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

GOMELSKY, ET AL,)	CV-08-4969-JF
)	
PLAINTIFF,)	SAN JOSE, CALIFORNIA
)	
VS.)	
)	FEBRUARY 5, 2010
APPLE, INC.)	
)	
DEFENDANT.)	PAGES 1-39
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

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

FOR THE PLAINTIFF: COHEN MILSTEIN
BY: DOUGLAS MCNAMARA
1100 NEW YORK AVENUE, STE 500
WASHINGTON, DC 20005

FOR THE DEFENDANT: MORRISON & FOERSTER
BY: PENELOPE PREOVOLOS
ANDREW MUHLBACH
425 MARKET STREET
SAN FRANCISCO, CA 94105

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

FOR THE PLAINTIFF: MEISELMAN DENLEA
BY: MICHAEL BERG
1311 MAMARONECK AVENUE
WHITE PLAINS, NY 10605

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1 SAN JOSE, CALIFORNIA

FEBRUARY 5, 2010

2 P R O C E E D I N G S

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

5 THE COURT: THEN WE HAVE THE APPLE CASES.
6 BERENBLAT AND WAGNER.

7 MR. BERG: YOUR HONOR, THIS IS
8 MICHAEL BERG OF MEISELMAN DENLEA ON COURT CALL FOR
9 PLAINTIFFS.

10 MR. MCNAMARA: YOUR HONOR, THIS IS
11 DOUGLAS MCNAMARA OF COHEN MILSTEIN ON BEHALF OF
12 PLAINTIFF WAGNER.

13 MS. PREVOLOS: PENELOPE PREVOLOS,
14 YOUR HONOR. GOOD MORNING. ON BEHALF OF APPLE,
15 INC.

16 MR. MUHLBACH: GOOD MORNING, YOUR HONOR.
17 ANDREW MUHLBACH ALSO ON BEHALF OF APPLE.

18 THE COURT: OKAY. WELL, WE'VE BEEN HERE
19 BEFORE AND I THINK WE ARE GETTING TO THE POINT
20 WHERE THE COURT NEEDS TO BITE THE BULLET.

21 I GUESS THE -- IN MY MIND, AND I WILL
22 ADDRESS THIS TO DEFENSE COUNSEL SINCE THEY ARE THE
23 MOVING PARTY, THE BEST ARGUMENT THAT THE PLAINTIFF
24 HAS OR THE PLAINTIFFS HAVE, RATHER, SEEMS TO ME IS
25 THAT THERE'S EVIDENCE THAT THERE WERE PROBLEMS WITH

1 THE MEMORY SLOT PRIOR TO THE TIME THAT THE
2 PLAINTIFFS BOUGHT THEIR POWERBOOKS AND THAT APPLE
3 DID NOT DISCLOSE THOSE PROBLEMS -- ESSENTIALLY, IT
4 ENDS UP BEING A COMMON LAW FRAUDULENT CONCEALMENT
5 CLAIM.

6 IN OTHER WORDS, THROUGH THE INTERNET
7 POSTINGS AND SO FORTH THERE'S EVIDENCE THAT APPLE
8 KNEW ABOUT THE PROBLEM AND NONETHELESS REPRESENTED
9 TO THE WORLD THAT THE COMPUTER WAS MERCHANTABLE.
10 IT DIDN'T SAY THERE WAS PROBLEM WITH THE MEMORY
11 SLOT EVEN THOUGH THEY NEW THERE WAS A PROBLEM WITH
12 THE MEMORY SLOT. SO I THINK THAT'S THE BEST
13 ARGUMENT THAT I CAN SEE FROM PLAINTIFFS.

14 I THINK WITH REGARD TO THE IMPLIED
15 WARRANTY AND THE UNCONSCIONABILITY AND SO FORTH, I
16 HAVE SOME QUESTIONS FOR PLAINTIFFS COUNSEL ABOUT
17 THAT BECAUSE I'M STILL NOT SOLD ON THAT THEORY.

18 BUT ON THE CONCEALMENT, IF I COULD GET
19 SOME COMMENT FROM DEFENSE COUNSEL. IF THERE'S
20 EVIDENCE THAT THE MANUFACTURER KNOWS THAT THERE'S A
21 PROBLEM AND THEN THEY DON'T DO ANYTHING ABOUT IT
22 AND THEY PUT OUT A WARRANTY THAT'S LIMITED IN A WAY
23 THAT THIS ONE IS, IS THERE NOT SOME TYPE OF CLAIM
24 AT LEAST UNDER CALIFORNIA LAW FOR THAT?

