU HAD TO USE THE FILM IN THE CAMERA.
19 IT WOULDN'T WORK WITH SOME OTHER FILM.

20 SO WHAT THE COURT FOUND IN THAT CASE --
21 AND I'M READING FROM 542. "IN THE ABSENCE OF AN
22 ALLEGATION THAT THE PURCHASE OF THE ALLEGED TIED
23 PRODUCTS WAS REQUIRED AS A CONDITION OF SALE OF THE
24 ALLEGED TYING PRODUCTS," SO IN THE ABSENCE OF AN
25 ALLEGATION THAT ONE WAS CONDITIONED ON THE OTHER,

1 "RATHER THAN AS A PREREQUISITE TO THE PRACTICAL AND
2 EFFECTIVE USE OF THE TYING PRODUCTS, FOREMOST
3 COMPLAINED IT FAILED TO PLEAD THE COERCION
4 ESSENTIAL TO A PER SE UNLAWFUL TYING ARRANGEMENT.

5 AND IF THAT'S TRUE IN THAT CASE WHERE YOU
6 NEEDED TO USE THE TWO AS A PRACTICAL AND EFFECTIVE
7 MEANS, HERE YOU DON'T NEED TO DO THAT.

8 THE COURT: BUT THAT'S WHERE I START OUT.

9 IN OTHER WORDS, THAT CASE SAID, AND I
10 AGREE WITH YOU, THEY HELD THAT THERE WAS NO PER SE
11 VIOLATION BECAUSE THERE WAS NO COERCION BECAUSE YOU
12 DIDN'T HAVE TO BUY ALL OF THOSE THINGS. THEY WERE
13 JUST COMPATIBLE.

14 THEY WERE TECHNOLOGICALLY TIED AS THE
15 LANGUAGE IN THE CASE SUGGESTS BUT THE COURT THERE
16 LEFT OPEN THE POSSIBILITY OF A RULE OF REASON
17 ANALYSIS.

18 AND SO THAT BECOMES THE ISSUE. WHY WOULD
19 THE COURT LEAVE OPEN RULE OF REASON WITHOUT A
20 COERCIVE RELATIONSHIP UNLESS RULE OF REASON WAS
21 AVAILABLE BASED ON A NONCOERCIVE RELATIONSHIP?

22 NOW, IT COULD BE THAT THE COURT JUST LEFT
23 IT OPEN BECAUSE SOMETIMES I SAY I'M NOT GOING TO
24 ADDRESS IT AND IT'S NOT BECAUSE I THOUGHT ABOUT IT
25 AND I THINK IT HAS VIABILITY BUT IT'S JUST I

1 HAVEN'T ADDRESSED IT.

2 BUT OTHER TIMES THE COURTS SAY ALTHOUGH
3 -- BECAUSE THERE'S LANGUAGE IN THE CASES THAT IF
4 ALL OF THE ELEMENTS ARE NOT AVAILABLE FOR A PER SE
5 VIOLATION, YOU NEVERTHELESS CAN STATE A RULE OF
6 REASONS.

7 WELL, WHAT ELEMENTS ARE THERE?

8 AND SO THE CASES DON'T SAY -- AT LEAST I
9 HAVEN'T READ A CASE THAT SAYS THAT IF THERE IS NO
10 COERCIVE TIE, YOU CAN'T DO A RULE OF REASON
11 ANALYSIS AND THAT SEEMS TO ME WHAT I NEED TO FIND
12 IN ORDER TO GO YOUR WAY ON THIS MOTION.

13 MR. MITTELSTAEDT: OKAY. AND I THINK I
14 CAN PROVIDE THAT IN THIS WAY, YOUR HONOR: FIRST OF
15 ALL, I AGREE THAT IF IN FOREMOST PRO THE COURT HAD
16 SAID THAT THERE IS NO COERCION, THE PLAINTIFFS
17 DON'T SATISFY COERCION FOR THE PER SE TEST AND NOW
18 WE'RE GOING TO GO ON TO SEE IF THEY SATISFY SOME
19 LESSER SHOWING OF COERCION FOR A RULE OF REASON,
20 THAT WOULD BE ONE THING.

21 BUT THE COURT DIDN'T DO THAT. AND THE
22 REASON IT DIDN'T DO THAT IS THAT IT WAS NOT
23 SUGGESTING THAT THERE WAS A DIFFERENT STANDARD FOR
24 COERCION. IT SAID, AND THIS IS AT 542 -- 541, SO A
25 PAGE BEFORE. "FOREMOST HAS NOT CHALLENGED THE

1 ALLEGED TYING ARRANGEMENT UNDER THE RULE OF
2 REASON."

3 SO THE DISPOSITIVE QUESTION IS WAS IT A
4 PER SE VIOLATION?

5 SO THAT'S JUST LIKE ANY CASE WHERE YOUR
6 HONOR SAYS, I FIND THAT THE FACTS DON'T SATISFY
7 WHAT THE PLAINTIFFS HAVE ALLEGED.

8 THERE'S NO IMPLICATION OR SUGGESTION
9 THERE THAT IT WOULD BE DIFFERENT IF THEY HAD
10 ALLEGED SOMETHING ELSE.

11 THE COURT: WELL, DO YOU -- LET ME
12 INTERRUPT.

13 DO YOU HAVE A CASE WHICH SAYS EXPLICITLY
14 THAT THE LACK OF A COERCIVE TIE AND WHERE THE
15 RESTRICTED CONDUCT IS TYING, OR THE LACK OF A
16 COERCIVE TIE DEPRIVES THE PLAINTIFF OF THE ABILITY
17 TO STATE A SECTION 1 CLAIM UNDER THE RULE OF
18 REASON?

19 MR. MITTELSTAEDT: YES.

20 THE COURT: GIVE ME THAT CASE.

21 MR. MITTELSTAEDT: I HAVE TWO CASES. ONE
22 MORE EXPLICIT THAN THE OTHER.

23 THE COURT: I'LL TAKE TWO.

24 MR. MITTELSTAEDT: THE FIRST ONE IS
25 NORTHERN PACIFIC, THE SUPREME COURT CASE. AND

1 THAT'S THE CASE THAT IS CITED IN THE COURT'S --
2 YOUR HONOR'S PREVIOUS DECISION, AND IT SAYS "WHERE
3 THE BUYER IS FREE TO TAKE EITHER PRODUCT BY ITSELF,
4 THERE IS NO TYING PROBLEM."

5 THE COURT: I KNOW THAT LANGUAGE, AND I
6 AGREE WITH THAT.

7 IN OTHER WORDS, THAT'S JUST THE GENERAL
8 STATEMENT THAT THERE'S NO TIE IF THE PRODUCTS ARE
9 NOT TIED, BUT THAT DOESN'T STATE, AS I INVITED
10 YOU GIVE ME A CASE THAT SAID IF THERE IS NO TIE,
11 THEN YOU CAN'T ANALYZE A SECTION 1 CLAIM UNDER THE
12 RULE OF REASON.

