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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."
) NOVEMBER 23, 2009
)
)
) PAGES 1 - 58
)

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
BY: BONNY SWEENEY
THOMAS R. MERRICK
655 WEST BROADWAY
SUITE 1900
SAN DIEGO, CALIFORNIA 92101

ZELDES & HAEGGQUIST
BY: HELEN ZELDES
625 BROADWAY, SUITE 906
SAN DIEGO, CALIFORNIA 92102

FOR THE DEFENDANTS: JONES DAY
BY: ROBERT A. MITTELSTAEDT
MICHAEL SCOTT
555 CALIFORNIA STREET
26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

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SAN JOSE, CALIFORNIA NOVEMBER 23, 2009

P R O C E E D I N G S

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

THE CLERK: CALLING CASE NUMBER 05-00037,
THE APPLE IPOD ITUNES ANTITRUST LITIGATION.

ON FOR VARIOUS MOTIONS. FIFTEEN MINUTES
EACH SIDE FOR ALL MOTIONS.

THE COURT: I'M SURE THAT'S NOT GOING TO
BE SUFFICIENT BUT --

MS. ZELDES: THAT'S OUR FIRST MOTION.

THE COURT: YOUR FIRST MOTION IS FOR MORE
TIME?

FIRST INTRODUCE YOURSELVES TO ME.

MS. SWEENEY: GOOD MORNING, YOUR HONOR.
BONNIE SWEENEY FOR THE DIRECT PURCHASER PLAINTIFFS.

MR. MERRICK: GOOD MORNING, YOUR HONOR.
THOMAS MERRICK ALSO FOR THE DIRECT PURCHASER
PLAINTIFFS.

MS. ZELDES: GOOD MORNING, YOUR HONOR.
HELEN ZELDES ON BEHALF OF STACY SOMERS THE INDIRECT
PURCHASER PLAINTIFFS.

MS. ROACH: GOOD MORNING, YOUR HONOR.
PAULA ROACH ON BEHALF OF DIRECT PURCHASER

1 PLAINTIFFS.

2 MR. MITTELSTAEDT: AND FOR APPLE, YOUR
3 HONOR, BOB MITTELSTAEDT AND MICHAEL SCOTT.

4 THE COURT: WELL, AS MS. GARCIA DIRECTLY
5 SUMMARIZED IT, WE HAVE VARIOUS MOTIONS.

6 WE HAVE A MOTION BY THE DIRECT PURCHASER
7 PLAINTIFFS TO MODIFY THE DEFINITION OF THE CLASS TO
8 INCLUDE ITUNE PURCHASERS.

9 WE HAVE A MOTION, IT DOESN'T SAY BY WHOM,
10 BUT A MOTION FOR RECONSIDERATION OF THE 23(B)(2)
11 CLASS, I BELIEVE THAT'S APPLE'S MOTION; A MOTION
12 FOR DECERTIFICATION OF THE RULE 23(B)(3) CLASS,
13 THAT MUST BE APPLE'S MOTION AS WELL; AND THEN I
14 HAVE A SUPPLEMENTAL MOTION FOR CLASS CERTIFICATION
15 OF THE RULE 23(B)(2) CLASS.

16 I ACTUALLY WANTED TO HEAR FROM THE
17 PLAINTIFFS FIRST BECAUSE I APPROACHED THIS WHOLE
18 PROBLEM AS ONE OF TRYING TO UNDERSTAND WHAT IS THE
19 PLAINTIFF'S THEORY AND CLAIM.

20 AND I ACTUALLY WONDERED WHETHER OR NOT
21 THE MOTION TO MODIFY THE CLASS WAS AT THE INSTANCE
22 OF THE PLAINTIFFS THEMSELVES OR WHETHER OR NOT THEY
23 TOOK THE COURT'S QUESTION AS BEING THE ONLY REASON
24 FOR THE MODIFICATION.

25 I KNOW THAT THERE ARE ISSUES OF MOOTNESS

1 AND OTHERS THAT ARE RAISED WITH RESPECT TO WHETHER
2 OR NOT THE COURT SHOULD CHANGE THE DEFINITION, BUT
3 I DID WANT TO HEAR THE MOTIVATIONAL STATEMENT.

4 MR. MERRICK: AGAIN, THOMAS MERRICK FOR
5 THE DIRECT PURCHASER PLAINTIFFS, YOUR HONOR.

6 YES, I WOULD SAY THAT THE COURT'S JULY
7 17TH, ORDER ASKING FOR ADDITIONAL BRIEFING WAS ONE
8 OF OUR PRIMARY MOTIVATING FACTORS.

9 WHAT IT DID IS, I THINK, SHOWED UP
10 RIGHTFULLY SO, WHICH THE COURT IS CORRECT IN
11 SEEING, THAT THERE WAS A GAP IN THE INJUNCTIVE
12 RELIEF CLASS THAT COULD ONLY BE CURED IF WE ALSO
13 INCLUDED ITUNES PURCHASERS.

14 SO I WOULD HOPE THAT ANSWERS YOUR INITIAL
15 QUESTION, BUT THAT WAS OUR MOTIVATING FORCE.

16 THE COURT: WELL, THIS IS ON THE MONOPOLY
17 CLAIM?

18 MR. MERRICK: CORRECT.

19 THE COURT: STATE FOR ME AS CLEARLY AS
20 YOU CAN WHAT IS THE CLAIM THAT WOULD THEN ENCOMPASS
21 THE ITUNE PURCHASERS AS PART OF THAT CLASS.

22 MR. MERRICK: WELL, THE MONOPOLIZATION
23 CLASS, OR CLAIM RATHER, UNLIKE THE TYING CLAIM, IS
24 BASED ON SOME SIMILAR ASPECTS TO THE TYING CLAIM
25 BUT NOT ALL.

1 THE MONOPOLIZATION AND ATTEMPTED
2 MONOPOLIZATION CLAIMS ARE BASED ON APPLE'S
3 MAINTENANCE AND ACQUISITION OF MONOPOLY POWER IN
4 THE MUSIC PLAYER MARKET, THE ON-LINE MUSIC MARKET,
5 AND THE ON-LINE VIDEO MARKET PER THE COMPLAINT.

6 THAT BEING THE CASE, THE (B) (2) CLASS
7 SEEKING INJUNCTIVE RELIEF WOULD BE TRYING TO -- IS
8 AIMED AT REMEDYING ALL OF THAT CONDUCT, THE
9 MONOPOLIZATION CONDUCT ON ALL THREE OF THOSE
10 FRONTS.

11 THE COURT: I MISSED THE THIRD. THE
12 MONOPOLY IN THE PLAYER MARKET, THE MUSIC MARKET AND
13 THE?

14 MR. MERRICK: VIDEO MARKET.

15 THE COURT: AND THE VIDEO MARKET.

16 MR. MERRICK: THE ON-LINE.

17 THE COURT: AND THIS WAS ACCOMPANIED
18 WITHOUT ANY CHANGES IN THE PLEADINGS. SO I'M TO
19 RELY ON THE CURRENT PLEADINGS FOR THAT PURPOSE?

20 MR. MERRICK: CORRECT, YOUR HONOR. AND
21 THIS IS THE CLASS THAT WE'RE MOVING ON NOW, THAT
22 WE'RE MOVING TO HAVE THE DEFINITION CHANGED TO, IS
23 THE SAME CLASS AS WHAT WAS PLED IN THE COMPLAINT
24 ORIGINALLY.

25 THE COURT: YES. ALL RIGHT.

1 NOW, GOING TO THE MONOPOLY CLAIM, STATE
2 AS CLEARLY AS YOU CAN WHAT THAT CLAIM IS.

3 MR. MERRICK: WELL, APPLE'S OVERALL USE
4 OF INTEROPERABILITY, IF I CAN PUT IT AS SUCCINCTLY
5 AS THAT; THEIR MARKET POWER WITHIN THE MUSIC PLAYER
6 MARKET FOR IPODS; THEIR MARKET POWER WITHIN THE
7 ITUNES MUSIC STORE MARKET WORKING TOGETHER CREATED
8 A MAINTENANCE OF MONOPOLY POWER IN THOSE MARKETS
9 WHICH THEN LED TO A HARM TO COMPETITION, THE LACK
10 OF INTEROPERABILITY, INJURY TO THE CONSUMERS,
11 HIGHER PRICES, SUPPLY AND SELECTION OF COMPETING
12 PRODUCTS WAS DAMPENED DUE TO THE MONOPOLY. THE
13 NUMBER AND EFFECTIVENESS OF COMPETITORS WOULD BE
14 DIMINISHED, AND THAT'S SORT OF A NUTSHELL OF OUR
15 ALLEGATIONS IN THE COMPLAINT.

16 THE COURT: THE CLARITY OF THAT IS YET TO
17 GET TO ME, AND I'M TRYING TO ASK YOU THESE
18 QUESTIONS BECAUSE IT DOES SEEM TO ME THAT IF I'M
19 GOING TO MODIFY ANYTHING, I NEED TO UNDERSTAND
20 BETTER WHAT IT IS THAT WOULD BE CAPTURED BY IT.

21 I ACTUALLY NEED TO STUDY THIS BETTER
22 BEFORE I'M IN A POSITION TO GRANT THIS
23 MODIFICATION.

24 WHAT I WORRY ABOUT IS THAT THE
25 INTEROPERABILITY IS THE EVIL THAT IS BEING ALLEGED.

1 IN OTHER WORDS, THAT IT'S NOT DRM, WHICH
2 IS SOMETHING THAT PERHAPS IS IMPOSED BY THE OWNER
3 OF THE COPYRIGHT, BUT IT IS WHATEVER IS CALLED
4 INTEROPERABILITY.

5 MR. MERRICK: I CAN ADDRESS THAT I THINK,
6 YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 MR. MERRICK: A COUPLE HEARINGS AGO THE
9 COURT STATED SOMETHING THAT I THOUGHT PUT IT VERY
10 SUCCINCTLY, WHICH IS THAT THERE IS DRM AND THEN
11 THERE IS APPLE'S DRM.

12 APPLE'S DRM MADE IT SO THAT ONLY THE
13 DOWNLOADS WOULD ONLY WORK WITH AN APPLE AND THAT
14 ONLY APPLE IPODS COULD SYNC WITH ITUNES.

15 THE RECORD LABELS DID WANT DRM. THAT
16 PART WE DO AGREE WITH.

17 HOWEVER, THE RECORD LABELS ALSO WERE IN
18 FAVOR OF INTEROPERABILITY WHICH WOULD HAVE BEEN --
19 WHICH IS THE REASON WHY -- WHICH IS OUR REAL MAJOR
20 COMPLAINT.

21 WE UNDERSTAND THAT THERE NEEDS TO BE SOME
22 COPYRIGHT PROTECTION, BUT THE WAY THAT APPLE WENT
23 ABOUT DOING THAT THROUGH ITS OWN PROPRIETARY DRM --
24 A GREATER EXAMPLE IS AN E-MAIL THAT WE FILED UNDER
25 SEAL THAT IS ATTACHED TO A DECLARATION IN THE REPLY

1 BRIEF ON -- THAT THE MOTION FOR REDEFINING THE
2 CLASS WHERE APPLE INTERNALLY IS TALKING ABOUT ONE
3 OF THE RECORD LABEL'S REACTION TO REAL NETWORKS
4 CHANCE OR -- I'M SORRY -- EFFORTS TO MAKE THEIR
5 MUSIC STORE IN A SENSE BE ABLE TO WORK WITH AN
6 IPOD.

7 AND WHAT HAPPENED IS THAT THEY WENT TO
8 THE RECORD LABELS AND SAID WHAT DO YOU THINK? AND
9 IN THE E-MAIL THE RECORD LABELS SAID WE DON'T HAVE
10 A PROBLEM AND OUR CONCERN WOULD BE
11 INTEROPERABILITY. WE WOULD LIKE TO SEE APPLE
12 LICENSE TO REAL AND SO IT WOULD GIVE US MORE
13 OPPORTUNITY TO SELL OUR PRODUCT.

14 AGAIN, WE'RE GETTING INTO EVIDENCE BASED
15 ISSUES AND FACT BASED ISSUES, AND I THINK THAT'S
16 KIND OF AN EXAMPLE OF THE KIND OF ACTIVITY THAT
17 WE'RE ALLEGING.

18 THE COURT: SO THAT THE CLASS NEEDS TO
19 INCLUDE THE PURCHASERS OF MUSIC?

20 AND IS THAT ALL PURCHASERS OF MUSIC?

21 MR. MERRICK: FROM ITUNES, YES. THE
22 REASON IT NEEDS TO INCLUDE PURCHASERS OF MUSIC IS
23 THAT AFTER THERE'S -- APPLE DID STOP USING DRM IN
24 ITS ITUNES DOWNLOADS IN JANUARY OF 2009, BUT THE
25 800 POUND GORILLA, THE ELEPHANT IN THE ROOM AS IT

1 WERE WOULD STILL BE 5 BILLION LOCKED SONGS THAT ARE
2 STILL IN EXISTENCE. AND THAT'S AFTER THE DRM IS NO
3 LONGER BEING USED. THAT'S WHAT THE FOCUS OF THE
4 (B) (2) CLASS WOULD BE AND ALSO THE VIDEO, THE VIDEO
5 STILL HAS DRM IN IT AS WELL.