25 MS. PREOVOLOS: YOUR HONOR, LET ME

1 ADDRESS THAT. I THINK THAT THE 10,000 POUND
2 GORILLA IN THE ROOM, THAT WITH DUE RESPECT THE
3 COURT HASN'T ADDRESSED, IS THAT THAT'S A FRAUD
4 CLAIM.

5 SO THERE'S NO QUESTION THAT RULE 9(B)
6 APPLIES. AND I DON'T THINK WE'VE HAD A WHO, WHAT,
7 WHEN OR WHERE HERE PLED AT ALL. THERE'S NO
8 EVIDENCE THAT APPLE HAD KNOWLEDGE OF A DEFECT.

9 ALL THERE ARE, ARE ALLEGATIONS THAT
10 PEOPLE COMPLAINED ABOUT ALLEGED ISSUES ON THE
11 INTERNET. THE PROBLEM WITH MAKING THAT AN
12 EXCEPTION, BASICALLY, IS DAUGHERTY. BECAUSE
13 THERE'S NO DISPUTE THIS PROBLEM PERFORMED PERFECTLY
14 THROUGHOUT THE PLAINTIFF'S WARRANTY AND BEYOND.

15 THE PROBLEM WITH THAT IS THAT THERE ARE
16 ALWAYS SUCH COMPLAINTS ON THE INTERNET. SO IF
17 THAT'S ENOUGH TO GET YOU PAST 9(B) WE ARE GOING TO
18 BE LITIGATING THE MERITS OF ANY CLAIM, FRANKLY, FOR
19 ANY PRODUCT MANUFACTURED BY ANY COMPUTER MAKER.

20 THE COURT: HOW MUCH DO YOU NEED? I
21 TOTALLY AGREE WITH YOU, AND I THINK THAT THE LAST
22 ORDER THE COURT ISSUED TALKED ABOUT RULE 9(B) AT
23 SOME LENGTH.

24 SO I THINK THAT IS WHERE WE ARE. SO,
25 SURE, I MEAN, THE WAY YOU'VE JUST PUT IT, YOU ARE

1 RIGHT. IT CAN'T BE ENOUGH THAT ONE PERSON WHO SITS
2 IN FRONT OF HIS OR HER COMPUTER ALL DAY AND
3 COMPLAINS ABOUT PRODUCTS, THAT'S ENOUGH TO CREATE A
4 FRAUDULENT CONCEALMENT CLAIM. BUT WHERE IS THAT
5 LINE? WHAT DOES THE PLAINTIFF NEED TO SHOW AT THE
6 PLEADING STAGE?

7 MS. PREVOLOS: WELL, I THINK THERE HAS
8 TO BE SOME INDICATION THAT MORE IS GOING ON THAN
9 ISSUES ARISING WITH SOME NUMBER OF PRODUCTS AFTER
10 THE WARRANTY PERIOD.

11 AND I THINK -- THERE'S SO MANY THINGS
12 HERE THAT I CAN SAY THAT I'M NOT SURE WHICH OF THEM
13 TO PICK -- NO, I UNDERSTAND. HERE'S A PROBLEM. A
14 COUPLE OF THINGS.

15 PROBLEM NUMBER ONE, FRANKLY THERE WILL
16 ALWAYS BE A NUMBER, HUNDREDS, THOUSANDS OF
17 COMPLAINTS ON THE INTERNET ABOUT ANYTHING, GO ON
18 AND LOOK AT PETITIONS AS TO APPLE, HP OR WHOMEVER
19 AND YOU WILL SEE THAT. THAT'S BECAUSE WE SELL
20 MILLIONS OF PRODUCTS AND THERE WERE LITERALLY
21 SEVERAL MILLIONS OF THESE COMPUTERS SOLD.

22 AND THE INTERNET IS A VERY FERTILE SOURCE
23 FOR ISSUES. I THINK WHERE YOU HAVE TO DRAW THE
24 LINE, THOUGH, IS THERE HAS TO BE SOME
25 REPRESENTATION BY THE DEFENDANT THAT SAYS THERE'S

1 NOT A PROBLEM OR THAT AMOUNTS TO CONCEALMENT,
2 BECAUSE YOUR HONOR IS TALKING ABOUT FRAUDULENT
3 CONCEALMENT.

4 WE DON'T HAVE THAT HERE. WE DON'T HAVE
5 ANY WHO, WHAT, WHEN, WHERE, WHERE APPLE SAID
6 THERE'S NO PROBLEM. AND THE PROBLEM ALSO IS
7 TALKING ABOUT WHEN THESE PEOPLE'S COMPUTERS WERE
8 SHIPPED, STEP BACK FOR A MOMENT BECAUSE THAT REALLY
9 UNDOES AN AWFUL LOT.