13 MR. MITTELSTAEDT: I'LL GIVE YOU THE
14 SECOND CASE, BUT I'M GOING TO COME BACK TO THAT ONE
15 BECAUSE I THINK IT'S PRETTY GOOD.

16 THE COURT: ALL RIGHT.

17 MR. MITTELSTAEDT: THE SECOND ONE IS
18 ADVANCED COMPUTER, AND THAT'S CITED IN OUR BRIEF.
19 IT'S 845 F.SUPP 356.

20 AND THERE THE COURT SAYS, AND IT'S
21 SUMMARIZING ITS DISCUSSION, BECAUSE PLAINTIFFS
22 CANNOT SHOW THAT THE LICENSING OF THE SOFTWARE AT
23 ISSUE THERE WAS EXPRESSLY OR IMPLICITLY CONDITIONED
24 UPON THE PURCHASE OF THE COMPUTER EQUIPMENT
25 SERVICING AT ISSUE THERE, THEY FAILED TO RAISE A

1 GENUINE ISSUE OF MATERIAL FACT REGARDING THE
2 PRESENCE OF A TYING ARRANGEMENT.

3 ACCORDINGLY, PLAINTIFFS CANNOT MAINTAIN A
4 PER SE OR A RULE OF REASON TYING CLAIM.

5 THE COURT: AH. I DIDN'T SEE THAT CASE,
6 THAT LANGUAGE.

7 SO WHERE AM I GOING TO FIND THAT? ON
8 WHAT PAGE?

9 MR. MITTELSTAEDT: PAGE 369.

10 THE COURT: ALL RIGHT. NEXT.

11 MR. MITTELSTAEDT: AND, YOUR HONOR, THOSE
12 ARE THE -- OR THAT IS THE EXPLICIT REFERENCE THAT
13 WE HAVE BEEN ABLE TO FIND. BUT IT STANDS TO REASON
14 BECAUSE ALL OF THE CASES DESCRIBE THE COERCION
15 ELEMENT AS THE THRESHOLD ELEMENT IN THE SAME TERMS.

16 AND THERE JUST ISN'T A COURT THAT SAYS
17 THAT THE TEST IS DIFFERENT DEPENDING ON WHETHER YOU
18 APPLY RULE OF REASON OR PER SE.

19 THE COURT: LET ME INTERRUPT. IF THAT
20 CASE DOES BEAR YOU OUT, AT LEAST AND THAT'S A
21 DISTRICT COURT CASE, BUT THAT HELPS.

22 LET ME HEAR FROM YOUR OPPONENT.

23 JUST ONE MOMENT.

24 (PAUSE IN PROCEEDINGS.)

25 GO AHEAD, COUNSEL.

1 MS. SWEENEY: FIRST I'D LIKE TO TALK A
2 LITTLE BIT ABOUT THE COERCION ELEMENT. APPLE'S
3 COUNSEL HAS SAID THAT THE PLAINTIFF'S COUNSEL HAS
4 NOT PLEADED COERCION HERE. AND AS YOUR HONOR WILL
5 RECALL FROM ALL OF THE BRIEFING AND ARGUMENT THAT
6 HAS PRECEDED THIS ONE, THE QUESTION IS WHETHER THE
7 KIND OF IMPLICIT COERCION THAT THE PLAINTIFFS HAVE
8 ALLEGED IS SUFFICIENT FOR A RULE OF REASON TYING
9 CLAIM, AND WE CONTEND IT IS.

10 AND WHEN I SAY "IMPLICIT," I'M REFERRING
11 TO THE FACT THAT A CONSUMER CAN BUY ITUNES MUSIC
12 AND UP UNTIL RECENTLY COULD NOT DIRECTLY PLAY BACK
13 THAT MUSIC ONTO ANY PORTABLE DEVICE OTHER THAN AN
14 IPOD DEVICE.

15 WHEREAS THE CONDITIONING IS NOT EXPRESSED
16 IN THE SENSE THAT APPLE DIDN'T PLACE CONTRACTUAL
17 RESTRICTIONS ON THE CONSUMER AT THE TIME OF
18 PURCHASE, IT IS NONETHELESS THE KIND OF IMPLICIT
19 COERCION THAT HAS BEEN RECOGNIZED BY OTHER CASES.

20 AND YOUR HONOR IS VERY FAMILIAR WITH THE
21 MOORE CASE FROM THE NINTH CIRCUIT WHICH HELD THAT
22 IMPLICIT COERCION CAN SATISFY THE REQUIREMENT FOR A
23 TYING CLAIM WHERE AN APPRECIABLE NUMBER OF BUYERS
24 HAVE BEEN FORCED TO ACCEPT A BURDENSOME CONTRACTUAL
25 RESTRICTION OR OTHER KIND OF RESTRICTION.

1 AND IN ADDITION, THE NORTHERN PACIFIC
2 CASE WHICH APPLE'S COUNSEL RELIED ON AND YOUR HONOR
3 CITED IN THE ORDER ALSO STANDS FOR THE PROPOSITION
4 THAT, THAT COERCION NEED NOT IN EVERY CASE BE
5 EXPRESSED IN ORDER TO SATISFY A TYING CLAIM.

6 THE NORTHERN PACIFIC CASE SAYS THAT A
7 TYING ARRANGEMENT MAY BE DENIED AS AN AGREEMENT BY
8 A PARTY TO SELL ONE PRODUCT BUT ONLY ON THE
9 CONDITION THAT THE BUYER ALSO PURCHASE A DIFFERENT
10 PRODUCT OR AT LEAST IT REQUIRES THAT HE, THAT HE
11 WILL NOT PURCHASE THAT PRODUCT, THAT IS THE SECOND
12 PRODUCT, FROM ANY OTHER SUPPLIER.

13 AND THAT'S THE KIND OF IMPLICIT COERCION
14 THAT PLAINTIFFS ARE ALLEGING IN THIS CASE.

15 BECAUSE ONCE A CONSUMER HAS PURCHASED
16 ITUNES MUSIC, AND IT CANNOT THEN PORTABLY PLAY
17 THOSE SONGS ON ANY OTHER DEVICE BESIDES AN IPOD,
18 THAT CONSUMER IS LOCKED IN.