6 THE COURT: WHEN IT STOPPED DRM, IT
7 STOPPED ITS DRM OR IS IT ALL DRM'S?

8 MR. MERRICK: ALL.

9 THE COURT: ALL HAS BEEN STOPPED. SO IF
10 YOU BUY THE MUSIC, YOU'RE THEN ABLE TO DUPLICATE IT
11 MULTIPLE TIMES, YOU CAN TRANSFER IT MULTIPLE TIMES.
12 THE COPYRIGHT OWNER HAS LOST ANY CONTROL OVER ITS
13 DISTRIBUTION.

14 MR. MERRICK: HOW MUCH CONTROL THEY LOST
15 I'M NOT SURE BUT THEY DON'T HAVE THE DRM ON IT NOW,
16 BUT, AGAIN, YOU STILL HAVE FIVE BILLION LOCKED
17 SONGS.

18 THE COURT: AND SO THE FOCUS WOULD BE ON
19 THE PURCHASERS OF ITUNES WHO REMAIN HAVING DRM,
20 APPLE DRM PROTECTED MUSIC?

21 MR. MERRICK: CORRECT.

22 THE COURT: AND ONLY THOSE?

23 MR. MERRICK: WELL, THE CLASS WOULD
24 CONSIST AS PLED, WOULD CONSIST OF BOTH IPOD BUYERS
25 AND THE ITUNES BECAUSE, AGAIN, THE MONOPOLIZATION

1 IS LARGER THAN JUST THE LOCKED SONGS LEFT IN IT.
2 IT HAS TO DO WITH THE LACK OF INTEROPERABILITY.

3 THE COURT: AND WHAT IS THE HARM TO
4 COMPETITION WITH RESPECT TO THE IPOD PURCHASERS?
5 THEY'RE ABLE TO DOWNLOAD THE APPLE DRM PROTECTED
6 MUSIC?

7 MR. MERRICK: THEY ARE, BUT THE IDEA
8 THERE IS THAT HAVING THE DRM ON IT AT THE TIME
9 IMPACTED WHETHER THEY COULD USE COMPETING SOURCES
10 AND WHETHER COMPETING SOURCES COULD USE THEIR,
11 COULD USE ITUNES. SO IT'S BOTH.

12 THE COURT: WELL, WHY WOULD THE
13 PURCHASERS -- I SEE, SO THE PURCHASER OF THE IPOD,
14 IT'S NOT SO MUCH WHAT IS ENCODED INTO THE MUSIC, IT
15 IS WHAT IS ENCODED INTO THE PLAYER SO THAT IT IS
16 NOT ABLE TO PLAY OTHER MUSIC.

17 MR. MERRICK: THAT'S PART OF IT, TOO,
18 YOU'RE RIGHT.

19 THE COURT: PART OF IT, TOO? THAT'S THE
20 WHOLE POINT OF THE DRM -- PART OF THE CLASS WITH
21 RESPECT TO THE PLAYER; RIGHT?

22 MR. MERRICK: RIGHT.

23 THE COURT: THAT THE PLAYER ITSELF WON'T
24 DECODE OTHER MUSIC.

25 MR. MERRICK: AND IF THEY HAVE DOWNLOADED

1 ANY MUSIC INTO THEIR IPOD, THAT MEANS THAT IT'S
2 TIED INTO ONLY AN IPOD AND THEY COULDN'T BUY A
3 COMPETING PLAYER.

4 THE COURT: VERY WELL. LET ME TAKE THAT
5 AS THE EXPLANATION OF THE WHY. NOW LET'S GO TO THE
6 WHY NOT?

7 MR. MITTELSTAEDT: FIRST OF ALL, YOUR
8 HONOR, ON THE SECTION 2 CLAIM AND WHAT IT IS,
9 ACCORDING TO THE COMPLAINT THEY ARE SIMPLY
10 REALIZING AND INCORPORATING BY REFERENCE ALL OF THE
11 PREVIOUS ALLEGATIONS, THE ALLEGATIONS THAT DEALT
12 WITH TYING.

13 AS I READ THE COMPLAINT, YOUR HONOR,
14 THEIR SECTION 2 CLAIM IS THE SAME THING AS THEIR
15 TYING CLAIM.

16 THE COURT: I AGREE WITH YOU. AS I
17 UNDERSTAND IT, ALTHOUGH THE TECHNOLOGICAL TIE
18 DOESN'T WORK, AS FAR AS THE COURT IS CONCERNED, AS
19 A STRICT TYING CLAIM, THEY ARE REALLEGING IT AS A
20 SECTION 2 CLAIM.

21 MR. MITTELSTAEDT: YES. AND AT THE
22 APPROPRIATE TIME, AND I THINK IT DOES BEAR ON WHAT
23 WE'RE TALKING ABOUT THIS MORNING, OUR POSITION IS
24 GOING TO BE THAT UNDER FOREMOST PRO, THE NINTH
25 CIRCUIT CASE YOUR HONOR HAS RELIED ON, BECAUSE THE

1 TYING CLAIM, THE CONDUCT UNDERLYING THE TYING CLAIM
2 IS NOT ANTICOMPETITIVE IT, IN THE WORDS OF THE
3 NINTH CIRCUIT IN FOREMOST PRO, QUOTE, "IS OF NO
4 ASSISTANCE TO THE PLAINTIFF'S EFFORTS TO STATE A
5 CLAIM FOR RELIEF FOR MONOPOLIZATION AND ATTEMPTED
6 MONOPOLIZATION, BOTH OF WHICH REQUIRE AT LEAST SOME
7 ALLEGATION OF ANTICOMPETITIVE CONDUCT."

8 THE --

9 THE COURT: WELL, WAS FOREMOST PRO A
10 SECTION 2 CASE?

11 MR. MITTELSTAEDT: IT WAS BOTH A TYING
12 CASE AND A SECTION 2 CASE AFTER FINDING THAT THE
13 INTRODUCTION OF TECHNOLOGICALLY RELATED PROJECTS
14 ALONE WAS NOT AN ANTICOMPETITIVE ACT, EVEN IF, AS
15 THE NINTH CIRCUIT SAID, THE PRODUCTS WERE
16 INCOMPATIBLE WITH PRODUCTS OFFERED BY COMPETITORS.

17 AFTER THE COURT FOUND THAT AND THROUGHOUT
18 THE SECTION 1 TYING CLAIM, THE COURT WENT ON TO
19 FIND THAT THAT SAME CONDUCT WAS OF NO ASSISTANCE TO
20 THE PLAINTIFF IN TRYING TO ESTABLISH A SECTION 2
21 CLAIM.

22 SO I THINK THAT THAT BEARS ON WHETHER THE
23 PLAINTIFF SHOULD GET A CLASS CERTIFIED HERE.

24 THE OTHER ASPECT OF THEIR CLAIM, YOUR
25 HONOR, AT BOTTOM, AS YOUR HONOR HAS RECOGNIZED

1 BEFORE, IS THEY ARE SAYING THAT APPLE SHOULD HAVE
2 USED MICROSOFT'S DRM OR IT SHOULD HAVE LICENSED
3 FAIR PLAY TO COMPETITORS.

4 OUR POSITION IS THAT THERE IS SIMPLY NO
5 ANTITRUST DUTY ON AN INNOVATIVE COMPANY TO DO
6 EITHER OF THOSE THINGS.

7 THE IDEA THAT MICROSOFT COULD COME INTO
8 THIS COURT, FOR EXAMPLE, AND SUE APPLE FOR NOT
9 USING MICROSOFT SOFTWARE, AND THAT MICROSOFT, IF
10 THEY CAN'T DO THAT, CONSUMERS SHOULD NOT BE ABLE TO
11 DO THAT STANDING IN THE SHOES OF MICROSOFT.

12 THE COURT: WELL, LET ME SEE IF I CAN
13 STATE THE CLAIM AS I HAVE ARTICULATED IT TO MYSELF,
14 AND THIS IS JUST A SUMMARY. IT'S NOT NECESSARILY
15 WHAT THE PLAINTIFF WOULD AGREE TO BE THEIR CLAIM.

16 AS I HAVE ARTICULATED IT TO MYSELF, THE
17 PLAINTIFFS ARE CLAIMING THAT APPLE HAS MONOPOLY
18 POWER IN MUSIC AND THAT USING ITS MONOPOLY POWER IN
19 MUSIC, IT LEVERAGES THAT MARKET PLAYER TO EXTRACT A
20 PREMIUM WITH RESPECT TO PLAYERS BY TECHNOLOGICAL
21 TYING BETWEEN THE MUSIC AND THE PLAYER SUCH THAT IF
22 YOU WANT TO ENJOY THIS 60, 70 PERCENT -- I'VE SEEN
23 DIFFERENT NUMBERS WITH RESPECT TO THE POWERS IN
24 MUSIC -- IF YOU WANT TO ENJOY THE BENEFIT OF THAT
25 MUSIC, YOU HAVE TO BUY A PLAYER.

1 AND SO IT LEVERAGES ITS MARKET POWER IN
2 MUSIC TO EXTRACT A PREMIUM FROM THE MARKET IN
3 PLAYERS.

4 NOW, I HAVEN'T QUITE SORTED OUT YET, AS
5 I'M STRUGGLING WITH THIS CASE, WHAT THAT DOES IN
6 TERMS OF WHO SHOULD BE IN THE CLASS, BUT THAT --
7 AND THEN I HAVE ALSO SEEN IN THE PLAINTIFF'S
8 COMPLAINT THAT APPLE HAS AN 80 PERCENT MARKET SHARE
9 IN PLAYERS, BUT IT SEEMS TO ME THAT THIS CASE
10 STARTED OUT WITH BOTH TECHNOLOGIES, THE MUSIC AND
11 THE PLAYERS IN THE BALANCE. AND WE'RE TRYING TO
12 WORK OUR WAY THROUGH EXACTLY WHAT IS THE THEORY AND
13 WHAT SHOULD BE THE CLASS GIVEN THAT THEORY AND THE
14 RELIEF THAT IS BEING SOUGHT.

15 MR. MITTELSTAEDT: UNDERSTOOD. AND I'M
16 FOCUSSING ON THE FIRST PART, YOU KNOW, WHAT IS
17 THEIR CLAIM AND THEN I'LL GET QUICKLY TO THE SECOND
18 PART WHAT DOES THAT IMPLY FOR THE CLASS ISSUE.

19 BUT ON THE WAY THAT YOUR HONOR STATED
20 THEIR CLAIM, I AGREE, I THINK, THAT THAT'S THE WAY
21 THEY STATE IT. BUT THERE ARE TWO THINGS WRONG WITH
22 THAT.

23 FIRST OF ALL, AS YOUR HONOR HAS FOUND,
24 IT'S NOT A MATTER -- IT'S NOT ACCURATE THAT ITUNES
25 MUSIC CANNOT PLAY ON AN IPOD, ON AN IPOD

1 COMPETITOR.

2 AS YOUR HONOR FOUND IN THE LAST ORDER,
3 IT'S JUST A MATTER OF USING ANOTHER STEP OR TWO IN
4 ORDER TO PLAY THAT MUSIC ON COMPETING PLAYERS.

5 SO THE ABSOLUTE NATURE OF THAT THE
6 PLAINTIFF'S STATEMENT OF THEIR CASE IS JUST
7 CONTRARY TO THE FACTS.

8 THE OTHER POINT, THOUGH, AND THIS IS MORE
9 IMPORTANT, IS WHAT THE PLAINTIFFS ARE DOING IS
10 DESCRIBING THEIR CLAIM IN A FAIRLY GENERIC HIGH
11 LEVEL WAY.

12 BUT WHEN YOU UNRAVEL THAT, WHAT THE CLAIM
13 AMOUNTS TO IS THAT APPLE WAS REQUIRED TO USE SOME
14 TYPE OF ANTI-PIRACY DRM. APPLE HAD A CHOICE OF
15 USING MICROSOFT'S, AT LEAST THEORETICALLY, OR
16 DEVELOPING ITS OWN. AND IT CHOSE TO USE ITS OWN.

17 AND THE PLAINTIFFS HAVE NOT COME UP WITH
18 ANY COHERENT THEORY ABOUT WHY THAT IS AGAINST THE
19 ANTITRUST LAWS.

20 THE COURT: WELL, AS I UNDERSTAND THE
21 THEORY -- AND I AM ONLY DOING IT THIS WAY AS
22 OPPOSED TO HAVE THE PLAINTIFF DOING IS TO KEEP YOU
23 TALKING.

24 IS THAT THE REASON THEY DEVELOPED THEIR
25 OWN IS TO SELL PLAYERS AT A PREMIUM. IN OTHER

1 WORDS, IT SAW A MARKET THAT IT COULD DEVELOP.

2 IT COULD HAVE DEVELOPED ITS OWN IN A
3 FASHION THAT WOULD NOT HAVE RESTRICTED THE MUSIC TO
4 OTHER PLAYERS, BUT IT CHOSE TO RESTRICT THE MUSIC
5 TO ITS PLAYER AS PART OF ITS DEVELOPMENT EFFORT.