10 A MANUFACTURER, IN GOOD FAITH, DOES ALL
11 THE PRETESTING IT CAN DO, PUTS THE PRODUCT ON THE
12 MARKET AND THE PRODUCT IS FINE, FUNCTIONS FINE
13 UNDER WARRANTY.

14 OVER TIME WHAT DAUGHERTY TELLS THIS COURT
15 AND TELLS DEFENDANTS IS THAT SOME PRODUCTS FAIL.
16 AND SOME SIGNIFICANT -- NOT SIGNIFICANT -- SOME
17 NOTICEABLE PERCENTAGE OF PEOPLE WILL HAVE FAILURES
18 NO MATTER WHAT WHEN YOU HAVE TWO OR THREE MILLION
19 UNITS OF A PRODUCT.

20 AND WHEN NOTHING MANIFESTS EXCEPT THAT
21 THE PRODUCTS FAIL OUTSIDE WARRANTY, I THINK UNLESS
22 THERE IS SOME AFFIRMATIVE MISREPRESENTATION OR
23 ACTIVE CONCEALMENT BY THE DEFENDANT, AND YOUR HONOR
24 TALKED ABOUT THAT IN HOVSEPIAN II IN PARTICULAR,
25 AND WE DON'T HAVE THAT HERE.

1 THEN I JUST THINK UNLESS YOU DRAW A LINE
2 ASKING FOR SOMETHING MORE THAN A LOT OF ONLINE
3 COMPLAINTS --

4 THE COURT: THAT'S WHAT I'M GRAPPLING
5 WITH, AND I DON'T WANT TO REPRESENT THE
6 MANUFACTURING INDUSTRY AS A WHOLE BECAUSE WE GOT A
7 LOT OF THESE CASES. WITH THE INTERNET BEING WHAT
8 IT IS AND YOU GET A LOT OF INTERNET COMPLAINTS AND
9 THEN WE GET AN ARGUMENT WELL, THE MANUFACTURER HAD
10 TO KNOW THAT THERE WAS A PROBLEM BECAUSE WE LOOK AT
11 ALL THESE INTERNET COMPLAINTS AND THEN THEY DIDN'T
12 SAY ANYTHING. THEY DIDN'T SAY THE MEMORY SLOT
13 DOESN'T ACCOMMODATE TWO GIGABYTES OR SOMETHING
14 FAILS.

15 I'M JUST TRYING TO FIGURE THIS OUT, NOT
16 ONLY FOR THIS CASE BUT FOR OTHERS. WHAT DO YOU
17 HAVE TO SHOW? OBVIOUSLY, IF THERE IS AN
18 AFFIRMATIVE MISREPRESENTATION THEN YOU'VE GOT FRAUD
19 AND YOU ARE NOT DEALING WITH THAT. BUT FOR
20 FRAUDULENT CONCEALMENT?

21 MS. PREVOLOS: I THINK THERE HAS TO BE
22 SOMETHING MORE, THOUGH, THAN COMPLAINTS ON THE
23 INTERNET.

24 THE COURT: OKAY. SO WHAT IS THE
25 SOMETHING MORE?

1 MS. PREOVOLOS: IT COULD BE ANY NUMBER OF
2 THINGS. BUT IT COULD BE, YOU KNOW, THE DEFENDANT
3 BEING ASKED AND BEING SILENT, WE DON'T HAVE
4 ALLEGATIONS LIKE THAT HERE. WE DON'T HAVE ANY, I
5 HAVE TO KEEP SAYING, WE DON'T HAVE WHO, WHAT, WHEN,
6 WHERE.

7 THE COURT: YOU'RE SAYING I'M ASKING THE
8 WRONG ATTORNEY. I SHOULD BE ASKING PLAINTIFF'S
9 COUNSEL, WHERE IS THE PARTICULARITY WHERE APPLE IS
10 CONFRONTED WITH NUMEROUS COMPLAINTS? YOUR TWO
11 GIGABYTE MEMORY SLOT DOESN'T ACCOMMODATE TWO
12 GIGABYTES, WHAT DO YOU HAVE TO SAY ABOUT THAT? AND
13 APPLE SAYS NOTHING.