19 THE COURT: NOW, THIS IS A MOTION FOR
20 JUDGMENT ON THE PLEADINGS?

21 MS. SWEENEY: RIGHT.

22 THE COURT: AND I'VE TRIED TO ADHERE TO
23 THE RULE THAT I HAVE TO ACCEPT YOUR ALLEGATIONS AS
24 TRUE BECAUSE YOU'RE THE NONMOVING PARTY. AND TO
25 THE EXTENT THAT I HAVE ALLEGATIONS ON THE OTHER

1 SIDE, I HAVE TO CONSIDER THAT THEY ARE UNDISPUTED.

2 BUT THERE ARE A BUNCH OF ALLEGATIONS
3 BETWEEN THE TWO SIDES THAT ARE NOT DISPUTED.

4 YOU DON'T DISPUTE THEN THAT THESE
5 PRODUCTS ARE SOLD SEPARATELY AND THAT IN THE TERMS
6 OF PURCHASE OF ONE, THERE'S NO REQUIREMENT THAT YOU
7 PURCHASE THE OTHER?

8 MS. SWEENEY: THAT'S CORRECT, YOUR HONOR.

9 THE COURT: AND IT IS UNDISPUTED THAT
10 IPODS WERE ON THE MARKET LONG BEFORE THERE EVER WAS
11 AN ITUNES?

12 MS. SWEENEY: THEY WERE ON THE MARKET FOR
13 APPROXIMATELY 18 MONTHS BEFORE ITUNES.

14 THE COURT: EIGHTEEN MONTHS? I THOUGHT
15 IT WAS LONGER, BUT LET'S ASSUME IT WAS 18 MONTHS.
16 THAT'S STILL A CONSIDERABLE PERIOD OF TIME WHEN YOU
17 HAVE AN IPOD AND IT HAS A FUNCTION, IT HAS A USE
18 THAT IS INDEPENDENT OF BUYING ON-LINE MUSIC.

19 MS. SWEENEY: THAT'S A GOOD POINT, YOUR
20 HONOR. AND I WOULD LIKE TO DIRECT YOUR HONOR'S
21 ATTENTION TO UNITED STATES VERSUS MICROSOFT, THE
22 SECOND CIRCUIT DECISION WHICH IS THE ONLY COURT OF
23 APPEAL DECISION OR REALLY ANY DECISION THAT I'M
24 AWARE OF WHERE A COURT ACTUALLY WENT THROUGH A
25 DETAILED ANALYSIS OF A TYING CLAIM AND SAID THAT

1 THIS IS A TECHNOLOGICAL TIE, THIS IS ONE WHERE THE
2 RULE OF REASON AS OPPOSED TO THE PER SE RULE OUGHT
3 TO APPLY.

4 NOW, IN THAT CASE THE UNITED STATES
5 GOVERNMENT AND THE STATES ALLEGED THAT MICROSOFT --
6 THERE WERE A NUMBER OF CLAIMS IN THE CASE. THERE
7 WAS A MONOPOLIZATION CLAIM, AND THERE WAS ALSO A
8 TYING CLAIM.

9 AND THE GOVERNMENT ALLEGED THAT
10 MICROSOFT -- THE TYING PRODUCT IN THAT CASE WAS
11 WINDOWS, THE WINDOWS OPERATING SYSTEM.

12 AND MICROSOFT TIED TO WINDOWS THE BROWSER
13 OR INTERNET EXPLORER WHICH MANY VIEWED AS AN
14 INFERIOR PRODUCT TO ITS COMPETITORS SUCH AS
15 NETSCAPE.

16 AND IN THAT CASE, YOUR HONOR, THE WINDOWS
17 OPERATING SYSTEM AND THE BROWSER WERE ALWAYS
18 AVAILABLE SEPARATELY. THEY WERE USED FOR SEPARATE
19 PURPOSES.

20 MANY PEOPLE ONLY BOUGHT THE WINDOWS
21 OPERATING SYSTEM AND DIDN'T BUY THE BROWSER AND
22 VICE VERSA. AND IN THAT CASE WHICH APPLE TRIED TO
23 DISTINGUISH ON THE GROUNDS THAT THERE WAS EXPRESSED
24 CONDITIONING. THAT EXPRESSED CONDITIONING ONLY
25 APPLIED TO A PORTION OF THE MARKET.

1 SO WE HAD CONTRACTUAL RESTRICTIONS IN THE
2 CONTRACTS BETWEEN MICROSOFT AND ITS OEM'S. AND
3 THOSE RESTRICTIONS PROHIBITED THE OEM'S FROM
4 ALLOWING THE USER TO SEE ANY POTENTIAL BROWSERS
5 OTHER THAN INTERNET EXPLORER AND IT ALSO --

6 THE COURT: WELL, JUST ON THE TYING SIDE
7 OF THAT -- THERE'S A DIFFERENCE IN TECHNOLOGICAL
8 TIES WHERE TWO PRODUCTS ARE INTEGRATED AS ONE.

9 THAT CASE INVOLVED A CIRCUMSTANCE WHERE
10 WHEN YOU BOUGHT WINDOWS, YOU ALREADY HAD TO BUY THE
11 EXPLORER, THE BROWSER. IT WAS ALSO INTEGRATED
12 WITHIN THE PRODUCT, WASN'T IT?

13 MS. SWEENEY: WELL, THAT'S ONLY TRUE IF
14 YOU BOUGHT --

15 THE COURT: IS THAT TRUE?

16 MS. SWEENEY: NO, NOT FOR EVERY USE OF IE
17 OR FOR WINDOWS, YOUR HONOR.

18 THE COURT: WASN'T THAT A CASE WHERE THE
19 ARGUMENT THERE WAS A REASON TO INTEGRATE THE
20 PRODUCTS AND THEY WERE PROPERLY SOLD AS ONE?

21 MS. SWEENEY: AND THAT ARGUMENT WAS
22 REJECTED BY THE DISTRICT COURT AND THE COURT OF
23 APPEALS.

24 THE COURT: AND I LIKE WHEN PEOPLE GO
25 "AND." IS IT YES OR NO, IS THAT THE ALLEGATION?

1 MS. SWEENEY: THAT WAS MICROSOFT'S
2 DEFENSE, ONE OF ITS DEFENSES.

3 THE COURT: BUT THIS IS DIFFERENT IN THE
4 SENSE THAT YOU CAN GO TO A STORE AND BUY AN IPOD
5 AND NEVER SUBSCRIBE TO ITUNES; CORRECT?

6 MS. SWEENEY: BUT THAT WAS ALSO TRUE IN
7 THE CASE OF WINDOWS, YOUR HONOR.

8 THE COURT: IS THAT CORRECT? YES OR NO?

9 MS. SWEENEY: THAT IS CORRECT.

10 THE COURT: AND YOU CAN GO TO ITUNES AND
11 DOWNLOAD MUSIC AND PLAY IT AND IT WILL PLAY
12 FUNCTIONALLY WELL WITHOUT EVER BUYING AN IPOD;
13 CORRECT?

14 MS. SWEENEY: THAT'S CORRECT.

15 THE COURT: SO ISN'T THE TECHNOLOGICAL
16 TIE INVOLVED HERE, IT IS TRUE THAT TO DIRECTLY
17 DOWNLOAD INTO A PORTABLE PLAYER, A PORTABLE DIGITAL
18 PLAYER, IT WILL ONLY PORT DIRECTLY INTO AN IPOD,
19 BUT YOU CAN THROUGH A SERIES OF STEPS PLAY IT ON A
20 PORTABLE PLAYING, YOU JUST CAN'T DO IT DIRECTLY;
21 CORRECT?