6 THE ANTICOMPETITIVE MOTIVATION WAS NOT TO
7 PROTECT THE COPYRIGHT OWNER BUT IT WAS TO MAKE --
8 TO HARM COMPETITION AND PLAYERS THAT COULD PLAY THE
9 MUSIC.

10 MR. MITTELSTAEDT: BUT, YOUR HONOR, WHEN
11 A COMPANY IS DECIDING ON DESIGNING A PRODUCT OR
12 LAUNCHING A NEW PRODUCT, IT'S MOTIVATION TO TRY AND
13 SELL MORE COMPLEMENTARY PRODUCTS, TO TRY AND GET AN
14 ADVANTAGE OVER COMPETITORS. THAT MOTIVATION IS NOT
15 ENOUGH TO STATE A SECTION 2 VIOLATION.

16 I MEAN, THE ISSUE IS DOES A COMPANY
17 DEVELOPING A NEW PRODUCT HAVE ANY ANTITRUST DUTY TO
18 MAKE THAT PRODUCT INTEROPERABLE WITH COMPETITOR'S
19 PRODUCTS.

20 AND THE ANTITRUST CASES ARE LEGION THAT
21 SAY THAT A COMPANY DOES NOT HAVE TO DO ANYTHING TO
22 HELP COMPETITION.

23 SO -- AND I THINK THAT THAT PRINCIPLE IS
24 ENCAPSULATED WELL IN SAYING THIS, YOUR HONOR, THE
25 PLAINTIFFS, ONE OF THEIR THEORIES IS THAT APPLE

1 SHOULD HAVE USED MICROSOFT'S DRM INSTEAD OF
2 DEVELOPING ITS OWN.

3 THAT WOULD HAVE BEEN ONE AT LEAST
4 THEORETICAL WAY TO HAVE MORE INTEROPERABILITY. BUT
5 THERE'S JUST NOTHING IN THE ANTITRUST LAWS THAT
6 SAYS THAT APPLE WAS REQUIRED TO DO THAT.

7 SO, YOU KNOW, THAT, I MEAN, THAT IS, I
8 THINK, HORNBOOK ANTITRUST LAW. NO DUTY TO HELP
9 COMPETITORS. NO DUTY TO DESIGN YOUR PRODUCTS IN A
10 WAY THAT MAKE THEM INOPERABLE.

11 YOU THINK ABOUT THE RAMIFICATIONS OF
12 THEIR THEORY. APPLE COULD NOT HAVE LEGALLY UNDER
13 THEIR THEORY BROUGHT THE IPOD TO MARKET OR THE
14 ITUNES MUSIC STORE TO MARKET UNLESS IT INVESTED
15 ENOUGH MONEY TO MAKE THOSE THINGS INTEROPERABLE
16 WITH COMPETITOR'S PRODUCTS.

17 THAT WOULD THWART INNOVATION, AND THAT'S
18 WHAT THE NINTH CIRCUIT SAID IN FOREMOST PRO. YOU
19 SIMPLY DON'T HAVE TO MAKE YOUR PRODUCTS
20 INTEROPERABLE WITH OTHERS. THAT WOULD STOP THE
21 INNOVATION, AND THAT'S WHY THERE'S NO ANTITRUST
22 DUTY TO DO THAT.

23 THE COURT: I KNOW THIS IS EVIDENTIARY IN
24 NATURE, BUT MY MIND IS DRAWN TO A CIRCUMSTANCE THAT
25 I HAVE HEARD AT SOME POINT ALONG THE WAY IN THIS

1 LITIGATION WHERE THAT EVEN THOUGH IT HAD DEVELOPED
2 ITS OWN VERSION OF DRM, WHEN A COMPETITIVE PRODUCT
3 THAT CAME ALONG THAT COULD USE IT, APPLE DID
4 SOMETHING TO CHANGE ITS VERSION OF DRM TO MAINTAIN
5 THE RELATIONSHIP BETWEEN THE MUSIC AND THE DIRECT
6 DOWNLOAD TO THE IPOD. I AGREE WITH YOU THERE ARE
7 INDIRECT WAYS TO DO IT.

8 AND SO SHOULDN'T THE COURT AT LEAST ALLOW
9 THIS TO PROCEED TO THE POINT WHERE I CAN LEARN MORE
10 ABOUT THAT THROUGH DISCOVERY? I DON'T KNOW IF
11 CHANGING THE CLASS DEFINITION IS THE WAY -- THE
12 ROUTE TO THAT BUT WHY SHOULDN'T I PAY ATTENTION TO
13 THAT?

14 MR. MITTELSTAEDT: THE ALLEGATION IS THAT
15 A YEAR AND A HALF AFTER THE ITUNES MUSIC STORE WAS
16 LAUNCHED, SO NOW WE'RE UP TO OCTOBER OF 2004, REAL
17 NETWORKS DEVELOPED SOME TYPE OF DRM THAT MIMICKED
18 FAIR PLAY.

19 AND SO WHEN REAL NETWORKS SOLD MUSIC ON
20 THEIR MUSIC STORE, IT WAS INTERPRETED BY THE IPOD
21 AS APPLE'S FAIR PLAY DRM PROTECTED MUSIC.

22 THE WAY THEY DID THAT, AND THIS IS
23 ALLEGED IN THE COMPLAINT, IS REAL NETWORKS WAS ABLE
24 TO, IN THE WORDS OF THE COMPLAINT, DISCERN PART OF
25 APPLE'S SOFTWARE CODE, PART OF THEIR CODE FOR THE

1 DRM.

2 APPLE IS UNDER A STRICT CONTRACT WITH THE
3 LABELS, WAS AT THE TIME, TO MAINTAIN THE SECURITY
4 OF ITS DRM FOR OBVIOUS REASONS.

5 AND SO THIS WAS AN INSTANCE WHERE THE
6 COMPETITOR HAD BEEN ABLE TO, WHETHER BY HACKING,
7 REVERSE ENGINEERING, OR OTHERWISE, FIGURE OUT PART
8 OF THE SOFTWARE CODE.

9 APPLE, LIKE ALL SOFTWARE MANUFACTURERS,
10 PERIODICALLY UPDATES ITS SOFTWARE FOR A VARIETY OF
11 REASONS, FIXING BUGS, STAYING A STEP OR TWO AHEAD
12 OF HACKERS OR WHATEVER.

13 AND AS THE EVIDENCE WILL SHOW THAT APPLE
14 WAS PLANNING A SOFTWARE UPGRADE AND WENT AHEAD AND
15 INSTITUTED THAT. THE EFFECT OF THAT SOFTWARE
16 UPDATE WAS TO BLOCK THIS HACK.

17 REAL COULD COME BACK AND TRY TO REHACK
18 AROUND THE SOFTWARE UPDATE.

19 WE ARE PROVIDING DISCOVERY TO THE
20 PLAINTIFFS ON THAT INCIDENT. THE PLAINTIFFS HAVE
21 ASKED FOR A 30(B)(6) DEPOSITION, AND WE'RE WORKING
22 OUT THE DETAILS WITH THEM.

23 AND I'M CONFIDENT THAT AFTER THAT
24 DEPOSITION IS TAKEN AND WHEN WE FINISH COMPLETING
25 PRODUCING DOCUMENTS ON THAT, THAT ISSUE SHOULD GO

1 AWAY JUST LIKE THE ISSUE OF CHIP DISABLING AS I
2 THINK HAS GONE AWAY.

3 THERE'S ANOTHER ALLEGATION IN THE
4 COMPLAINT THAT APPLE DISABLES THE PROCESSOR CHIP IN
5 THE IPOD SO THAT IT WON'T PLAY MICROSOFT'S DRM.
6 THAT'S SIMPLY UNTRUE.

7 THE PLAINTIFF'S EXPERTS HAVE SAID THAT
8 THEY KNOW NOTHING ABOUT THAT, AND I THINK THAT WILL
9 GO AWAY.

10 IF IT DOESN'T GO AWAY VOLUNTARILY, WE'LL
11 DISPROVE THAT AS WELL.

12 FOR PURPOSES OF THE CLASS DISCUSSION
13 THOUGH, YOUR HONOR, IF THE PLAINTIFFS EVENTUALLY
14 END UP FOCUSING ON THIS REAL NETWORK HACK IN LATE
15 2004, THAT HAS IMPLICATIONS, I THINK VERY SERIOUS
16 IMPLICATIONS ON WHETHER THEY GET A CLASS AND WHAT
17 KIND OF SCOPE OF THE CLASS WOULD BE IF ANY.

18 BECAUSE THE ISSUE OF WHO, IF ANYONE WAS
19 HARMED BY APPLE ISSUING A REGULARLY PERIODIC
20 SOFTWARE UPDATE IS SOMETHING THAT HASN'T BEEN
21 ADDRESSED BY THE PLAINTIFFS AND IT IS COMPLICATED
22 AND IT WOULDN'T GO BACK, YOU KNOW, TO THE START OF
23 THE MUSIC STORE.

24 THE COURT: YOU DO NOT HAVE CURRENTLY
25 BEFORE THE COURT A MOTION TO DISMISS THE SECTION 2

1 CLAIM FOR FAILURE TO STATE A CLAIM; CORRECT?

2 MR. MITTELSTAEDT: NO. WE TRIED TO DO
3 THIS IN A FAIRLY SYSTEMATIC WAY AND I THINK NOW
4 THAT THE TYING CLAIMS ARE GONE, I THINK THAT'S THE
5 NEXT STEP.

6 THE COURT: THAT WOULD PUT THE ISSUE
7 BEFORE THE COURT IN A DIFFERENT LIGHT. I'M NOT
8 DISPOSED TO GRANT YOUR MOTION TO MODIFY -- I'M NOT
9 DISPOSED TO DENY THE MOTION TO MODIFY THE CLASS ON
10 MOOTNESS GROUNDS.

11 AS COUNSEL POINTS OUT EVEN THOUGH THERE
12 HAS BEEN A CHANGE IN THE TECHNOLOGY, THERE ARE
13 STILL A GROUP OF PEOPLE WHO ARE STILL AFFECTED BY
14 THE OLD TECHNOLOGY, AND AS I UNDERSTAND IT THERE IS
15 MONEY ASSOCIATED WITH THE CURRENT CHANGE.

16 IS THERE ANYTHING ELSE TO SAY OTHER THAN
17 WHAT I HEAR AS A POTENTIAL 12(B)(6) REASON NOT TO
18 MODIFY THE CLASS?

19 MR. MITTELSTAEDT: YES. WHEN THE
20 PLAINTIFFS MOVED TO CERTIFY THE CLASS, THIS
21 INJUNCTIVE RELIEF CLASS, THEIR POINT, THEIR MAIN
22 POINT WAS THAT APPLE WAS CONTINUING TO USE THIS DRM
23 AT THE MUSIC STORE AND YOUR HONOR CERTIFIED THE
24 (B)(2) CLASS FOR THE DIRECT PURCHASERS ON THAT
25 BASIS.

1 AND THEN IN JULY OF THIS YEAR WHEN IT WAS
2 BROUGHT TO YOUR HONOR'S ATTENTION THAT APPLE HAD
3 STOPPED DOING THAT AND APPLE HAD STOPPED DOING THAT
4 BECAUSE THE RECORD LABELS WITHDREW THAT
5 REQUIREMENT. APPLE NEVER WANTED TO USE DRM IN THE
6 FIRST PLACE. THAT'S IN THE RECORD.

7 APPLE USED DRM ONLY BECAUSE THE LABELS
8 REQUIRED IT AND WHEN THE LABELS WITHDREW THAT
9 REQUIREMENT, APPLE WAS VERY QUICK TO STOP USING DRM
10 IN ITS MUSIC STORE.

11 SO THAT RELIEF, THE RELIEF IT WAS SEEKING
12 WAS LITERALLY MOOT AND THAT'S WHY YOU INVITED APPLE
13 TO DECERTIFY THE (B) (2) CLASS.

14 NOW, IN RESPONSE TO THAT ONE, THEY
15 QUESTION WHETHER APPLE REALLY IS INTENT ON NOT
16 USING DRM IN THE FUTURE.

17 WE HAVE SUBMITTED A DECLARATION FROM
18 EDDIE CUE, WHO IS THE HEAD OF THE MUSIC STORE, WHO
19 HAS SAID -- AND THIS IS DOCUMENT 256, MR. CUE,
20 WHICH IS C-U-E -- HAS SAID, "WELL BEFORE THE LABELS
21 AGREED TO DO SO APPLE PUBLICALLY EXPRESSED ITS
22 DESIRE TO SELL DRM FREE MUSIC.

23 "NOW THAT THE LABELS HAVE AGREED THAT
24 APPLE MAY SELL MUSIC THEY PROVIDE TO APPLE WITHOUT
25 USE OF DRM, APPLE SELLS ONLY DRM FREE MUSIC.

1 "APPLE IS NOT AWARE THAT THE RECORD
2 LABELS HAVE ANY PLAN TO REINSTITUTE A DRM
3 REQUIREMENT AND APPLE HAS NO INTENTION OF OPERATING
4 A MUSIC STORE THAT SELLS DRM MUSIC IN THE FUTURE."