14 MS. PREOVOLOS: I THINK THE PROBLEM IS,
15 YES, BECAUSE THE DEFENDANT DOESN'T ADMIT A PROBLEM.
16 BUT YOU KNOW WHAT THAT MEANS IS, I THINK MY CORE
17 PROBLEM, EVEN WITH PHRASING THE QUESTION THAT WAY,
18 IS IT'S SUCH A HUGE END RUN AROUND AUTHORITY
19 BECAUSE I HAVE TO KEEP COMING BACK TO THE FACT THAT
20 THESE PLAINTIFFS ADMIT THEIR COMPUTERS WORKED FINE
21 FOR TWO YEARS, THREE YEARS, THREE AND A HALF YEARS,
22 AND BEYOND THE TIME THEY INSTALLED ADDITIONAL
23 MEMORY. SO IT'S NOT ABOUT THE INSTALLATION OF
24 ADDITIONAL MEMORY.

25 THE COURT: DOES DAUGHERTY SAY -- AND YOU

1 KNOW DAUGHERTY IS A CASE THAT THE COURT RELIED ON
2 HEAVILY IN THE LAST RULING -- DOES DAUGHERTY SAY
3 THAT IF A MANUFACTURER KNOWS THAT A YEAR AND A DAY
4 AFTER MANUFACTURE, THAT THE PRODUCT IS GOING TO
5 FAIL MISERABLY, AND THEN IT ISSUES A ONE YEAR
6 EXPRESS WARRANTY WHICH SAYS AFTER THIS ALL
7 WARRANTIES ARE OFF, THERE AREN'T ANY IMPLIED
8 WARRANTIES. IT SAYS, YOU'VE GOT A YEAR OF
9 GUARANTEED. THIS IS A HYPOTHETICAL CASE, BUT DOES
10 DAUGHERTY SAY TOO BAD TO THE CONSUMER?

11 MS. PREVOLOS: THAT'S NOT THIS CASE,
12 OBVIOUSLY. BUT IF YOU LOOK AT OESTREICHER AND
13 DAUGHERTY, I THINK THEY WOULD HAVE TO SAY THE
14 ANSWER IS STILL THAT THE PLAINTIFF'S DON'T PREVAIL.
15 OBVIOUSLY, YOU CREATE THIS HORRENDOUS SLIPPERY
16 SLOPE.

17 HERE'S THE PROBLEM. PARTS DO FAIL
18 EVENTUALLY. YOU TALKED ABOUT THIS IN THIS CASE AND
19 IN HOVSEPIAN. SO THE MANUFACTURER, IN ORDERING
20 PARTS AND ORDERING REPLACEMENT PARTS, HAS TO HAVE
21 AN IDEA, HAS TO HAVE SOME KNOWLEDGE ABOUT WHEN
22 THINGS ARE GOING TO FAIL.

23 AND I THINK THERE'S AN ASSUMPTION THAT
24 THEY WILL LAWFULLY FAIL OUTSIDE THE WARRANTY OR WE
25 WOULDN'T SAY KEEP PARTS FOR SEVEN YEARS IN

1 CALIFORNIA.

2 BUT YOU ARE SAYING IF THE DEFENDANT HAS
3 SOME ESTIMATE THAT THE PRODUCT IS GOING TO FAIL,
4 LET'S SAY THREE YEARS BECAUSE THAT'S WHAT HAPPENED
5 HERE. I'M NOT SAYING APPLE KNEW THAT, BUT ASSUME
6 THAT FOR A SECOND, THE MANUFACTURER KNOWS TWO YEARS
7 OUT OF WARRANTY SOME NUMBER OF MEMORY SLOTS ARE
8 GOING TO NEED REPLACEMENT. DOES THAT MEAN THE
9 DEFENDANT IS ENGAGED IN FRAUDULENT CONCEALMENT? I
10 SUBMIT THAT'S THE END OF DAUGHERTY. I REALLY DO.

11 AND THAT'S THE PROBLEM HERE. I DON'T
12 CONCEDE APPLE HAD THAT KNOWLEDGE. AND FRANKLY, TO
13 GET INTO THE FACTS OF THIS CASE, THE FAILURE RATES
14 WERE LOW AND APPLE HAS NO KNOWLEDGE. WELL, WE
15 DON'T GET TO DO THAT.

16 BUT I SAY THAT BECAUSE I DO THINK YOU
17 HAVE TO HAVE THAT PERSPECTIVE. LET'S ASSUME FOR A
18 SECOND THERE'S NO DEFECT HERE, THAT THE FAILURE
19 RATES ARE LOW AND SOME NUMBER OF PEOPLE ARE GOING
20 TO HAVE A MEMORY ISSUE. SOME NUMBER OF PEOPLE ARE
21 GOING TO HAVE A HARD DRIVE ISSUE, I'LL TELL YOU
22 THAT RIGHT NOW. SOME PEOPLE ARE GOING TO HAVE A
23 GAME CHIP ISSUE, IT'S JUST GOING TO HAPPEN.