22 MS. SWEENEY: JUST AS I AS A COMPUTER
23 USER COULD HAVE GONE OUT AND PURCHASED WINDOWS
24 OPERATING SYSTEM AND NEVER HAD ANY INTEREST IN
25 MICROSOFT'S BROWSER PRODUCT. AND I DIDN'T HAVE TO

1 BUY IT.

2 THE COURT: WELL, I'M JUST SAYING; IS
3 THAT CORRECT? AND IF THAT IS CORRECT, THEN THE
4 QUESTION BECOMES IS IT A VIOLATION TO MAKE IT MORE
5 CONVENIENT OR TO GET AN OPTIMUM BENEFIT BETWEEN TWO
6 PRODUCTS TO TIE THEM SO THAT THEY ARE COMPATIBLE?
7 AND THAT'S WHY I'VE BEEN LOOKING AT THESE CASES
8 SUCH AS FOREMOST BECAUSE THERE AREN'T A LOT OF
9 TECHNOLOGICAL CASES OUT THERE WHERE TWO PRODUCTS
10 ARE MADE COMPATIBLE.

11 IS THERE A CASE WHERE THE COURT HAS HELD
12 THAT TWO PRODUCTS THAT ARE SOLD SEPARATELY BUT
13 WHICH ARE MADE TECHNOLOGICALLY COMPATIBLE HAVE BEEN
14 HELD TO BE A TIE?

15 MS. SWEENEY: THE FOREMOST CASE I THINK
16 AS YOUR HONOR POINTED OUT PROVIDES THE CLOSEST
17 EXAMPLE.

18 AND IN THAT CASE THE COURT REJECTED THE
19 PLAINTIFF'S CLAIMS, AND I THINK THAT CASE IS VERY
20 ILLUSTRATIVE OF WHY PLAINTIFFS' CLAIMS IN THIS CASE
21 ARE SUFFICIENT.

22 NOW, IN THAT CASE KODAK MANUFACTURED THE
23 110 CAMERA AND IT CAME OUT WITH THE COMPLEMENTARY
24 PRODUCTS, THE FILM, ET CETERA, ET CETERA.

25 AND THE PLAINTIFF COMPLAINED THAT, GEE,

1 WE DIDN'T KNOW YOU WERE GOING TO COME OUT WITH THIS
2 PRODUCT. WE HAVEN'T HAD TIME TO PRODUCE OUR OWN
3 VERSION OF COMPLEMENTARY PRODUCTS.

4 AND THE COURT SAID, WELL, YOU HAVEN'T
5 ALLEGED ENOUGH FOR A PER SE TIE.

6 BUT I QUESTION WHETHER THE PLAINTIFF IN
7 THAT CASE EVEN HAD ENOUGH FOR A RULE OF REASON TIE
8 AND HERE'S WHY: AS THE COURT POINTED OUT, THE
9 FORECLOSURE IN THE TIED PROVIDE MARKET, AND
10 ESPECIALLY WHEN YOU'RE LOOKING AT A CASE OF RULE OF
11 REASON YOU HAVE TO LOOK AT ANTICOMPETITIVE EFFECTS.
12 YOU HAVE TO LOOK AT THE TIED MARKET. WAS THERE
13 FORECLOSURE IN THE TIED MARKET?

14 AND THE WAY THAT KODAK ENGINEERED ITS NEW
15 PRODUCT WITH ITS COMPLEMENTARY PRODUCTS, THERE WAS
16 NO REAL FORECLOSURE IN THE TIED PRODUCT MARKET.
17 ALL YOU HAD WAS A TIME LAG.

18 AND THE COURT SAID, ANY SHORT RUN ABSENCE
19 OF COMPETITION IN THE MARKET FOR THE
20 TECHNOLOGICALLY TIED PRODUCT COULD JUST AS LIKELY
21 BE DUE TO THE UNWILLINGNESS OR INABILITY OF
22 COMPETITORS TO DEVOTE SUFFICIENT ECONOMIC RESOURCES
23 TO MATCH THE PACE OF TECHNOLOGICAL DEVELOPMENT SET
24 BY THE INDUSTRY'S LEADER.

25 NOW, HERE WE DON'T HAVE THAT SITUATION.

1 WE DON'T HAVE A SITUATION WHERE RIVAL MAKERS OF
2 PORTABLE PLAYERS CAN GO OUT AND MAKE A PRODUCT THAT
3 WILL PLAY ITUNES DIRECTLY.

4 AND, IN FACT, APPLE, AND THIS IS ALLEGED
5 IN NUMEROUS ALLEGATIONS IN OUR COMPLAINT, APPLE
6 DELIBERATELY DESIGNED ITS SYSTEM WITH THE
7 PROPRIETARY FAIR PLAY DRM SO THAT ITS RIVALS IN THE
8 PLAYER MARKET COULDN'T DO THAT.

9 AND ONCE THOSE RIVALS, THOSE COMPETITORS
10 OF APPLE IN THE PLAYER MARKET DID FIGURE OUT A WAY
11 THAT THEY COULD DIRECTLY PLAY ITUNES MUSIC ON ITS
12 PLAYERS, WHAT DID APPLE DO? THEY IMMEDIATELY
13 ISSUED A SOFTWARE UPDATE AND KNOCKED THAT SYSTEM
14 OUT. AND THEY DID IT AGAIN.

15 THE COURT: AND I LEFT OPEN YOUR MONOPOLY
16 CLAIM BECAUSE I THINK THAT THAT MIGHT SPEAK TO THAT
17 CLAIM, BUT EVEN AS YOU DESCRIBE THE RULE OF REASON,
18 YOU EXPRESS IT IN TERMS OF AN APPRECIABLE --
19 AFFECTING APPRECIABLE COMPETITION IN THE TIED
20 PRODUCT MARKET.

21 SO YOU HAVE GOT TO HAVE A TIED PRODUCT
22 BEFORE YOU ANALYZE IT UNDER RULE OF REASON.

23 IF I FIND THAT THERE'S NO TIED PRODUCT,
24 THAT'S THE PROBLEM THAT I FACE. I HAVE FOUND IN MY
25 PREVIOUS ORDER THAT THERE WAS NO TYING BECAUSE

1 THERE IS NO TIED -- THERE'S NO TYING PRODUCT,
2 THERE'S NO TIED PRODUCT.

3 CONSUMERS CAN BUY EACH INDEPENDENTLY AND
4 THERE'S NO COERCION.

5 AND UNLESS I BACK OFF FROM THAT AND I NOW
6 SAY I NOW RECOGNIZE THAT A TECHNOLOGICAL
7 COMPATIBILITY IS A TIE, THEN I CAN'T GET TO A RULE
8 OF REASON ANALYSIS.