5 THAT'S MR. CUE'S DECLARATION. THAT MOOTS
6 THIS ISSUE. IT MAKES NO SENSE FOR THE PLAINTIFFS
7 TO, TO BRING THIS CASE AND PURSUE A CLASS TO ESTOP
8 APPLE FROM DOING SOMETHING THAT IT NEVER WANTED TO
9 DO IN THE FIRST PLACE AND THAT IT STOPPED DOING AS
10 SOON AS ITS CONTRACTS WITH THE RECORD LABELS WOULD
11 PERMIT.

12 THE COURT: LET ME -- THIS IS PERHAPS
13 BEYOND THE MOTION, BUT DO I UNDERSTAND THAT
14 ALTHOUGH THE MUSIC IS DRM FREE, IS IT
15 INTEROPERABILITY LIMITED FREE?

16 IN OTHER WORDS, CAN YOU NOW DOWNLOAD
17 MUSIC FROM THE STORE AND PLAY IT DIRECTLY ON TO A
18 PLAYER OTHER THAN AN IPOD?

19 MR. MITTELSTAEDT: YES.

20 THE COURT: SO THAT THAT INTEROPERABILITY
21 LIMITATION HAS ALSO BEEN REMOVED?

22 MR. MITTELSTAEDT: YES. IN RESPONSE TO
23 THAT, I THINK THAT THE PLAINTIFFS HAVE TO ADMIT
24 THAT THAT MAIN RELIEF THAT THEY WERE SEEKING AND
25 THE RELIEF ON WHICH YOUR HONOR CERTIFIED THE (B) (2)

1 CLASS IN THE FIRST PLACE IS MOOT.

2 SO THEIR FALLBACK POSITION IS, WELL,
3 THERE'S ALL THAT MUSIC OUT THERE THAT PEOPLE BOUGHT
4 BEFORE THAT STILL HAS DRM ON IT.

5 SO IT'S ON THAT BASIS THAT THEY WANT TO
6 CERTIFY THIS CLASS AND THEY WANT TO BROADEN THE
7 CLASS.

8 THE COURT: WHAT IS WRONG WITH THAT?

9 MR. MITTELSTAEDT: SEVERAL THINGS. THE
10 MAIN ONES ARE THIS: AS YOUR HONOR NOTED, TO HAVE
11 AN IPOD CLASS WHERE THE INJUNCTIVE RELIEF RELATES
12 TO WHAT IS GOING ON WITH THE MUSIC LOOKS LIKE IT'S
13 A DISCONNECT.

14 AND THE PLAINTIFFS HAVE NEVER ANSWERED, I
15 DON'T THINK SATISFACTORILY, YOUR HONOR'S QUESTION
16 ABOUT HOW YOU CONNECT THAT KIND OF RELIEF REMOVING
17 THE DRM WITH THE IPOD CLASS.

18 WHAT THEY DID INSTEAD WAS SAY, WELL,
19 WE'LL BROADEN THE CLASS. WE'LL ADD NEW PEOPLE.
20 WE'LL ADD ITUNES MUSIC PURCHASERS WHO DON'T HAVE
21 IPODS.

22 THAT DOESN'T SOLVE THE PROBLEM THAT THEY
23 HAVE WITH RESPECT TO THE IPOD PURCHASERS AND IT
24 JUST CREATES MORE PROBLEMS FOR THE MUSIC
25 PURCHASERS.

1 AND LET ME EXPLAIN WHY.

2 WHAT THEY HAVE TO SHOW IS THAT -- WELL,
3 LET ME START WITH, WITH THE PRACTICAL ISSUE.

4 THEY SAY THAT IT'S A COSTLESS AND
5 EFFORTLESS FOR APPLE TO REMOVE DRM FROM ALL OF
6 THESE SONGS THAT HAVE BEEN PREVIOUSLY DOWNLOADED.

7 WE HAVE SUBMITTED ANOTHER DECLARATION
8 FROM MR. CUE, THIS ONE AUGUST 31, 2009 WHERE HE
9 DESCRIBES THE TECHNICAL REASON WHY THAT IS NOT
10 TRUE.

11 AND WHAT HE EXPLAINS IS THAT, AND I'M
12 GOING TO QUOTE THIS, "WHEN A CUSTOMER BUYS DRM FREE
13 VERSIONS OF PREVIOUSLY PURCHASED MUSIC, APPLE DOES
14 NOT SIMPLY," QUOTE, "'REMOVE' THE DRM FROM THE
15 PREVIOUSLY PURCHASED FILES."

16 MR. CUE GOES ON TO EXPLAIN THAT WHAT
17 APPLE DOES INSTEAD IS PROVIDE A NEW FILE OF HIGHER
18 AUDIO QUALITY WHICH IS THEN DOWNLOADED BY THE
19 CUSTOMER.

20 AND THE RECORD LABELS UNDER THE CONTRACT
21 WITH APPLE TREAT EACH OF THESE NEW DOWNLOADS AS A
22 NEW TRANSACTION.

23 AND SO TO PROVIDE CUSTOMERS WITH DRM FREE
24 VERSIONS OF MUSIC THEY PREVIOUSLY BOUGHT, APPLE IS
25 REQUIRED TO PAY THE LABELS A CERTAIN AMOUNT PER

1 DOWNLOAD, AND THAT AMOUNT IS IN THE RECORD UNDER
2 SEAL, AND APPLE ALSO INCURS CREDIT CARD FEES AND
3 LICENSING UPGRADES AND SO FORTH.

4 SO FOR STARTERS, THIS IDEA THAT APPLE CAN
5 MAGICALLY REMOVE DRM IS NOT TRUE. IT'S A SEPARATE
6 TRANSACTION THAT COSTS APPLE MONEY, AND THAT'S WHY
7 APPLE CHARGES CUSTOMERS.

8 THE COURT: AND IF YOU'RE ABLE TO GET
9 OVER THE PLAINTIFF'S COMPLAINT ABOUT IMPOSING IT IN
10 THE FIRST PLACE, THEN THAT WOULD BE LEGITIMATE. IF
11 YOU'RE NOT, THEN THAT IS -- THAT'S A REMEDY.

12 MR. MITTELSTAEDT: WELL, LET'S GET TO
13 THAT POINT. IS IT A REMEDY AND FOR WHOM?

14 THERE ARE MANY ITUNES MUSIC PURCHASERS
15 WHO AS FAR AS THIS RECORD SHOWS, YOUR HONOR, AND AS
16 FAR AS COMMON SENSE TAKES US, ARE PERFECTLY
17 CONTENT.

18 THEY BOUGHT THEIR MUSIC. THEY KNEW ABOUT
19 THE LIMITATIONS, AND THEY PAID 99 CENTS FOR THE
20 SONG.

21 AND NOW THEY'RE PLAYING THAT MUSIC ON
22 THEIR HOME COMPUTERS, YOU KNOW, THROUGH HEADPHONES,
23 OR THEY HAVE BURNED THAT MUSIC TO CD'S AND THEY'RE
24 USING CD'S JUST LIKE THEY WOULD USE CD'S BOUGHT AT
25 A STORE, MEANING THAT THEY PLAY THEM ON A CAR

1 STEREO OR THEIR HOME STEREO.

2 OR THEY, AFTER BURNING, THEY RIPPED IT
3 BACK TO THEIR COMPUTER AND NOW THEY'RE PLAYING IT
4 ON IPOD COMPETITORS BECAUSE THE PROCESS OF BURNING
5 DESTROYS THE DRM.

6 OR ITUNES PURCHASERS, IF THEY HAVE BOUGHT
7 MUSIC SINCE EARLY 2007 AND THEY BOUGHT EMI, ONE OF
8 THE LABEL'S MUSIC, THAT WAS ALL DRM FREE FROM EARLY
9 2007.

10 SO THERE ARE A LOT OF MUSIC PURCHASERS
11 OUT THERE WHO ARE NOT HARMED IN THE SLIGHTEST BY
12 PLAINTIFF'S THEORY OF LACK OF INTEROPERABILITY.

13 THE CLASS THAT THEY WANT YOUR HONOR TO
14 ADD, ITUNES MUSIC PURCHASERS, THEY HAVE GOT TO SHOW
15 A COUPLE OF THINGS. ONE, THEY HAVE TO SHOW THAT
16 IT'S THE PRIMARY RELIEF THAT THEY'RE SEEKING FOR
17 THESE PEOPLE.

18 IN ORDER TO CERTIFY A (B) (2) CLASS THE
19 PLAINTIFFS HAVE TO SHOW THE INJUNCTIVE RELIEF IS
20 THE PREDOMINANT RELIEF THAT THEY'RE SEEKING.

21 BUT IF PROVIDING DRM FREE MUSIC TO THESE
22 PEOPLE WOULD NOT GIVE THEM ANY BENEFIT, IT'S PEOPLE
23 WHO ARE PERFECTLY HAPPY, MAYBE PEOPLE WHO DON'T
24 EVEN KNOW THERE IS DRM ON THEIR MUSIC.

25 IF THOSE PEOPLE WOULDN'T BE BENEFITTED BY

1 GIVING THEM THIS FREE UPGRADE, IT'S IMPOSSIBLE FOR
2 THE PLAINTIFFS TO SAY THAT THIS RELIEF THAT THEY'RE
3 SEEKING ON BEHALF OF ALL OF THESE PEOPLE IS THE
4 PRIMARY -- THE PREDOMINANT REASON FOR THIS CASE.

5 IT WOULD BE GIVING RELIEF TO PEOPLE WHO
6 DON'T NEED IT, WHO WOULDN'T BENEFIT FROM IT, WHO
7 WOULDN'T DO ANYTHING WITH IT IF THEY GOT IT.

8 AT THE SAME TIME, YOUR HONOR, IT WOULD
9 IMPOSE AN ENORMOUS COST ON APPLE. THE RECORD SHOWS
10 THE AMOUNT THAT APPLE PAYS TO THE LABELS PER
11 UPGRADE PER NEW FILE AND YOU MULTIPLY THAT TIMES
12 THE FOUR BILLION SONGS THAT APPLE HAS SOLD AND IT'S
13 AN ENORMOUS AMOUNT OF MONEY, AN ENORMOUS AMOUNT OF
14 MONEY THAT WOULD NOT BENEFIT, MOST, IF ANY OF THE
15 PEOPLE THAT THEY ALLEGE AS THE CLASS.

16 SO THAT APPLIES BOTH TO THE IPOD
17 PURCHASERS AND IT APPLIES TO THIS, THIS NEW GROUP.
18 IT JUST WOULDN'T BENEFIT THE IPOD CLASS IN A
19 DIFFERENT WAY. THE IPOD CLASS ALREADY HAS THEIR
20 IPODS BY DEFINITION.

21 AND SO NOW GOING TO THOSE IPOD PURCHASERS
22 AND SAYING, HERE, WE'RE GOING TO GIVE YOU DRM FREE
23 MUSIC FOR FREE, THERE'S NO SHOWING IN THE RECORD
24 THAT THAT WOULD BENEFIT A SUBSTANTIAL PORTION OF
25 THE CLASS OR BENEFIT ANYBODY.

1 THE COURT: YOU'RE -- I DO REALIZE THAT
2 GIVEN THE COMPLEXITY OF THIS THE TIME THAT I HAVE
3 ALLOWED IS NOT GOING TO BE SUFFICIENT TO HANDLE
4 EVERYTHING.

5 SO LET ME TURN TO YOUR OPPONENT.

6 IT DOES SEEM TO ME THAT ONE POSSIBILITY
7 THAT SHOULD BE BEFORE THE COURT AND IT'S THE ONE
8 THAT I RAISED AND THAT IS TAKE NO ACTION WITH
9 RESPECT TO MODIFYING THE CLASSES UNTIL THE COURT
10 HAS DEFINITELY RULED WITH RESPECT TO WHETHER OR
11 NOT GIVEN THE COURT'S RULINGS ON THIS TYING CLAIM
12 THERE IS A VIABLE SECTION 2 CLAIM THAT CAN BE
13 STATED. AND THAT I HAVE NOT GIVEN SEPARATE
14 CONSIDERATION TO BECAUSE THAT WILL AFFECT THE
15 QUESTIONS BEFORE THE COURT.

16 NOW, I DON'T EXPECT YOU TO BE IN A
17 POSITION TO RESPOND TO THE MERITS OF THAT, BUT WHY
18 DOESN'T THAT MAKE SENSE?

19 MR. MERRICK: WELL, I CAN RESPOND TO THE
20 MERITS A LITTLE BIT. ONE IS THAT IT IS NOT UNUSUAL
21 FOR A COURT TO FIND THAT THERE IS NO TYING CLAIM
22 AND YET FIND THAT THERE IS A MONOPOLIZATION CLAIM
23 BASED ON SOME OF THE SAME FACTUAL ARGUMENTS THAT
24 PLAINTIFFS HAVE SAID WOULD SUPPORT A TYING CLAIM.