24 THE COURT: OR A VERTICAL LINE ISSUE.

25 MS. PREVOLOS: OR A VERTICAL LINE ISSUE,

1 PRECISELY.

2 BUT IF THEY HAVE THAT PROBLEM TWO YEARS
3 OUTSIDE WARRANTY, DO I REALLY HAVE TO GO THROUGH A
4 FULL EVIDENTIARY SHOWING TO DEMONSTRATE THAT THE
5 FAILURE RATES ARE LOW --

6 THE COURT: SO BASICALLY -- AND WE WILL
7 GET TO THE NOTICE ISSUE AND SO FORTH BECAUSE THAT'S
8 THE OTHER THING WE NEED TO TALK ABOUT.

9 BUT ASSUMING THAT YOU HAVE NOTICE AND
10 ASSUMING THAT THE CONSUMER KNOWS THIS PRODUCT IS
11 WARRANTED FOR A YEAR AND THAT'S IT, THAT IT DOESN'T
12 REALLY MATTER WHAT THE MANUFACTURER KNOWS AS LONG
13 AS THE MANUFACTURER DOES NOT WILLFULLY CONCEAL
14 SOMETHING IN RESPONSE TO AN INQUIRY OR IT DOESN'T
15 WILLFULLY MISREPRESENT SOMETHING.

16 MS. PREVOLOS: I'M NOT SURE WHERE ELSE
17 TO DRAW THE LINE, I'M REALLY NOT.

18 BECAUSE, I MEAN, MUCH LESS THAN THAT
19 HAPPENED HERE. IF WE HAD TO GO TO SUMMARY
20 JUDGEMENT I THINK WE WOULD SHOW APPLE DIDN'T KNOW A
21 DARN THING AND TO THIS DAY MAINTAINS THESE PRODUCTS
22 ARE FINE.

23 AND ONE THING I CAN TELL YOU THAT IS IN
24 THE RECORD IS THAT APPLE DID DO AN EXTENDED
25 WARRANTY REPLACEMENT FOR THIS PART ON SOME

1 COMPUTERS WHICH INDICATES TO YOU IF APPLE THINKS
2 THERE'S AN ISSUE IT'S GOING TO DO SOMETHING ABOUT
3 IT. AND THAT'S IN THE COMPLAINT.

4 THE COURT: SO REALLY YOUR RESPONSE IS
5 THERE MIGHT BE A HYPOTHETICAL CASE WHERE THE
6 ANALYSIS IN DAUGHERTY DOESN'T APPLY TO THIS CASE.

7 MS. PREVOLOS: WELL, THE WHO, WHAT,
8 WHEN, WHERE HAS NOT BEEN ALLEGED.

9 THE COURT: WE HAVE COMPLAINTS ON THE
10 INTERNET AND THAT'S ALL WE'VE GOT.

11 MS. PREVOLOS: YOU'VE PROBABLY GOT
12 THOUSANDS OF COMPLAINTS ON THE INTERNET BUT YOU
13 ALWAYS WILL. AND HONESTLY, I THINK YOUR HONOR CAN
14 GO ON THE INTERNET AND LOOK AT THE FORUMS AND YOU
15 WILL FIND LOTS.

16 THE COURT: I STOPPED READING THE FORUMS
17 NOT ONLY FOR CONSUMER CASES BUT BECAUSE I HAVEN'T
18 DONE ANY INDEPENDENT RESEARCH IN THIS CASE, I WANT
19 TO MAKE THAT CLEAR. BUT I STOPPED READING THAT
20 KIND OF THING A LONG TIME AGO BECAUSE FORUMS SEEM
21 TO ATTRACT PEOPLE WHO LIKE TO COMPLAIN ABOUT
22 THINGS.

23 BUT THE POINT IS THAT DOESN'T MEAN AT
24 SOME POINT A MANUFACTURER DOESN'T HAVE KNOWLEDGE
25 THAT CREATES A DUTY. THE QUESTION IS WHETHER

1 THEY'VE PLED THAT HERE.

2 MS. PREVOLOS: RIGHT.

3 I THINK THE OTHER PROBLEM, THOUGH, IS IF
4 THAT KNOWLEDGE HAPPENS AFTER THE WARRANTY, IF THE
5 MANUFACTURER HAD NO WAY TO KNOW AND IF THE
6 PRODUCT -- I STILL THINK THAT IF YOU CREATE A
7 FRAUDULENT CONCEALMENT EXCEPTION TO DAUGHERTY, AS A
8 PLEADING MATTER YOU SORT OF READ OUT OF THE LAW.