9 SO I WOULD HAVE TO -- YOU WOULD HAVE TO
10 ASK ME TO SAY FIND A TIE BECAUSE THAT'S THE ONLY
11 RESTRICTION THAT YOU'RE ASSERTING IN THESE TWO
12 CLAIMS. YOU CALL THEM TYING CLAIMS.

13 IF I SAID THERE IS NO TIE, HOW DO I GET
14 TO A RULE OF REASON ANALYSIS?

15 IS THERE SUCH A THING AS A RULE OF REASON
16 ANALYSIS AND A TYING CLAIM WITHOUT A TIE?

17 MS. SWEENEY: I THINK WE HAVE ALLEGED A
18 TIE, YOUR HONOR. AND HERE'S THE DISTINCTION I WANT
19 TO DRAW: WE ALLEGE AN IMPLICIT TIE.

20 AN IMPLICIT TIE, WHICH WAS RECOGNIZED BY
21 THE NINTH CIRCUIT IN THE MOORE CASE AND REMEMBER
22 THAT WAS A CEMETERY CASE AND WHERE THE CEMETERY
23 OWNERS TIED PURCHASE OF A PLOT AND A MARKER BUT NOT
24 IN EVERY CASE. THERE WERE I THINK SEVEN CEMETERIES
25 AND ONLY FIVE OF THEM HAD THE TIE. AND FOR THE

1 NINTH CIRCUIT THAT WAS ENOUGH BECAUSE AN
2 APPRECIABLE NUMBER OF BUYERS WERE FORCED TO BUY THE
3 MARKET.

4 THE COURT: THAT SAYS THAT THERE WAS
5 ENOUGH TYING TO SATISFY. I HAVE SAID THAT THERE IS
6 NO TYING.

7 MS. SWEENEY: WHAT ABOUT THE WAYS AND
8 MEANS CASE, YOUR HONOR, WHICH RECOGNIZES IF A
9 DOMINANT SUPPLIER OF A PRODUCT OF PRICING THOSE
10 PRODUCTS IN SUCH A WAY, OR PUTS CERTAIN KINDS OF
11 RESTRICTIONS ON THEM SO THAT ONE PRODUCT IS LESS
12 USEFUL WITHOUT THE OTHER, THAT ALSO IS AN IMPLICIT
13 TIE.

14 THE COURT: WELL, THAT'S WHY I FOCUSSED
15 ON WHAT EVIDENCE THERE IS OR WHAT ALLEGATIONS THERE
16 ARE BUT YOU CAN'T -- THE IPOD HAS NO REAL FUNCTION
17 WITHOUT ITUNES, THAT THEY'RE FUNCTIONALLY HOBBLLED.

18 IF A PERSON -- I WOULD AGREE WITH YOU, IF
19 A MANUFACTURER HAS TWO SEPARATE PRODUCTS AND
20 TECHNOLOGICALLY HOBBLLES THEM ONE TO THE OTHER SO
21 THEY HAVE NO FUNCTION INDEPENDENT OF THE OTHER,
22 YOU'RE THEREFORE FORCED TO BUY BOTH, YOU MAY HAVE
23 GOTTEN CLOSE TO WHAT I WOULD CONSIDER TO BE A
24 TECHNOLOGICAL TIE.

25 BUT IF THE TWO PRODUCTS ARE SOLD IN

1 SEPARATE MARKETS AND THAT THEY FUNCTION
2 INDEPENDENTLY WITHOUT THE OTHER, ALTHOUGH BETTER
3 TOGETHER, THAT'S NOT THE KIND OF HOBBLING THAT
4 WOULD DEPRIVE EACH OF THE FULL FUNCTIONALITY.

5 MS. SWEENEY: WELL, THE QUESTION OF
6 WHETHER A RULE OF REASON TYING CLAIM YOU TO HAVE BE
7 DEPRIVED OF COMPLETE AND FULL FUNCTIONALITY.

8 HERE WE'RE ALLEGING PARTIAL IMPAIRMENT OF
9 FUNCTIONALITY AND IT IS ENOUGH UNDER A RULE OF
10 REASON CLAIM, AND I WOULD LIKE TO GO BACK TO WHERE
11 YOUR HONOR STARTED THIS CONVERSATION WHICH IS WHAT
12 IS THE DIFFERENCE BETWEEN A RULE OF REASON CLAIM
13 AND A TYING CLAIM?

14 AND AS APPLE'S COUNSEL RECOGNIZED, THERE
15 IS A DEARTH OF LAW ON RULE OF REASON TYING CLAIM.
16 WE HAVE THE FOREMOST PRO DECISION WHICH SEEMS TO
17 SUGGEST THAT IF YOU HAVE A TECHNOLOGICAL TIE, THEN
18 YOU SHOULD LOOK UNDER THE LENS OF A RULE OF REASON
19 PER SE ANALYSIS.

20 YOU ALSO HAVE THE MICROSOFT CASE WHICH
21 HAS A VERY EXTENSIVE DISCUSSION OF WHY THE PER SE
22 DID NOT APPLY TO THAT TECHNOLOGICAL TIE AND WHAT A
23 COURT SHOULD LOOK AT IN -- BECAUSE THE COURT
24 REMANDED TO THE DISTRICT COURT. OF COURSE THE CASE
25 SETTLED THEN SO THE COURT NEVER WENT THROUGH THE

1 ANALYSIS, BUT THE COURT GAVE EXPLICIT INSTRUCTIONS
2 AS TO WHAT THE DISTRICT COURT WOULD DO.

3 NOW, APPLE SAYS THE ONLY DIFFERENCE
4 BETWEEN A RULE OF REASON AND A PER SE TYING CLAIM
5 IS THAT THE USE THE RULE OF REASON CLAIM WHEN THE
6 DEFENDANT DOESN'T HAVE MARKET POWER, AND THAT'S
7 SIMPLY NOT TRUE. THERE IS NO BASIS FOR THAT
8 STATEMENT IN THE CASE LAW OR IN THE AREEDA TREATISE
9 WHICH APPLE RELIES UPON.

10 IN THE MICROSOFT CASE, WHEN THE COURT OF
11 APPEALS SENT THE CASE BACK DOWN TO BE ANALYZED
12 UNDER A RULE OF REASON STANDARD, THE COURT HAD
13 ALREADY HELD THAT THERE WAS A MONOPOLIZATION CLAIM
14 UNDER SECTION 2 AND THAT IT AFFIRMED THE LOWER
15 COURT'S FINDING THAT APPLE HAD MONOPOLY POWER IN
16 THE TYING PRODUCT.

17 SO THERE, OF COURSE, IT WASN'T A QUESTION
18 OF APPLYING RULE OF REASON SIMPLY BECAUSE THE
19 DEFENDANT DOESN'T HAVE MARKET POWER.