25 A GOOD EXAMPLE OF THAT MOST RECENTLY IS,

1 AND IT'S IN THE PAPERS, THE TELLIS ATLAS CASE WHICH
2 IS 2008 WESTLAW 44911230 NORTHERN DISTRICT FROM
3 NOVEMBER OF LAST YEAR.

4 AND THERE THE DEFENDANTS SUCCESSFULLY
5 MOVED FOR SUMMARY JUDGMENT ON THE TYING CLAIM, AND
6 IT WAS GRANTED.

7 THE PLAINTIFFS -- THEN THEY SAID THAT THE
8 PLAINTIFFS WERE PRECLUDED FROM BRINGING EVIDENCE
9 THAT WOULD HAVE SUPPORTED THE TYING CLAIM IN
10 SUPPORT OF THEIR MONOPOLIZATION CLAIM.

11 THE COURT SAID, NO, THAT ISN'T THE WAY
12 THAT IT WORKS. QUOTE, THIS IS FROM STAR PAGE 2,
13 "TELLIS ATLAS'S FAILURE TO PROVE THAT NAVTEQ,"
14 WHICH IS N-A-V-T-E-Q, "ALLEGED TYING CONDUCT WAS
15 UNLAWFUL, DOES NOT AUTOMATICALLY REQUIRE THAT SUCH
16 CONDUCT BE REMOVED FROM THE SCOPE OF THE SECTION 2
17 INQUIRY."

18 I DON'T THINK THE COURT HAS RULED
19 DEFINITELY THAT APPLE HAS BEEN GUILTY OF NO
20 ANTICOMPETITIVE CONDUCT. THAT ISSUE WASN'T BEFORE
21 THE COURT.

22 THE COURT'S RULING ON THE TYING CLAIM WAS
23 BASED ON THE NATURE OF A SECTION 1 CLAIM WHICH IS
24 NOT THE SAME AS A SECTION 2 CLAIM.

25 THE COURT: WHAT I HEAR YOU SAYING IS

1 THAT ULTIMATELY I WOULD FIND IN YOUR FAVOR ON IT.
2 THE QUESTION THAT I ASKED IS WHY SHOULDN'T I DO
3 THAT FIRST BEFORE MODIFYING THE CLASS DEFINITION
4 BECAUSE IT WOULD PROVIDE ME WITH AN OPPORTUNITY TO
5 HAVE THE PLAINTIFF ARTICULATE ITS REMAINING CLAIM
6 DEVOID OF THE TYING CLAIM BECAUSE MOST OF WHAT
7 HAPPENS IN THIS COMPLAINT IS IT IS ALLEGED IN GREAT
8 DETAIL AS A TYING CLAIM AND THEN ALL OF THAT IS
9 INCORPORATED BY REFERENCE INTO A VERY SHORT
10 STATEMENT OF THE SECTION 2 CLAIM.

11 SO IT'S -- IT REALLY CHALLENGES THE
12 COURT, AS I HAVE STARTED OUT TO START TO UNDERSTAND
13 A LITTLE BIT ABOUT THE PLAINTIFF'S CASE, AND I
14 HAVEN'T WORKED MY WAY THROUGH IT YET.

15 MR. MERRICK: I DO BELIEVE, YOUR HONOR --
16 I'M SORRY.

17 THE COURT: THIS MOTION DOES ASK ME TO
18 ARTICULATE THE CLASS IN A WAY THAT, FIRST OF ALL, I
19 WOULD HAVE TO MAKE SURE THAT THE TIME LIMITATIONS
20 INVOLVED IN ALL OF THESE CHANGES ARE RESPECTED, IF
21 INDEED THESE CHANGES ARE.

22 DO YOU AGREE THAT THE DRM -- FREEDOM FROM
23 DRM, THE APPLE DRM HAS ALSO ELIMINATED THE
24 INTEROPERABILITY CLAIM?

25 MR. MERRICK: AS FAR AS I AM AWARE. I'M

1 NOT FAMILIAR ENOUGH WITH THE TECHNOLOGY BEHIND IT
2 TO GIVE A DEFINITIVE ANSWER, BUT I DO BELIEVE THAT
3 THEY ARE ALL INTEROPERABLE, YES.

4 THE COURT: ALL RIGHT. AND PART OF THE
5 CERTIFICATION AND DEFINITION OF A NEW CLASS HAS TO
6 BE WHAT RELIEF IS -- DO YOU STILL HAVE A (B) (3)
7 CLASS HERE AS WELL AS A (B) (2) CLASS?

8 MR. MERRICK: YES.

9 THE COURT: UNDERSTANDING THAT
10 RELATIONSHIP IS IMPORTANT. I KNOW I HAVEN'T GOTTEN
11 TO THE INDIRECT PURCHASERS WHO ALSO HAVE A CLAIM,
12 AND I DO WANT TO RESERVE SOME TIME TO HEAR FROM
13 THEM AS WELL.

14 BUT TALK ME OUT OF WAITING.

15 MR. MERRICK: WELL, I DON'T THINK THERE'S
16 ANY REASON TO.

17 AS THE COURT IN DECEMBER IN GRANTING THE
18 (B) (2) CLASS IN THE FIRST PLACE NOTED, AND IT'S
19 DOCUMENT 196, "PLAINTIFFS SEEK TO ENJOIN DEFENDANT
20 FROM MAINTAINING ITS RESTRICTIVE TECHNOLOGY
21 PRACTICES IN THE FUTURE," WHICH I GUESS YOU COULD
22 SAY MAYBE HAS RESOLVED, ASSUMING THAT WE CAN TAKE
23 MR. CUE AT HIS WORD. BUT WE DON'T HAVE ANY
24 DISCOVERY ON ANY OF THAT INFORMATION, BUT -- "AND
25 SEEK TO COMPEL DEFENDANT TO," QUOTE-UNQUOTE,

1 "UNLOCK MEDIA ALREADY PURCHASED FROM ITMS SO IT MAY
2 BE PLAYED ON NON-IPOD DIGITAL MEDIA PLAYERS."

3 THAT HAS NOT OCCURRED ON A BACKWARDS
4 LOOKING BASIS, AND WE'RE TALKING ABOUT, AGAIN, IT'S
5 NOT AN INCONSIDERABLE BURDEN. WE'RE TALKING ABOUT
6 FIVE BILLION SONGS. APPLE IS THE 800 POUND GORILLA
7 IN THE SONG DOWNLOAD MARKET.

8 THE COURT: BUT YOU AGREE HERE THAT THE
9 BURDEN WOULD ONLY BE IMPOSED ON APPLE WITH RESPECT
10 TO THOSE CONSUMERS WHO WOULD HAVE A NON-IPOD PLAYER
11 AND WOULD WISH TO RECONFIGURE THE MUSIC SO IT COULD
12 PLAY ON THOSE?

13 MR. MERRICK: I WOULDN'T AGREE WITH THAT.

14 I -- WE -- OBVIOUSLY IT'S A FACT BASED
15 ANALYSIS AS TO INJURY, BUT THE POINT WE'RE MAKING
16 IS THAT THE FACT THAT THERE ARE FIVE BILLION LOCKED
17 SONGS STILL OUT THERE IS IN AND OF ITSELF IS A FORM
18 OF INJURY.

19 THE COURT: WHY, WHY IF IT'S -- WHY IS IT
20 A FORM OF INJURY IF YOU HAVE AN IPOD?

21 MR. MERRICK: WELL, SOMEBODY IS GOING TO
22 EVENTUALLY HAVE TO MAKE A DECISION AS TO BUYING A
23 NEW MUSIC PLAYER. THESE THINGS DO NOT LAST
24 FOREVER. TECHNOLOGY IMPROVES WITH CHANGES.

25 AT SOME POINT SOMEBODY IS GOING TO HAVE

1 TO DEAL WITH MAKING A DECISION. IF THAT DECISION
2 IS IN ANY WAY WHATSOEVER INFLUENCED BY THE FACT
3 THAT THEY HAVE BLOCKED SONGS ON THEIR IPOD THAT IS
4 STILL AN ANTICOMPETITIVE -- OR AN ANTITRUST INJURY.

5 AS FAR AS THE COST TO APPLE, THE ISSUE
6 HERE FOR CLASS CERTIFICATION PURPOSES FOR THE
7 (B) (2) CLASS IS WHETHER OR NOT THAT TRANSLATES ITS
8 CLAIM INTO DAMAGES. AND IT DOESN'T.

9 THE FACT THAT APPLE MAY HAVE TO PAY A
10 LICENSING FEE TO A THIRD PARTY DOESN'T MAKE THE
11 COST OF THEM COMPLYING WITH AN INJUNCTIVE -- WITH
12 THE EQUITABLE RELIEF DAMAGES TO THE CLASS. THERE'S
13 A DISCONNECT FUNDAMENTALLY THERE.

14 AND AS FAR AS HOW MUCH MONEY IT WOULD
15 COST APPLE, IT WOULD BE VERY EXPENSIVE. IT'S VERY
16 EXPENSIVE BECAUSE APPLE AGAIN IS THE 800 POUND
17 GORILLA.

18 THERE'S THE DUKES VERSUS WALMART CASE
19 THAT IS CITED IN THE MATERIALS THAT WHERE THEY
20 TALKED ABOUT WHAT AN ENORMOUS AMOUNT OF MONEY IT
21 WAS GOING TO COST WALMART.

22 WELL, THAT'S ENTIRELY BASED BECAUSE
23 WALMART IS THE 800 POUND GORILLA RETAILER. AND IT
24 WOULD COST APPLE BECAUSE APPLE IS THE 800 POUND
25 GORILLA IN THE MUSIC DOWNLOAD SALES.

1 THE COURT: YOU KNOW, THE ONE PROBLEM I
2 HAVE AS I KEEP GOING BACK AND FORTH IN MY MIND AS
3 TO WHETHER OR NOT THIS IS A CONSUMER LEGAL REMEDIES
4 CASE OR ANTITRUST CASE I HAVE TO PAY ATTENTION TO
5 WHAT IS IT THAT IS GOING ON HERE. THE HARM HAS TO
6 BE TO COMPETITION, THOSE WHO WOULD BE IN THE
7 BUSINESS OF MAKING PLAYERS AND MUSIC I GUESS.

8 AND THE CONSUMERS, I GUESS, WOULD BENEFIT
9 FROM THIS REMEDY, BUT I'D HAVE TO COME UP WITH A
10 REMEDY THAT SPEAKS TO THE WORLD OF COMPETITION AS
11 OPPOSED TO THE WORLD OF ULTIMATE CONSUMERS, DON'T
12 I?

13 MR. MERRICK: YES, AND THAT'S WHAT WE'RE
14 SAYING. THAT'S WHY UNLOCKING THE FILES IS STILL
15 IMPORTANT TO THE COMPETITIVE MARKET BECAUSE OF THE
16 FIVE BILLION SONG BACKLOG OF ANTICOMPETITIVE
17 BEHAVIOR.

18 THE COURT: THANK YOU.

19 BEFORE I GO BACK OVER HERE I WANTED TO
20 GIVE THE INDIRECT PURCHASER COUNSEL AN OPPORTUNITY
21 TO SPEAK, AND I'LL LET YOU RESPOND TO THAT.

22 MS. ZELDES: THANK YOU, YOUR HONOR.
23 HELEN ZELDES AGAIN FOR THE SOMERS CLASS.

24 RESPONDING TO THE COURT'S REQUEST FOR
25 CLARIFICATION OF HOW THE CASES OVERLAP AND HOW OUR

1 CLAIMS ARE TIED TO THE RELIEF REQUESTED, THE
2 INDIRECT PURCHASERS AND THE DIRECT PURCHASERS
3 INJUNCTIVE RELIEF CLASSES OVERLAP ALMOST
4 COMPLETELY.

5 YOU ASKED US TO CLARIFY THAT, AND WE BOTH
6 SEEK TO HAVE THE RESTRICTIONS REMOVED FROM THE ITMS
7 FILES.

8 HOWEVER, THE INDIRECT PURCHASERS CLASS IS
9 BROADER. WE SEEK TO REPRESENT FOLKS WHO HAVE ALSO
10 PAID, ALREADY PAID TO CONVERT THEIR MUSIC TO DRM
11 FREE FILES. THEY HAVE ALREADY PAID THIS 30 PERCENT
12 CONVERSION FEE AND SO THAT'S HOW OUR CLASSES ARE
13 DIFFERENT.

14 THE COURT: AND THE DIRECT PURCHASER
15 CLASS WOULD NOT INCLUDE THOSE?

16 MS. ZELDES: THEY HAVE NOT INCLUDED THOSE
17 PEOPLE, THAT'S CORRECT, YOUR HONOR.

18 THEY INCLUDE PEOPLE WHO ALREADY HAVE A
19 LIBRARY, AND THEY'RE ASKING LIKE WE ARE, APPLE TO
20 CONVERT THOSE FILES FOR FREE AT NO COST TO THE
21 CONSUMER, BUT THERE'S A GROUP OF PEOPLE, A
22 SUBSTANTIAL GROUP OF FOLKS WHO HAVE ALREADY PAID
23 THIS HEFTY 30 PERCENT CONVERSION CHARGE AND WE'RE
24 SAYING UNDER OUR (B) (2) CLASS WE WOULD BE ENTITLED
25 TO DISGORGEMENT OF THAT 30 PERCENT FEE.