9 THE COURT: AS LONG AS YOU'RE UP LET ME
10 ASK YOU ABOUT THE NOTICE ISSUE BECAUSE THAT'S THE
11 ARGUMENT THAT THE PLAINTIFFS ARE MAKING THAT I
12 THINK I'M GOING TO NEED TO TALK TO THEM ABOUT.

13 THEY ARE SAYING BECAUSE OF THE WAY THAT
14 THE POWERBOOKS WERE PACKAGED THE BUYERS COULD NOT
15 HAVE HAD PRE PURCHASE NOTICE THAT THERE WAS A
16 LIMITED WARRANTY.

17 MS. PREVOLOS: ALL RIGHT. LET ME GO
18 AHEAD AND RESPOND TO THAT BECAUSE THERE ARE
19 NUMEROUS RESPONSES.

20 THE FIRST RESPONSE IS THE FACT THAT THE
21 WARRANTY IS IN THE PACKAGING TO MAKE SURE THAT
22 EVERYONE HAS IT ISN'T EVIDENCE THAT IT'S NOT
23 AVAILABLE PRESALE AT ALL, AND THE PLAINTIFFS DON'T
24 REALLY PLEAD THAT.

25 I MEAN IT'S -- THAT IS YOUR GENERALIZED,

1 DOESN'T COMPLY WITH ANY KIND OF PLEADING STANDARD
2 RULE 9 OR RULE 8, KIND OF ALLEGATION.

3 YOU KNOW, THEY DON'T DENY THAT THE
4 WARRANTY WAS AVAILABLE ON THE WEB AND THEY DON'T
5 DENY THAT IT WAS AVAILABLE IN THE STORES, BECAUSE
6 IT WAS.

7 I THINK AN ADDITIONAL POINT WORTH NOTING
8 IS YOUR HONOR'S DECISION IN THE TIETSWORTH CASE.
9 AND IN THAT CASE, I WANT TO EMPHASIZE HERE THAT THE
10 WARRANTY WAS AVAILABLE PRESALE, THAT'S PROBABLY
11 APPARENT FROM THE COMPLAINT IF YOU LOOK AT IT
12 CLOSELY.

13 BUT JUST ASSUME FOR A MINUTE THAT IT
14 WASN'T. THEN TIETSWORTH SAID WELL, ALL RIGHT,
15 MS. TIETSWORTH DIDN'T GET THE WARRANTY AT THE TIME
16 SHE PURCHASED HER WASHING MACHINE, BUT SHE GOT IT
17 WHEN SHE GOT HER WASHING MACHINE AND SHE COULD HAVE
18 RETURNED IT. AND THAT'S PRECISELY THE CASE HERE.

19 AND MOREOVER, I DO WANT TO DRAW ONE LINE
20 BECAUSE THE PLAINTIFFS ARE PRETTY CLEAR ABOUT
21 SAYING "INSIDE THE PACKAGING," BUT IT'S NOT INSIDE
22 THE PACKAGING ON THE COMPUTER.

23 SO WHAT THAT MEANS IS IF YOU OPEN A BOX,
24 AND I DON'T THINK THEY ARE GOING TO DISAGREE WITH
25 US, IF YOU OPEN A BOX AND THERE'S A COMPUTER IN

1 PLASTIC WRAP AND IT'S SEALED AND THE WARRANTY IS
2 OUTSIDE THAT. IF YOU DON'T OPEN THAT SEAL AND YOU
3 TAKE THE COMPUTER BACK THERE'S ABSOLUTELY NO
4 RESTOCKING FEE SO YOU CAN RETURN IT FREE OF CHARGE
5 IF YOU DON'T LIKE THE WARRANTY.

6 THE FINAL POINT I WOULD MAKE THOUGH IS
7 THIS IS NOT A CASE ABOUT THE CLASS OR ABOUT APPLE'S
8 GENERAL PRACTICES, BUT ABOUT THESE PLAINTIFFS. AND
9 THESE PLAINTIFFS HAVE NOW HAD THREE CHANCES TO
10 RESPOND TO APPLE'S ARGUMENT THAT YOU DIDN'T SEE IT
11 PRESALE, AND THEY HAVEN'T ALLEGED THAT THEY DIDN'T
12 SEE IT PRESALE.

13 THE COURT: THAT'S WHERE I'M STARTING
14 WITH PLAINTIFF'S COUNSEL IS THAT NONE OF THE NAMED
15 PLAINTIFFS CLAIM THAT THEY DIDN'T KNOW ABOUT IT.