20 AND THEN --

21 THE COURT: WELL, YOUR RULE OF REASON --
22 ARE YOU STATING A RULE OF REASON CLAIM UNDER YOUR
23 MONOPOLY CLAIM AS WELL?

24 MS. SWEENEY: YES, THE MONOPOLY CLAIM IS
25 A RULE OF REASON CLAIM, YOUR HONOR.

1 THE COURT: SO I'M NOT, I'M NOT
2 DISAGREEING WITH YOU JUST AS TO THAT GENERAL
3 PROPOSITION. BUT AS TO THE TYING CLAIM.

4 IT IS DIFFICULT TO ARTICULATE WHAT
5 RESTRAINT I'M APPLYING THE RULE OF REASON TO
6 WITHOUT THE TIE.

7 IN OTHER WORDS, IT'S NOT A RULE OF
8 REASON; IT'S THIS RESTRAINT IS UNREASONABLE. SO
9 WHAT IS THE RESTRICTION? WHAT YOU ALLEGE AS A
10 RESTRICTION IS A TIE. AND SO IF I FIND THAT THERE
11 IS NO TIE, THEN THERE'S NO RESTRAINT TO WHICH I'M
12 APPLYING MY ANALYSIS.

13 MS. SWEENEY: WELL, WE SAY THERE IS A
14 RESTRAINT BECAUSE OF THE IMPAIRED FUNCTIONALITY.

15 THE COURT: NOW, THAT'S THE QUESTION.

16 MS. SWEENEY: YES.

17 THE COURT: IS IMPAIRED FUNCTIONALITY
18 SUFFICIENT AND SO IF YOU CITE TO ME A CASE THAT
19 SAYS THAT IMPAIRED FUNCTIONALITY IS SUFFICIENT TO
20 BASE A SECTION 1 CLAIM UNDER THE RULE OF REASON,
21 THEN I'M INTERESTED.

22 MS. SWEENEY: WELL THEN AGAIN I WOULD GO
23 BACK TO FOREMOST PRO BECAUSE I THINK THAT'S THE
24 CLOSEST ANALOGY.

25 THE COURT: WELL, IT'S CLOSE, BUT IT

1 DOESN'T DO THE ANALYSIS. IT JUST SAYS THAT WE
2 DON'T HAVE TO REACH THAT ANALYSIS. THAT DOESN'T
3 HELP ME TO KNOW WHAT THE ANALYSIS IS IF THE COURT
4 SAYS WE'RE NOT DOING THAT.

5 MS. SWEENEY: AND THEN I WOULD POINT YOUR
6 HONOR TO THE AREEDA TREATISE BECAUSE AS EVERYONE
7 HAS RECOGNIZED THERE'S NOT A LOT OF CASES ON RULE
8 OF REASONING TYING BUT THE AREEDA TREATISE LAYS OUT
9 AN ARGUMENT WHY TECHNOLOGICAL TIES SHOULD BE
10 SUBJECT TO A RULE OF REASON ANALYSIS.

11 AND THE REASON THAT AREEDA GIVES IS VERY
12 SIMILAR TO THE ONE GIVEN BY THE COURT OF APPEALS IN
13 THE MICROSOFT DECISION.

14 IN THE MICROSOFT DECISION THE COURT SAID
15 THAT THIS TECHNOLOGICAL TIE IS UNLIKE ANY THAT THE
16 SUPREME COURT HAS EVER ADDRESSED AND PER SE RULES
17 OF LIABILITY ON ANTITRUST LAWS ARE RESERVED FOR
18 THAT COURTS HAVE SEEN TIME AND TIME AGAIN THAT THEY
19 KNOW THE PERNICIOUS AFFECTS OF THOSE, SUCH AS PRICE
20 FIXING, SUCH AS THE TYPICAL EXPRESSED CONDITIONAL
21 TYING AGREEMENT BUT A TECHNOLOGICAL TIE IS A
22 SLIGHTLY DIFFERENT SPECIES OF A TYING AGREEMENT.

23 AND I WOULD ALSO LIKE TO POINT OUT
24 BECAUSE I'M SURE APPLE'S COUNSEL WILL BRING THIS UP
25 THAT THE AREEDA TREATISE ALSO SUGGESTS THAT IN THE

1 CASE OF A TECHNOLOGICAL TIE YOU SOMETIMES DON'T
2 HAVE THE KIND OF CONCERTED ACTION THAT IS REQUIRED
3 FOR A SECTION 1 SHERMAN ACT CLAIM.

4 AND I WOULD JUST LIKE TO SAY THAT
5 INITIALLY AS AN INITIAL MATTER THAT THE AREEDA
6 TREATISE DOESN'T SAY THAT YOU NEVER HAVE THAT KIND
7 OF CONCERTED ACTION.

8 AND MORE IMPORTANTLY, ALL OF THE CASE
9 LAW, AND WE CITE A LOT OF THIS IN OUR BRIEF, ALL OF
10 THE CASE LAW IS UNANIMOUS THAT IN ORDER TO SATISFY
11 THE CONCERTED REQUIREMENT OF SECTION 1 FOR PURPOSES
12 OF THE TYING CLAIM, ALL THE PLAINTIFF NEEDS TO
13 ALLEGE IS THAT THE DEFENDANT SOLD A PRODUCT TO THE
14 PLAINTIFF AND IT'S THAT AGREEMENT, THAT AGREEMENT
15 TO PURCHASE THE PRODUCT THAT CONTAINED THIS
16 RESTRAINT THAT SATISFIES THE CONCERTED REQUIREMENT
17 OF SECTION 1.

18 WELL --

19 THE COURT: WELL, YOU CAN APPRECIATE MY
20 CONCERN BECAUSE YOU'RE ASKING ME TO EXTEND THE LAW,
21 AND WE'RE ALL OPERATING WITH THAT IN MIND.

22 DID YOU WANT TO RESPOND TO COUNSEL'S
23 ARGUMENT ABOUT THIS ADVANCED COMPUTER SERVICES
24 CASE? I HAVEN'T HAD A CHANCE TO STUDY IT AGAIN
25 MYSELF.

1 I DID READ IT AT SOME POINT, BUT HE CITED
2 IT FOR THE PROPOSITION THAT IF THERE IS NO TIE,
3 THEN YOU CAN'T USE RULE OF REASON ANALYSIS AND IT'S
4 A DISTRICT COURT CASE THAT COMES OUT OF THE EASTERN
5 DISTRICT OF VIRGINIA.