1 THE COURT: WELL, YOU SEE, I'M CONFUSED
2 BECAUSE I DID NOT UNDERSTAND THE INDIRECT
3 PURCHASERS TO HAVE ANYTHING TO DO WITH ITUNES AS
4 MUCH AS INDIRECT PURCHASERS OF THE PLAYER, THE
5 IPOD.

6 BECAUSE THERE IS NO SUCH THING AS
7 INDIRECT PURCHASERS OF ITUNES.

8 MS. ZELDES: YOU'RE CORRECT, YOUR HONOR.

9 THE COURT: SO WHY WOULDN'T I FIND THAT
10 IF I'M GOING TO ADD ITUNES PURCHASERS TO THE CLASS,
11 THAT THAT WOULD -- THERE WOULD BE A DUPLICATION
12 BETWEEN THE INDIRECT PURCHASER CLASS AND THE DIRECT
13 PURCHASER'S CLASS?

14 MS. ZELDES: THAT IS CORRECT, THE CLASSES
15 OVERLAP TO THE EXTENT THAT WE'RE BOTH SEEKING THE
16 FIRST TWO PRONGS OF THE INJUNCTIVE RELIEF WHICH IS
17 TO REMOVE THE DRM GOING FORWARD ON CONSUMER'S FILES
18 AND TO CONVERT THE FILES THAT THE FOLKS ALREADY
19 HAVE, BUT THERE'S A GROUP OF FOLKS THAT ARE NOT
20 REPRESENTED.

21 AND YOU'RE RIGHT, FOR INJUNCTIVE RELIEF
22 THERE IS NO DIFFERENCE. EVERYBODY BUYS THE MUSIC
23 DIRECTLY FROM APPLE.

24 SO WE'RE NOT INDIRECT PURCHASERS FOR THE
25 PURPOSES OF THAT PART OF THE INDIRECT -- THE

1 INJUNCTIVE RELIEF CLASS.

2 BUT THERE'S NOBODY SEEKING THAT RELIEF.
3 SO THE FOLKS WHO HAVE ALREADY PAID THAT 30 PERCENT,
4 WHICH IS A SUBSTANTIAL CONVERSION FEE. THAT'S NOT
5 AN INSUBSTANTIAL RESTRAINT. THERE'S NO RELIEF
6 BEING SOUGHT. SO THAT IS A CLASS THAT IS DIFFERENT
7 FROM THE, QUOTE-UNQUOTE, "DIRECT PURCHASERS."

8 AND APPLE'S MAIN BEEF WITH THAT IS THAT
9 YOU CAN'T ASK FOR DISGORGEMENT TO GET A (B) (2)
10 CLASS. THEY'RE EITHER SAYING THE MONETARY RELIEF
11 PREDOMINATES OR YOU CAN'T GET IT. AND THAT'S NOT
12 THE STANDARD.

13 THE STANDARD IS IF IT'S INCIDENTAL TO THE
14 INJUNCTIVE RELIEF, YOU CAN HAVE MONETARY DAMAGES AS
15 PART OF A (B) (2) CLASS AND THE NINTH CIRCUIT IS
16 CLEAR ON THAT THAT EVEN IN CASES WHERE THE
17 PLAINTIFFS HAVE SOUGHT THINGS LIKE BACKPAY IN AN
18 EMPLOYMENT DISCRIMINATION CASE, THE COURT HAS
19 AWARDED OR CERTIFIED A (B) (2) CLASS.

20 SIMILARLY PARTICULARLY IN PROBE VERSUS
21 STATE TEACHERS' RETIREMENT SYSTEM, THERE WAS A
22 GENDER BASED MORTALITY TABLES BEING USED AND THE
23 PLAINTIFFS SOUGHT MONETARY DAMAGES THERE AND THE
24 NINTH CIRCUIT AGAIN CERTIFIED A (B) (2) CLASS
25 BECAUSE THEY FOUND THAT THE INJUNCTIVE RELIEF WAS

1 THE PRIMARY RELIEF SOUGHT.

2 AND HERE THE MONETARY RELIEF IS CLEARLY A
3 SUBSET OF THE OVERALL INJUNCTIVE RELIEF THAT BOTH
4 PARTIES ARE SEEKING AND BOTH PARTIES ARE SEEKING.

5 THE COURT: SO YOUR CLASS WOULD BE A
6 (B) (3) CLASS FOR THE MONETARY RELIEF OF THE PAST
7 BECAUSE IT WOULD START TO OVERLAP WITH THE (B) (2)
8 CLASS OF THE DIRECT PURCHASERS WITH RESPECT TO THE
9 FUTURE?

10 MS. ZELDES: IT COULD BE EITHER A (B) (2)
11 OR (B) (3).

12 IT COULD BE A SEPARATE DAMAGES CLASS IF
13 YOUR HONOR WANTED TO CERTIFY THAT, OR IT COULD ALSO
14 BE A PART OF A (B) (2) CLASS.

15 THE INJUNCTIVE RELIEF IS REMOVING THE DRM
16 FROM ALL OF THE FILES. THIS IS A SMALL SUBSET OF
17 ALL OF THE FIVE BILLION FILES OUT THERE. THIS IS
18 SOMEBODY WHO ALREADY PAID APPLE TO CONVERT THEM.
19 SO IT IS A SUBSET.

20 IT IS INCIDENTAL TO -- FLOWS FROM THE
21 INJUNCTIVE RELIEF. AS SUCH YOU COULD CERTIFY IT
22 UNDER (B) (2), IN THE ALTERNATIVE, YES, YOU COULD
23 CERTIFY.

24 THE COURT: WHAT IS THIS SYNCING ISSUE?

25 MS. ZELDES: WELL, YOU KNOW, THEY WERE

1 TALKING ABOUT THERE'S NO INTEROPERABILITY ISSUES
2 ANYMORE. THERE WAS AN ISSUE THIS LAST YEAR THAT
3 APPLE ACTUALLY TOOK NO AFFIRMATIVE ACTION FROM PALM
4 3, FOR EXAMPLE, FROM SYNCING WITH THE ITUNES I WANT
5 TO SAY LIBRARY, AND SO THAT'S WHAT THAT ISSUE IS.

6 THAT'S NOT A PRIMARY PART OF THE
7 INJUNCTIVE RELIEF WE'RE SEEKING, BUT IT GOES TO THE
8 ANTICOMPETITIVE PRODUCT THAT APPLE IS TAKING
9 AFFIRMATIVE STEPS TO STOP OTHER PLAYERS THAT COULD
10 OTHERWISE SYNC UP WITH THEIR PLAYER.

11 THE COURT: THANK YOU.

12 FINAL WORDS.

13 MR. MITTELSTAEDT: YOUR HONOR, IN
14 DOCUMENT 86 IN THE SOMERS CASE WE RESPOND TO THEIR
15 ARGUMENT TO SAY IT IN A WORD.

16 WHEN THEY'RE ASKING FOR REIMBURSEMENT OF
17 THE 30 CENTS THAT CONSUMERS PAID TO GET DRM FREE
18 MUSIC, COPIES OF THE MUSIC THAT THEY HAD PREVIOUSLY
19 DOWNLOADED, THAT IS NOT INCIDENTAL RELIEF THAT
20 FLOWS FROM THE INJUNCTIVE RELIEF THAT THEY'RE
21 SEEKING. THAT IS THE RELIEF THAT THEY'RE SEEKING.

22 AND AS YOUR HONOR POINTED OUT, THAT'S
23 DAMAGES. IT'S NOT INJUNCTIVE RELIEF. CALLING IT
24 DISGORGEMENT DOESN'T CHANGE IT FROM DAMAGES TO
25 INJUNCTIVE RELIEF.

1 THE INDIRECT PLAINTIFFS HAD BEEN DENIED
2 (B) (3) CLASS. THEY DIDN'T MAKE THIS ARGUMENT.
3 IT'S NOT A GOOD ARGUMENT, BUT IF THEY WANT TO MAKE
4 THAT ARGUMENT, THEY SHOULD MAKE IT SO WE CAN
5 RESPOND TO IT.

6 THE THING THAT SHE MENTIONED AT THE END
7 HAS NOTHING TO DO WITH DRM. IT IS UNRELATED TO
8 THIS CASE. IT'S NOT ALLEGED IN THE COMPLAINT.
9 THEY HAVEN'T SOUGHT TO AMEND THE COMPLAINT TO
10 ALLEGE IT, AND IT HAS NOTHING TO DO WITH DRM.

11 THEY STILL HAVE NOT SAID, YOUR HONOR, AND
12 THIS IS THE KEY POINT, HOW EITHER THE EXISTING IPOD
13 CLASS OR A NEW CLASS OF PEOPLE WHO DON'T HAVE IPODS
14 WOULD BENEFIT FROM GETTING FREE DRM FREE MUSIC.

15 THEY KEEP SAYING, WELL, IT WOULD UNLOCK,
16 IT WOULD UNLOCK, IT WOULD UNLOCK, BUT THEY DON'T
17 SAY HOW THAT WOULD BENEFIT THE VAST MAJORITY OF
18 PEOPLE WHO, AS I SAY, ARE PERFECTLY CONTENT HAVING
19 APPLE MUSIC THAT THEY BOUGHT FOR 99 CENTS KNOWING
20 HOW IT COULD BE USED AND PEOPLE WHO WERE PERFECTLY
21 HAPPY USING THAT.

22 THEY STILL HAVEN'T IDENTIFIED ANY BENEFIT
23 EXCEPT FOR ONE THING, THEY SAY, HOW ABOUT IF
24 SOMEBODY WHO HAS AN IPOD WHO MIGHT WANT TO BUY AN
25 IPOD IN THE FUTURE?

1 WELL, NUMBER ONE, THE CLASS THEY WANT TO
2 REPRESENT IS MUCH BROADER THAN THAT. THEY HAVE NOT
3 LIMITED IT.

4 THE COURT: I THOUGHT IT WAS THOSE WHO
5 HAD ITUNES WHO WISHED TO BUY A DIFFERENT PLAYER IN
6 THE FUTURE EVEN IF THEY HAD AN IPOD NOW.

7 MR. MITTELSTAEDT: YES, BUT AS TO THOSE
8 PEOPLE, THAT -- IF THERE IS ANYBODY LIKE THAT, IT'S
9 ONLY A VERY SMALL PORTION OF THEIR PROPOSED CLASSES
10 WHICH CONSIST OF ALL IPOD OWNERS AND ALL ITUNES
11 MUSIC OWNERS.

12 AND SO POINT NUMBER ONE IS IT'S REALLY
13 OVERBROAD. THE CLASS THAT THEY'RE ASKING IS REALLY
14 OVERBROAD COMPARED TO THE VERY SMALL BENEFIT THAT
15 THEY HAVE THEORETICALLY IDENTIFIED.

16 NUMBER TWO, IF THEY SAY, OKAY, WELL, JUST
17 GIVE FREE UPGRADES TO THE PEOPLE WHO WANT TO
18 REPLACE THEIR IPOD WITH A COMPETITOR, HOW ARE THEY
19 EVER GOING TO IDENTIFY THOSE PEOPLE? THAT'S A VERY
20 SUBJECTIVE INDIVIDUALISTIC KIND OF ANALYSIS.

21 AND IT DOES NOT WARRANT EITHER CERTIFYING
22 A CLASS, LET ALONE GIVING FREE UPGRADES TO
23 EVERYBODY WHO HAS AN IPOD WHO EVER BOUGHT ANY
24 MUSIC.

25 AND THAT'S IMPORTANT FOR TWO REASONS, ONE

1 IS BASED ON THE CASES WE HAVE CITED. THEY HAVE TO
2 SHOW THAT THE INJUNCTIVE RELIEF THAT THEY'RE
3 SEEKING WOULD SUBSTANTIALLY BENEFIT OR WOULD
4 BENEFIT SUBSTANTIALLY ALL OF THE CLASS AND THEY
5 HAVEN'T BEEN ABLE TO SHOW THAT AND COMMON SENSE
6 TELLS YOU THAT'S NOT THE CASE.

7 BUT THE OTHER THING IS THAT THEY HAVE TO
8 SHOW THAT THIS FALLBACK RELIEF THEY'RE SEEKING NOW
9 IS THE PRIMARY REASON FOR BRINGING THIS LAWSUIT.

10 AND, YOU KNOW, TO ME IT DEFIES
11 BELIEVABILITY FOR THEM TO SAY EARLIER THAT THE MAIN
12 REASON INVOLVED GETTING APPLE TO STOP USING DRM IN
13 ITS STORE ON AN ONGOING BASIS AND NOW THE PRIMARY
14 REASON IS, IS JUST TO GET THE DRM REMOVED, IN THE
15 FACE OF THEIR CLAIM FOR TREBLED DAMAGES.

16 I MEAN, THE TREBLED DAMAGES ARE THE MAIN
17 REASON FOR BRINGING THIS CASE, AND THIS FALLBACK
18 RELIEF THAT WOULD BENEFIT, YOU KNOW, ONLY A SMALL
19 PORTION OF THE PROPOSED CLASS, IF IT WOULD BENEFIT
20 ANYBODY, JUST CANNOT BE CONSIDERED THE MAIN RELIEF.