16 MS. PREEVOLOS: RIGHT. AND THE
17 ADDITIONAL FACT HERE IS THAT THE NAMED PLAINTIFFS
18 TELL YOU THEY HAD EXTENDED WARRANTIES WHICH
19 TYPICALLY ARE BOUGHT AT THE TIME OF SALE. IF YOU
20 DON'T KNOW YOUR WARRANTY IS LIMITED, IT WOULD BE
21 FAIRLY ODD FOR YOU TO BUY AN EXTENDED WARRANTY. SO
22 I THINK AS TO SOME OF THESE PLAINTIFFS, THE
23 COMPLAINT MAKES CLEAR THEY HAD A PRESALE NOTICE.

24 THE COURT: THANK YOU, COUNSEL.

25 LET ME GET PLAINTIFF'S RESPONSE, IF I

1 MIGHT.

2 MR. BERG: YES, YOUR HONOR. MICHAEL BERG
3 FOR THE PLAINTIFFS.

4 INITIALLY, I JUST THINK IT WOULD BE
5 HELPFUL TO STEP BACK AND APPRECIATE JUST HOW
6 RADICAL APPLE'S VIEW IS HERE. THEY WOULD SAY THAT
7 BECAUSE THEY'VE GOT AN EXPRESS WARRANTY THAT'S
8 LIMITED TO ONE YEAR, THAT THE POLICIES OF THE STATE
9 OF CALIFORNIA IN ADOPTING A STATUTE THAT PROVIDES
10 FOR AN IMPLIED WARRANTY OF MERCHANTABILITY IS
11 COTERMINOUS WITH THAT ONE YEAR LIMITED EVEN IN
12 CIRCUMSTANCES WHERE, AS OTHER CASES HAVE NOTED,
13 EVEN IN CIRCUMSTANCES WHERE APPLE IS ALLEGED TO
14 HAVE KNOWN OF THE DEFECT WHERE THE DEFECT IS A
15 LATENT DEFECT IN THE PRODUCT AT THE TIME OF SALE
16 AND IS SUBSTANTIALLY CERTAIN TO MANIFEST ITSELF AND
17 CAUSE A DETERIORATION OR INABILITY TO USE THE
18 PRODUCT DURING ITS EXPECTED --

19 THE COURT: WELL, I'M NOT SURE. IT MAY
20 BE APPLE'S VIEW FOR PURPOSES OF LITIGATION. I
21 THINK THE COURT HAS MADE CLEAR IN ALL OF ITS
22 RULINGS IN THIS CASE THAT THAT'S NOT THE COURT'S
23 VIEW.

24 I THINK WHAT THE COURT HAS BEEN AFTER IS
25 THE KIND OF PARTICULARITY THAT WOULD SUPPORT THE

1 PREDICATE OF YOUR SENTENCE.

2 IN OTHER WORDS, IT'S -- SURE, I MEAN THE
3 WHOLE BASIS OF THIS CASE IS YOU HAVE FAILURES THAT
4 OCCUR OUTSIDE THE WARRANTY PERIOD. BUT THEN IT
5 CAN'T BE THAT IF SOMETHING FAILS BEYOND THE EXPRESS
6 WARRANTY PERIOD THAT IT'S AUTOMATICALLY THE FAULT
7 OF THE MANUFACTURER.

8 SO THERE HAS TO BE SOME SHOWING OF FRAUD
9 OR FRAUDULENT CONCEALMENT OR FRAUDULENTLY CONCEALED
10 THE KNOWN DEFECT. THAT'S WHAT I HAVE BEEN
11 GRAPPLING WITH NOT ONLY IN THIS CASE BUT IN A
12 NUMBER OF OTHERS.

13 WHAT IS THE BURDEN THAT CALIFORNIA LAW
14 DOES PLAY ON THE MANUFACTURER, AND THEN WHAT'S THE
15 PLEADING BURDEN ON THE PLAINTIFF TO GET YOU PAST
16 THE 12(B)(6) MOTION? SO THAT'S WHERE WE ARE.

17 MR. BERG: LET ME ADDRESS THAT THEN,
18 YOUR HONOR.

19 THE SECOND AMENDED COMPLAINT ALLEGES THAT
20 APPLE WAS AWARE OF THE DEFECT AS EARLY AS 2004.
21 THAT APPLE REPRESENTED TO THE CONSUMER THAT THEY
22 COULD ADD MORE MEMORY AFTER PURCHASE TO GET UP TO
23 TWO GIGABYTES OF RAM. SO APPLE OBVIOUSLY
24 UNDERSTOOD THAT CONSUMERS WOULD BE ADDING MEMORY
25 LATER USING THE MEMORY SLOT.