6 MS. SWEENEY: SURE. AND THAT CASE AGAIN,
7 LIKE THE FOREMOST PRO CASE IS DISTINGUISHABLE FROM
8 THIS ONE IN THAT THERE WAS NO FORECLOSURE IN THE
9 TIED PRODUCT MARKET BECAUSE THERE WAS NOTHING
10 PREVENTING THE RIVALS OF THE DEFENDANT FROM MAKING
11 AND DEVELOPING THEIR OWN SOFTWARE AND COMPETING
12 WITH THE DEFENDANT IN THE TIED PRODUCT MARKET.

13 HERE APPLE HAS DONE EVERYTHING IT CAN TO
14 KEEP ITS RIVALS FROM COMPETING WITH IT AND IN THE
15 MARKET WITH ITS PORTABLE DEVICES. SO THAT'S HOW I
16 WOULD DISTINGUISH THAT CASE, YOUR HONOR.

17 THE COURT: THANK YOU.

18 MS. SWEENEY: ANY OTHER QUESTIONS?

19 THE COURT: NO. FINAL WORDS?

20 MR. MITTELSTAEDT: JUST BRIEFLY, YOUR
21 HONOR. WHEN COUNSEL TAKES ABOUT AN EXPLICIT OR
22 IMPLICIT TIE, WHAT THEY'RE TALKING ABOUT IS HOW
23 THEY WOULD GO ABOUT PROVING A CONDITIONED SALE.

24 BUT THE CASES DON'T TURN ON WHETHER THE
25 TIE IS PROVED EXPLICITLY OR IMPLICITLY. THEY TURN

1 ON WHETHER THERE'S A TIE, WHETHER THERE'S A
2 CONDITIONED SALE AND WHERE THE PRODUCTS WERE
3 SEPARATELY AVAILABLE, THERE'S NOT A CONDITIONED
4 SALE.

5 THERE IS NO CASE THAT SAYS THAT IN A RULE
6 OF REASON CASE THE PLAINTIFF CAN GET BY WITH LESS
7 COERCION THAN IN A PER SE CASE.

8 PER SE CASES AND RULE OF REASON CASES
9 APPLY THE SAME STANDARD, THE SAME THRESHOLD
10 STANDARD FOR WHETHER THERE'S A TIE.

11 AND AREEDA TALKS ABOUT A TECHNOLOGICAL
12 TIE BUT -- AND THIS MAY BE A TECHNICAL POINT, BUT I
13 THINK IT'S WORTH MAKING. WHEN HE TALKS ABOUT A
14 TECHNICAL TIE, HE'S TALKING ABOUT IT IN THE SAME
15 TERMS OF FOREMOST PRO WHERE YOU CAN'T USE ONE
16 PRODUCT WITHOUT THE OTHER, WHERE AS A PRACTICAL
17 MATTER YOU HAVE TO BUY THEM TOGETHER.

18 BUT AGAIN, AS WE HAVE BEEN OVER, THAT'S
19 NOT THE CASE HERE. SO I DISAGREE THAT THIS RISES
20 TO THE LEVEL OF A TECHNOLOGICAL TIE.

21 BUT EVEN IF IT WERE CONSIDERED A
22 TECHNOLOGICAL TIE, WHAT AREEDA SAYS IS THAT
23 ORDINARILY THE CHALLENGED PRODUCT DESIGN, AND
24 THAT'S WHAT THIS CASE IS REALLY ABOUT, WHAT
25 SOFTWARE APPLE CHOSE TO USE IN ITS PRODUCT.

1 THE COURT: WELL, YOU KNOW, THAT'S ONE OF
2 THE THINGS THAT I THOUGHT THAT I WOULD HELP US ALL
3 OUT IS AN ARTICULATION OF THIS STANDARD OF
4 TECHNOLOGICAL TIE.

5 WOULD YOU REGARD FOREMOST PRO AS AN
6 EXAMPLE A TECHNOLOGICAL TIE IN THE SENSE THAT YOU
7 COULD NOT USE ONE PRODUCT WITHOUT THE OTHER?
8 BECAUSE THEY IN THAT CASE TALK ABOUT COMPATIBILITY
9 AND SAY THAT IT'S NOT A TECHNOLOGICAL TIE, AND SO I
10 WAS ACTUALLY LISTENING HARD AS BOTH SIDES WERE
11 ARGUING TO SEE WHERE YOU WOULD PUT THAT CASE.

12 MR. MITTELSTAEDT: WELL, I THINK WHAT
13 LABEL YOU PUT ON IT, WHETHER YOU CALL THAT A
14 TECHNOLOGICAL TIE OR NOT IS LESS IMPORTANT. IT'S
15 JUST A LABEL.

16 IN THAT CASE, AS I READ IT, YOUR HONOR,
17 THE COURT WAS SAYING THAT YOU COULDN'T USE AS A
18 PRACTICAL AND AS AN EFFECTIVE MATTER, YOU NEEDED TO
19 USE THE TWO PRODUCTS TOGETHER, BUT THE COURT SAID
20 THAT WASN'T ENOUGH TO SHOW COERCION.

21 HERE WE HAVE GOT LESS THAN THAT BECAUSE
22 THE PRODUCTS ARE SEPARATELY AVAILABLE AND CAN BE
23 USED SEPARATELY.

24 SO I THINK THAT I, I -- AND I END AS I
25 STARTED, FOR THE SAME REASONS THAT YOUR HONOR FOUND

1 THAT THERE WAS NOT -- THEY DIDN'T SATISFY THE
2 THRESHOLD COERCION ELEMENT FOR A PER SE CLAIM, THE
3 SAME THING APPLIES TO THE TYING CLAIM.

4 THE, THE LAST THING I WANT TO SAY IS THAT
5 THERE WAS A SECOND AND ACTUALLY A THIRD GROUND IN
6 OUR MOTION AND ONE OF THEM I THINK IS A VERY
7 INTERESTING ISSUE AND THAT IS WHEN THEY'RE
8 CHALLENGING A PRODUCT DESIGN, WHETHER THAT
9 SATISFIES ANOTHER ELEMENT OF SECTION 1 CASES, WHICH
10 IS THAT THERE NEEDS TO BE AN AGREEMENT.

11 AND SOME OF THE TYING CASES, YOU KNOW,
12 JUST REALLY CASES WHERE ONE PRODUCT WON'T BE SOLD
13 WITHOUT THE OTHER, THE COURTS HAVE FOUND THAT
14 THERE'S AN AGREEMENT BECAUSE THE BUYER AGREES TO
15 BUY BOTH AND SO THAT SATISFIES THE CONSPIRACY, IF
16 YOU WILL, ELEMENT OF SECTION 1.

17 BUT AS AREEDA SAYS IN THE TECHNOLOGICAL
18 AREA WHERE THE PLAINTIFFS ARE BASICALLY CHALLENGING
19 A PRODUCT DESIGN, WHERE IS THE AGREEMENT? AND IF
20 ANYTHING, AREEDA SAYS THAT THOSE OUGHT TO BE
21 CHALLENGED UNDER SECTION 2.