21 TWO OTHER POINTS QUICKLY. AT PAGE 9 OF
22 OUR MOTION TO RECONSIDER THE (B) (2) CLASS WE CITE A
23 NUMBER OF CASES THAT STAND FOR THE PROPOSITION THAT
24 WHERE MOST OF THE CLASS WOULD NOT BENEFIT FROM AN
25 INJUNCTION, A (B) (2) CLASS IS INAPPROPRIATE.

1 THAT'S THE SEPULVEDA CASE.

2 AND THEN WE CITE JAMES AND OTHER CASES IN
3 FOOTNOTE 7 THAT STANDS FOR THE PROPOSITION THAT
4 WHEN THE CLAIM BY THE PLAINTIFF IS FOR SUBSTITUTE
5 PRODUCTS OR SUBSTITUTE HOUSING, THAT'S A CLAIM FOR
6 DAMAGES. IT'S NOT A CLAIM FOR INJUNCTIVE RELIEF.

7 AND I THINK JAMES, YOUR HONOR, PAGE 9,
8 FOOTNOTE 7 OF OUR MOTION TO RECONSIDER THE (B) (2)
9 CLASS IS DIRECTLY ON POINT AND SHOWS WHAT THEY'RE
10 TRYING TO DO IS TO COME UP WITH SOME INJUNCTIVE --
11 SOMETHING THEY COULD PASS OFF AS INJUNCTIVE RELIEF
12 BUT IT'S NOT. IT'S DAMAGES.

13 FINAL POINT. THE DIRECT PLAINTIFFS SAY
14 THAT THEY ARE NOT ASSERTING ANY MONETARY DAMAGES,
15 NO MONETARY DAMAGE CLAIMS BASED ON ITUNES MUSIC
16 STORE PURCHASERS, AND THEY CITE THEIR COMPLAINT
17 WHICH SAYS THAT THE DAMAGE CLASS IS LIMITED TO IPOD
18 PURCHASERS.

19 SO THEY CONCEDE, I THINK, THAT IT'S NOT
20 ENOUGH FOR SOMEBODY TO HAVE BOUGHT ITUNES MUSIC.
21 THEY HAVE NOT SUFFERED AN ANTITRUST INJURY. THEY
22 HAVE NOT SUFFERED DAMAGES. IF THEY HAD, THESE
23 PLAINTIFFS WOULD HAVE BEEN SUING FOR THAT.

24 ONE YEAR AGO THE PLAINTIFFS AGREED TO
25 EXCLUDE ITUNES MUSIC PURCHASERS WHO DIDN'T HAVE

1 IPODS FROM THE CLASS. THEY ABANDONED THAT PART OF
2 THE GROUP.

3 NOW, WHEN YOUR HONOR ASKED THE QUESTION,
4 WHY DID YOU LIMIT IT TO IPOD PURCHASERS, INSTEAD OF
5 ANSWERING THAT QUESTION, THEY TRY AND EVADE THE
6 QUESTION BY EXPANDING THE CLASS, EXPANDING THE
7 CLASS TO INCLUDE PEOPLE FOR WHOM THEY ARE NOT
8 SEEKING MONEY DAMAGES.

9 THE COURT: NOW SLOW DOWN. WHAT IS THIS
10 CONCESSION THAT YOU'RE TELLING ME ABOUT? WHEN DID
11 IT HAPPEN AND HOW DID IT HAPPEN?

12 MR. MITTELSTAEDT: WHEN YOUR HONOR
13 CERTIFIED THE DIRECT (B) (3) CLASS.

14 THE COURT: AND HOW WAS THEIR CONCESSION
15 MANIFESTED? WAS THERE A STIPULATION OR WAS IT JUST
16 MY DEFINITION?

17 MR. MITTELSTAEDT: IF YOUR HONOR RECALLS,
18 THEIR ORIGINAL COMPLAINT ALLEGED A CLASS OF ITUNES
19 PURCHASERS AND IPOD PURCHASERS.

20 WHEN THEY MOVED TO CERTIFY, THEY LIMITED
21 THE MOTION TO ONLY TO IPOD PURCHASERS.

22 WHEN YOUR HONOR CERTIFIED THE CLASS, YOU
23 WENT BACK AND CERTIFIED THE CLASS AS PLED IN THE
24 COMPLAINT.

25 WE MOVED FOR RECONSIDERATION OR FOR

1 CLARIFICATION. THE PLAINTIFFS DID NOT OPPOSE THAT.
2 THEY DID NOT DISPUTE THAT THE CLASS SHOULD BE
3 LIMITED AS THEY HAD MOVED, WHICH WAS ONLY IPOD
4 PURCHASERS AND EXCLUDED THE ITUNES PURCHASERS WHICH
5 THEY HAD ALLEGED IN THE COMPLAINT. AND SO YOUR
6 HONOR MODIFIED THE (B) (3) CLASS DEFINITION TO
7 INCLUDE ONLY IPOD PURCHASERS AND TO EXCLUDE ITUNES
8 PURCHASERS WHO DIDN'T HAVE IPODS.

9 AND THEN WHEN YOUR HONOR LAST JULY ASKED
10 THE QUESTION, WHY DID YOU DIRECT PURCHASERS LIMIT
11 YOUR CLASS TO IPOD PURCHASERS, EVEN THOUGH THE
12 INJUNCTIVE RELIEF YOU'RE SEEKING HAS TO DO WITH
13 MUSIC, INSTEAD OF ANSWERING THAT QUESTION, THEY
14 REVERTED TO WHAT THEY HAD ALLEGED IN THE COMPLAINT
15 AND TRIED TO REACTIVATE THIS CLASS OF PEOPLE THAT
16 THEY HAD ABANDONED.

17 I THINK THAT, TOO, BEARS ON THE QUESTION
18 OF WHETHER THIS RELIEF THAT THEY'RE SEEKING FOR
19 THIS NEW CLASS IS THE PRIMARY REASON FOR THIS CASE.

20 THE COURT: I'LL LOOK AT THAT HISTORY. I
21 GUESS THAT'S WHY THE MOTION, BUT I DON'T HEAR YOU
22 SAYING THAT THAT OPERATES AS SOME KIND OF A
23 JUDICIAL ESTOPPEL. IT'S SIMPLY A CHANGE IN
24 POSITION. THE QUESTION IS WHETHER I SHOULD PERMIT
25 IT.

1 MR. MITTELSTAEDT: I THINK IT GOES TO
2 WHETHER IT'S THE PRIMARY PURPOSE FOR BRING THIS.

3 THEY HAD A GOOD REASON FOR NOT SEEKING
4 THE CLASS ORIGINALLY.

5 WHEN THEY'RE NOT SEEKING DAMAGES BASED ON
6 ITUNES MUSIC PURCHASES, AND THEY HAVE EXPLICITLY
7 SAID IN THE BRIEFING ON THIS MOTION, DOCUMENT 236,
8 PAGE 5, THAT THEY ARE NOT ASSERTING MONETARY
9 DAMAGES BASED ON MUSIC STORE PURCHASES, AND THAT'S
10 BECAUSE THERE'S NO ANTITRUST INJURY.

11 IT'S THE QUESTION YOUR HONOR ASKED, WHAT
12 IS THE HARM TO SOMEBODY WHO BUYS A MUSIC FILE WITH
13 DRM FOR 99 CENTS AND USES THAT IN THE WAYS THAT IT
14 CAN BE USED?

15 YOU KNOW, WHAT IS THE HARM THERE? AND IF
16 THERE'S NO HARM, HOW IS THAT GROUP ENTITLED TO
17 INJUNCTIVE RELIEF?

18 AND FOR THEM TO SAY, WELL, APPLE OUGHT TO
19 REMOVE THE DRM FROM ALL OF THESE SONGS. WELL,
20 PRESUMABLY THE PEOPLE KNEW THEY WERE BUYING SONGS
21 WITH DRM AND THAT'S WHY IT COST 99 CENTS.

22 THE COURT: I UNDERSTAND YOUR POSITION.
23 DID YOU STAND BECAUSE YOU HAD A FINAL WORD?

24 MR. MERRICK: I DID MAINLY BECAUSE I WANT
25 TO GO THROUGH -- I INVITE THE COURT TO READ THE

1 JAMES CASE.

2 THE COURT: I'M GOING TO GO BACK AND READ
3 THAT AND FOREMOST PRO AND THERE WERE A LOT OF CASES
4 THAT I STARTED THE FIRST TIME AROUND BUT MAINLY FOR
5 THE TYING ISSUES BUT COUNSEL'S ARGUMENT INVITES ME
6 TO GO BACK AND SEE WHAT THOSE CASES SAY ABOUT THE
7 SECTION 2 CLAIMS.

8 MR. MERRICK: BUT ON THE (B) (2) CLASS IN
9 JAMES -- OKAY. THE CASE INVOLVED A CLASS ACTION OF
10 AMERICANS WHO HAD HOUSES THAT WERE DEMOLISHED BY
11 THE CITY AND THE CITY HAD -- THERE WERE LIENS
12 AGAINST THE PROPERTY THAT WERE DEMOLISHED FOR THE
13 COST OF THE DEMOLITION.

14 THE SUBSTITUTE HOUSING ASPECT THAT APPLE
15 LIKES TO KEY IN ON WERE ONE OF MANY DIFFERENT KINDS
16 OF EQUITABLE RELIEF. THERE WERE SEVERAL OTHER
17 FORMS OF EQUITABLE RELIEF THAT THE COURT DID FIND
18 SUPPORTED A (B) (2) CLASS, INCLUDING CANCELLING THE
19 DEBT OF THE DEMOLITION COSTS, RELEASING THE LIENS
20 AND INSURING THEIR TITLE AND WHICH I WOULD SUGGEST
21 IS A LITTLE CLOSER TO WHAT WE HAVE HERE WHICH IS
22 THAT WE'RE ASKING FOR APPLE TO IN A SENSE REMOVE
23 THE LIEN AND GIVE THE PEOPLE CLEAR TITLE TO THE
24 MUSIC THAT THEY BOUGHT IN THE FIRST PLACE.

25 BUT WITH THAT I'LL LET MS. ZELDES HAVE

1 THE LAST WORD.

2 MS. ZELDES: I THINK IT'S A BIT
3 DISINGENUOUS, WITH ALL DUE RESPECT, TO SAY THAT WE
4 JUST CAME UP WITH THIS INJUNCTIVE RELIEF NOW.

5 WE HAVE ALWAYS PLED THAT PLAINTIFFS IN
6 BOTH CASES ARE LOCKED INTO THESE LIBRARIES. THIS
7 COURT FOUND LAST DECEMBER THAT INJUNCTIVE RELIEF
8 PREDOMINANT IN A DIRECT PURCHASER CASE.

9 OUR SUBCLASS OF FOLKS WHO ARE SEEKING THE
10 DISGORGEMENT OF CONVERSION FEES IS CLEARLY A SUBSET
11 OF THE OVERALL INJUNCTIVE RELIEF WE'RE SEEKING. IT
12 MAY OVERLAP WITH THE DIRECT PURCHASERS, BUT IT IS A
13 SUBSET AND NOT THE PREDOMINANT RELIEF SOUGHT.

14 AND THAT FOLKS ARE PAYING THIS TREMENDOUS
15 PREMIUM TO UNLOCK THEIR MUSIC SHOWS WHAT A
16 RESTRAINT THAT IS. THAT IS A TREMENDOUS RESTRAINT.
17 IF IT WAS INSIGNIFICANT, HOW COULD APPLE GET A 30
18 PERCENT MARGIN ON THAT?

19 THE COURT: WELL, I WON'T GO INTO WHAT
20 PART OF THAT APPLE KEEPS. THAT HAS TO DO WITH
21 WHETHER IT INCURS EXPENSES ASSOCIATED WITH
22 TRANSFERRING.

23 MS. ZELDES: AND THERE IS NO DISCOVERY ON
24 THAT AT THIS POINT, YOUR HONOR. IT IS AN ISSUE
25 THAT HAS NOT.

1 THE COURT: CAN I BRING THIS TO A CLOSE?

2 MR. MITTELSTAEDT: YOUR HONOR, COULD I
3 ADD ONE HOUSEKEEPING POINT? THERE ARE THREE
4 MOTIONS ON TODAY.

5 THE COURT: YES.

6 MR. MITTELSTAEDT: WE HAVE SPENT MOST OF
7 THE TIME ON WHETHER --

8 THE COURT: I HAD FOUR ACTUALLY BUT GO
9 AHEAD.

10 MR. MITTELSTAEDT: WE SPENT A LOT OF TIME
11 ON WHETHER THE (B) (2) CLASS SHOULD BE EXPANDED TO
12 INCLUDE ITUNES STORE PURCHASERS.

13 WE HAVE SPENT LESS TIME ON WHETHER, AS
14 THE COURT INVITED, THAT (B) (2) CLASS FOR INJUNCTIVE
15 RELIEF SHOULD BE DECERTIFIED. THAT'S BEEN FULLY
16 BRIEFED.