22 THE COURT: I UNDERSTAND YOUR ARGUMENT.
23 THANK YOU. MATTER SUBMITTED.

24 MR. MITTELSTAEDT: THANK YOU, YOUR HONOR.
25 COULD I RAISE ONE BRIEF MATTER AND THAT'S

1 SCHEDULING THE NEXT ROUND OF MOTIONS?

2 THE COURT: YES.

3 MR. MITTELSTAEDT: AS YOUR HONOR KNOWS WE
4 HAVE BEEN INVITED TO MOVE TO DECERTIFY THE
5 INJUNCTIVE RELIEF CLASS, AND WE HAVE DONE THAT AND
6 THAT HEARING IS SET FOR NOVEMBER 9TH. AND THE
7 BRIEFING IS COMPLETED.

8 WE HAVE ALSO MOVED TO DECERTIFY THE
9 (B) (3) CLASS, THE DAMAGES CLASS IN THIS CASE, THE
10 DIRECT PURCHASER CASE. AND WE HAVE GOT A QUESTION
11 ABOUT WHEN THAT IS GOING TO BE BRIEFED.

12 WE HAD SUGGESTED TO YOUR HONOR THAT THE
13 HEARING BE PUT OVER TO DECEMBER 14TH SO WE CAN GET
14 THE BRIEFS DONE AND DEPOSE EACH SIDES EXPERTS AND
15 SO FORTH.

16 YOUR HONOR INSTEAD OF ACCEPTING THE
17 STIPULATION FOR DECEMBER 14TH PUT THE HEARING ON
18 NOVEMBER 9TH WITH THE FINAL BRIEF, WHICH WOULD BE
19 APPLE'S REPLY BRIEF, DUE OCTOBER 19TH.

20 WE SAT DOWN TO TRY AND NEGOTIATE WHEN
21 THEIR OPPOSITION WOULD BE DUE AND HOW MUCH TIME WE
22 WOULD HAVE TO RESPOND TO IT, AND THEY'RE UNABLE TO
23 DO THEIR OPPOSITION, THEY SAY, BEFORE OCTOBER 12TH.

24 THEIR EXPERT ON WHO THEY INTEND TO RELY
25 IS UNAVAILABLE THE WEEK OF OCTOBER 12TH, WHICH

1 WOULD MEAN THAT OUR BRIEF WOULD HAVE TO BE FILED IN
2 A ONE WEEK'S TIME WITHOUT THE BENEFIT OF DEPOSING
3 THEIR EXPERT.

4 WE HAD ASKED YOUR HONOR TO REQUIRE THEM
5 TO FILE THEIR BRIEF LAST FRIDAY OR TODAY.
6 OBVIOUSLY THAT'S IMPRACTICAL AT THIS POINT. AND SO
7 I WANTED TO SEE IF YOUR HONOR WAS OPEN TO EITHER
8 PUTTING THE HEARING ON DECEMBER 14TH SO WE COULD
9 HAVE ADEQUATE TIME OR SHORT OF THAT TO GIVE US
10 UNTIL OCTOBER 26TH TO FILE OUR BRIEF WHICH WOULD
11 STILL BE TWO WEEKS BEFORE THE HEARING ALBEIT ONE
12 WEEK LESS THAN WHAT YOUR HONOR'S SCHEDULE WOULD
13 HAVE PROVIDED.

14 THE COURT: LET ME ASK BECAUSE MY STAFF
15 DOES THE SCHEDULING FOR ME.

16 IS THE 14TH A REGULAR LAW AND MOTION
17 CALENDAR?

18 (PAUSE IN PROCEEDINGS.)

19 THE COURT: YOU'RE ASKING TO COMBINE A
20 COUPLE MOTIONS. THE DECERTIFICATION MOTION I ASKED
21 FOR IS NOW SET FOR THE 9TH?

22 MR. MITTELSTAEDT: YES.

23 THE COURT: AND YOU WANT TO BRING THIS
24 ADDITIONAL MOTION AND YOU ALSO WANT TO BRING THIS
25 ON THE 9TH?

1 MR. MITTELSTAEDT: THAT'S THE NET EFFECT.

2 THE COURT: BUT IT'S HARD TO FIT
3 TOGETHER. LET ME STUDY YOUR REQUESTS AND SEE
4 WHETHER OR NOT WE CAN ACCOMMODATE IT.

5 SO ARE YOU CONTENT TO HAVE THE ONE MOTION
6 ON THE 9TH, OR WOULD YOU LIKE A DELAY SO BOTH ARE
7 HEARD AT THE SAME TIME?

8 MR. MITTELSTAEDT: I'M CONTENT TO HAVE
9 THEM HEARD ON SEPARATE DATES.

10 THE COURT: ARE YOU?

11 MS. SWEENEY: I'M CONTENT TO HAVE THEM
12 HEARD ON THE 9TH. I DON'T OPPOSE WHAT
13 MR. MITTELSTAEDT SUGGESTED.

14 THE COURT: SO LET'S LEAVE WHAT IS NOW ON
15 THE 9TH ON THE 9TH, AND I'LL COME BACK TO YOU IN AN
16 ADMINISTRATIVE ORDER SETTING A BRIEFING SCHEDULE ON
17 THE OTHER MOTION AND SEE IF I CAN ACCOMMODATE YOUR
18 REQUEST.

19 THE REASON THE 14TH IS A PROBLEM IS
20 THAT'S MY LAST HEARING DATE BEFORE THE HOLIDAYS,
21 AND MY STAFF IS GIVEN LEAVE TO GO AND DO OTHER
22 THINGS BETWEEN THE HOLIDAYS. AND SO SOMETIMES I'M
23 HERE BY MYSELF AND SO I DON'T PUT A LOT OF THINGS
24 THE LAST DAY ON THAT AND SO I MIGHT EVEN MOVE YOU
25 FURTHER OUT.

1 MR. MITTELSTAEDT: OKAY. WHEN THE COURT
2 SEES THE ADMINISTRATIVE MOTION, THAT REALLY FOCUSES
3 ON IF IT'S GOING TO BE ON NOVEMBER 9TH, WHAT SHOULD
4 THE BRIEFING SCHEDULE BE.

5 THE COURT: RIGHT.

6 MR. MITTELSTAEDT: SO YOU WON'T SEE THE
7 REQUEST TO GO BACK TO THE 15TH.

8 THE COURT: THAT'S YOUR PREFERENCE
9 THOUGH?

10 MR. MITTELSTAEDT: YES, I THINK THAT'S
11 THE EASIER WAY.

12 MS. SWEENEY: THANK YOU, YOUR HONOR.

13 MR. MITTELSTAEDT: THANK YOU, YOUR
14 HONOR.

15 THE COURT: IS THAT OUR LAST MOTION?

16 THE CLERK: THAT CONCLUDES THE CALENDAR.

17 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER
18 WERE CONCLUDED.)
19
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25