17 OUR BASIC ARGUMENT IS, AS I SAID, WITH
18 RESPECT TO THE ITUNES MUSIC STORE ALLEGED NEW
19 CLASS. THE MAIN RELIEF THEY SOUGHT IS MOOTED AS
20 DEMONSTRATED BY MR. CUE'S DECLARATION. AND THIS
21 FALLBACK RELIEF IS NOT THE PRIMARY PURPOSE AND IT
22 WOULDN'T BENEFIT MOST, IF ANY, OF THE CLASS.

23 SO WE HAVE BRIEFED THAT ISSUE AND I -- I
24 MEAN, WHAT WE HAVE SUGGESTED TO THE COURT IS THAT
25 BECAUSE THE PRIMARY INJUNCTIVE RELIEF THEY SOUGHT

1 CHANGING THE MUSIC STORE SO IT DOESN'T, YOU KNOW,
2 HAVE DRM ON THE MUSIC ON AN GOING BASIS, BECAUSE
3 THAT IS MOOT, THAT (B) (2) CLASS SHOULD BE
4 DECERTIFIED AS SET FORTH IN THE MOTION THAT YOUR
5 HONOR INVITED IN JULY.

6 THE COURT: WELL, IN THE NAME OF
7 HOUSEKEEPING, IT SOUNDS LIKE WE'RE STILL AT THE
8 SAME PLACE BUT WHAT I'M PERSUADED TO DO, I'LL GIVE
9 IT CONSIDERATION, IS TO INVITE A MOTION WHICH
10 CONFIRMS THAT IN LIGHT OF THE DISMISSAL OF THE
11 TYING CLAIM THERE IS A VIABLE MONOPOLY CLAIM AND TO
12 HAVE THE TWO SIDES FOCUS ME ON WHAT IT IS, IS THE
13 ESSENCE OF THAT CLAIM INDEPENDENT OF THE TYING.

14 I KNOW IT'S A TECHNOLOGICAL RELATIONSHIP
15 AS I HAVE CHARACTERIZED IT, AND I WANT TO
16 UNDERSTAND THAT BETTER. ALL OF THESE CHANGES IN
17 THE TECHNOLOGY DO SEEM TO ME TO OFFER THE NEED FOR
18 SOME KIND OF CUTOFF, AND I WANT TO UNDERSTAND THAT
19 BETTER.

20 SO I'LL INVITE THOSE MOTIONS. THE FACT
21 THAT I DON'T TAKE ANY ACTION ON THESE CURRENT
22 MOTIONS IS NOT AN INDICATION THAT I DON'T CONSIDER
23 IT APPROPRIATE FOR THE PLAINTIFF TO REDEFINE THE
24 CLASS TO INCLUDE ITUNES PURCHASERS. IT'S JUST THAT
25 I'M A LITTLE CONFUSED AT THIS POINT AS TO WHAT

1 RELIEF IS BEING SOUGHT AND WHETHER THAT'S
2 INDEPENDENT OF A PURCHASER OF A MACHINE.

3 AND THAT IS A SOURCE OF SOME CONFUSION
4 THAT I CAN GET CLARIFIED IN THE CONTEXT OF AN
5 INVITED MOTION TO DISMISS FOR FAILURE TO STATE A
6 CLAIM ON THE SECTION 2 FOR MONOPOLY.

7 MS. SWEENEY: YOUR HONOR, IF I COULD,
8 BONNIE SWEENEY FOR THE DIRECT PURCHASERS. I HEARD
9 MR. MITTELSTAEDT SAY HE WANTED TO ADDRESS SOME
10 HOUSEKEEPING ISSUES SO I WANTED TO CHIME IN HERE.

11 IN YOUR DISCUSSION JUST NOW, YOUR HONOR,
12 AND YOUR INVITATION TO DEFENDANT TO FILE YET
13 ANOTHER MOTION TO DISMISS I WANTED TO RAISE
14 SOMETHING THAT DURING THE TIME PERIOD THAT THIS
15 CASE HAS BEEN LITIGATED BEFORE MR. MERRICK JOINED
16 THE CASE APPLE FILED TWO MOTIONS TO DISMISS.

17 AND IF YOUR HONOR RECALLS BOTH OF THOSE
18 MOTIONS WERE DENIED. AND I THINK IF YOU GO BACK
19 AND LOOK AT YOUR HONOR'S OPINIONS, THERE WAS AN
20 OPINION ISSUED IN THE SLATTERY CASE AS WELL AS AN
21 OPINION ISSUED IN THE TUCKER CASE AND THOSE
22 OPINIONS LAY OUT VERY CLEARLY THAT PLAINTIFFS
23 ALLEGE A VERY SEPARATE STAND-ALONE MONOPOLIZATION
24 CLAIM. THOSE ALLEGATIONS ARE NOT DEPENDENT UPON
25 THE TYING CLAIM THAT YOUR HONOR HAS DISMISSED.

1 AND THE COURT'S DECISION ON THE
2 MONOPOLIZATION CLAIMS AND ATTEMPTED -- DON'T FORGET
3 WE HAVE AN ATTEMPTED MONOPOLIZATION CLAIM AS WELL,
4 ON THOSE CLAIMS MADE VERY CLEAR THAT UNDER THE LAW,
5 AND THERE WAS GREAT DISCUSSION IN THE BRIEFS, IN
6 ORAL ARGUMENT, IN YOUR HONOR'S OPINIONS AS TO THE
7 EFFECT OF THE UNITED STATES SUPREME COURT'S TRINKO
8 DECISION, A SECTION 2 MONOPOLIZATION CASE, NOTHING
9 TO DO WITH TYING.

10 SO I THINK THAT THE PROPER -- THE
11 JUNCTURE WE'RE AT HERE, YOUR HONOR. THE FIRST CASE
12 WAS FILED IN 2005. THE TUCKER CASE WAS FILED IN
13 2006.

14 WE'RE NOW IN 2009, AND MR. MITTELSTAEDT
15 SEEKS TO KEEP RELITIGATING OVER AND OVER AND OVER
16 AGAIN MOTIONS TO DISMISS, MOTIONS FOR CLASS, ET
17 CETERA.

18 I THINK THE APPROPRIATE WAY TO RESOLVE
19 THIS IS REALLY TO ALLOW PLAINTIFFS TO COMPLETE
20 DISCOVERY, SET A SCHEDULE AND THEN MR. MITTELSTAEDT
21 CAN BRING HIS MOTION FOR SUMMARY JUDGMENT.

22 AS YOU KNOW, YOU HAVE PROBABLY SEEN IN
23 THE PAPERS WE HAVE HAD DIFFICULTIES IN GETTING WHAT
24 WE NEED FROM APPLE IN DISCOVERY, AND I KNOW THAT'S
25 NOT YOUR HONOR'S PROBLEM. WE HAVE A MAGISTRATE

1 ASSIGNED TO THIS CASE.

2 BUT ONCE WE RESOLVE THOSE PROBLEMS AND
3 GET THROUGH DISCOVERY APPLE IS CERTAINLY ENTITLED
4 TO MAKE A MOTION FOR SUMMARY JUDGMENT, AND I THINK
5 THAT WOULD BE THE MOST FAIR AND EFFICIENT WAY TO
6 PROCEED GIVEN ALL OF THE DELAYS THAT COUNSEL HAS
7 ENCOUNTERED SINCE FILING THIS CASE.

8 THE COURT: WELL, THAT'S FAIR. I'LL TAKE
9 THAT INTO CONSIDERATION. THAT WOULD DELAY IT.

10 THE REASON I'M INVITING IT AS A 12(B)(6)
11 MOTION IS THAT IT WOULD HELP ME, FIRST OF ALL, TO
12 ON THESE MOTIONS WITH RESPECT TO THE DEFINITION OF
13 THE CLASS, BECAUSE RIGHT NOW THE COMPLAINT IS BASED
14 ON TYING. AND IT WOULD HELP ME TO SEE THE CASE ON
15 MONOPOLIZATION AND SEE WHAT IS THE APPROPRIATE
16 CLASS.

17 BUT I THINK YOU'RE RIGHT, I WOULD
18 UNCOUPLE THE QUESTION OF DISCOVERY. THIS IS NOT A
19 SECURITIES LITIGATION REFORM ACT CASE WHERE YOU
20 CAN'T GO AHEAD WITH DISCOVERY WHILE THESE THINGS
21 ARE GOING ON AND AS FAR AS I'M CONCERNED DISCOVERY
22 IS OPEN AND IF YOU NEED HELP FROM THE COURT GETTING
23 THE INFORMATION THAT YOU NEED, RESORT TO THAT
24 PROCESS.

25 MR. MITTELSTAEDT: WE HAVE PRODUCED A LOT

1 OF DOCUMENTS. WE HAVE A LOT OF LAWYERS WORKING AND
2 REVIEWING DOCUMENTS.

3 THE COURT: WHEN WOULD YOU BE IN A
4 POSITION TO BRING THIS ARGUMENT THAT YOU'VE MADE
5 SEVERAL TIMES -- AND THE ONLY REASON I'M ASKING FOR
6 CONSIDERATION IS THAT THINGS HAVE CHANGED IN TERMS
7 OF MY OWN UNDERSTANDING OF THE CASE AND IT JUST
8 HELPS ME IF I'M GOING TO DENY IT, YOU BENEFIT
9 BECAUSE IF I DENY IT, IT'S DONE IN LIGHT OF THE
10 CLAIMS DISMISSED.

11 IF I'M GOING TO GRANT IT, YOU WOULD
12 BENEFIT. SO IT SEEMS TO ME THAT IT WOULD BENEFIT
13 BOTH SIDES TO HAVE A GOOD CLEAR DETERMINATION AS TO
14 WHAT THE CLAIM IS AND TO SAY THAT THAT CLAIM IS
15 COGNIZABLE UNDER THE ANTITRUST LAWS.

16 HOW LONG?

17 MR. MITTELSTAEDT: I WOULD THINK, YOUR
18 HONOR, A MATTER OF WEEKS.

19 THE COURT: WEEKS.

20 MS. SWEENEY: CAN I RESPOND TO THAT, YOUR
21 HONOR? SO ARE YOU SAYING THAT YOU WOULD FILE A
22 MOTION TO DISMISS IN TWO WEEKS OR A MOTION FOR
23 SUMMARY JUDGMENT? I MISUNDERSTOOD.

24 THE COURT: HE'S SUGGESTING TO FOLLOW THE
25 COURT'S DETERMINATION OF THE 12(B)(6).

1 MS. SWEENEY: THANK YOU.

2 THE COURT: I WON'T BE AVAILABLE IN A
3 MATTER OF WEEKS.

4 MS. GARCIA, SUGGEST A DATE FOR A
5 SPECIALLY SET MOTION THAT IS CONSISTENT WITH OUR
6 LAW AND MOTION CALENDAR.

7 (PAUSE IN PROCEEDINGS.)

8 THE COURT: SO WE WOULD HAVE TO INTERRUPT
9 OUR SCHEDULE AND PUT YOU IN SOME TIME IN LATE
10 JANUARY OR EARLY FEBRUARY. AT THIS POINT WE CAN'T
11 HEAR YOU -- SO THE 25TH, 1ST, 8TH OR THE 22ND.

12 MR. MITTELSTAEDT: WHY DON'T WE TAKE THE
13 8TH.

14 THE COURT: FEBRUARY 8TH.

15 MS. SWEENEY: YOUR HONOR, APOLOGIZE. I
16 DON'T HAVE MY CALENDAR WITH ME. I THINK THAT DATE
17 IS OKAY.

18 THE COURT: SAY AGAIN.

19 MS. SWEENEY: I THINK THAT DATE IS OKAY.
20 I APOLOGIZE. I DIDN'T BRING MY CALENDAR.

21 THE COURT: WELL, THAT WOULD BE YOUR
22 TARGET DATE FOR SETTING UP YOUR BRIEFING SCHEDULE
23 AND IF YOU HAVE PROBLEMS ON THAT PARTICULAR DATE,
24 LET US KNOW AND WE CAN MOVE YOU TO ANOTHER DAY
25 DURING THE WEEK.

1 MR. MITTELSTAEDT: I KNOW THE ANSWER TO
2 THIS QUESTION BUT THERE WAS ANOTHER IMPORTANT
3 MOTION SET FOR TODAY AND THAT WAS OUR MOTION TO
4 DECERTIFY THE (B) (3) CLASS BASED ON YOUR HONOR'S
5 RULING IN THE INDIRECT PURCHASER CASE.

6 THE COURT: AND WHAT DO YOU THINK THE
7 ANSWER IS?

8 MR. MITTELSTAEDT: YOU POSSIBLY HAVE A
9 COURTROOM FULL OF LAWYERS AND YOU DON'T WANT TO
10 HEAR ANY ARGUMENT ON THAT.

11 THE COURT: I DON'T WANT TO HEAR ANY
12 ARGUMENT ON THAT.

13 MR. MITTELSTAEDT: THANK YOU VERY MUCH.

14 THE COURT: THANK YOU VERY MUCH. MATTER
15 IS UNDER SUBMISSION.

16 MS. SWEENEY: THANK YOU, YOUR HONOR.

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

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25