1 I UNDERSTAND THE ARGUMENT FROM APPLE THAT
2 ESSENTIALLY DENIGRATES THE COMPLAINTS OF PEOPLE WHO
3 USE THE INTERNET, YOU KNOW, BECAUSE IT IS ENTIRELY
4 TRUE THAT EVERY SO OFTEN, MAYBE EVERY DAY, PEOPLE
5 CAN SAY THINGS ON THE INTERNET THAT AREN'T TRUE.

6 ON THE OTHER HAND, WHEN WE HAVE SPECIFIC
7 ALLEGATIONS THAT HUNDREDS, THOUSANDS OF CONSUMERS
8 WERE SAYING THINGS ON THE INTERNET THAT WERE TRUE,
9 THAT WERE RESPONSIVE TO THE PROBLEMS THEY WERE
10 EXPERIENCING WITH THEIR G4'S.

11 WE FURTHER ALLEGE IN THE SECOND AMENDED
12 COMPLAINT THAT APPLE TALKS ABOUT FRAUDULENT
13 CONCEALMENT, APPLE REMOVED A THREAD OF 350 E-MAILS
14 OR MORE DISCUSSING THIS PRECISE ISSUE.

15 NOW, YOU KNOW, APART FROM CONCEALMENT,
16 IT'S CLEARLY EVIDENCE OF KNOWLEDGE ON THE PART OF
17 APPLE THAT CONSUMERS WERE EXPERIENCING THESE
18 PROBLEMS. TO DATE THERE IS A PETITION AND IT'S
19 ALLEGED, IN I BELIEVE PARAGRAPH 33, THAT THERE'S A
20 PETITION OF 5,000 CONSUMERS COMPLAINING ABOUT THIS
21 VERY ISSUE.

22 AT THE SAME TIME WE ALLEGE THAT APPLE,
23 BEING AWARE OF THE DIFFICULTIES AND THE INHERENT
24 DEFECT IN THE MEMORY SLOT, DECIDED TO ABANDON THIS
25 PRODUCT ENTIRELY AND TEAM WITH INTEL TO DEVELOP THE

1 MACBOOK PRO AND TO REPLACE THE POWERBOOK AND IN THE
2 MEANTIME NOT TO REPAIR THE DEFECTIVE POWERBOOKS.

3 SO BEYOND THAT, YOUR HONOR, I'M NOT SURE
4 WHAT BURDEN YOU COULD PLACE ON --

5 THE COURT: LET ME SEE IF I CAN
6 ARTICULATE IT, COUNSEL.

7 THE KNOWLEDGE OF COMPLAINTS ISN'T ENOUGH
8 BECAUSE ANYBODY CAN MAKE A COMPLAINT. YOU HAVE TO
9 HAVE A MENS REA WHERE YOU BELIEVE OR SHOULD -- YOU
10 KNOW OR SHOULD KNOW THAT THE COMPLAINTS HAVE MERIT
11 AND YOU ARE CONCEALING OR FAILING TO DISCLOSE OR
12 MAKING MISREPRESENTATIONS ABOUT THE TRUTH.

13 I MEAN, OTHERWISE IT'S AN IMPOSSIBLE
14 STANDARD. OTHERWISE, HOW MANY COMPLAINTS AND HOW
15 BIG A PETITION AND SO FORTH.

16 SO THERE HAS TO BE SOMETHING MORE THAN
17 THE COMPLAINTS, THERE HAS TO BE A SCIENTER AND
18 THAT'S THIS WHOLE AREA OF FRAUD. THERE HAS TO BE
19 SCIENTER THAT THE COMPLAINTS -- THERE'S TRUTH TO
20 THE COMPLAINTS.

21 THERE IS AN ACTUAL PROBLEM, IN THIS CASE
22 THE MEMORY CARD, AND THAT THEY KNOW THAT AND THEN
23 THEY DON'T TELL CONSUMERS THAT. AND I KNOW THAT'S
24 WHAT YOU ARE TRYING TO ALLEGE, THE QUESTION IS
25 WHETHER YOU'VE ALLEGED THAT WITH ENOUGH

1 PARTICULARITY.

2 IN OTHER WORDS, APPLE'S SCIENTER AND
3 THEIR KNOWLEDGE IS NOT ONLY ESTABLISHED BY THE FACT
4 THAT THERE WERE A LOT OF COMPLAINTS, BUT THEY KNEW
5 THAT THOSE COMPLAINTS HAD MERIT, THOSE COMPLAINTS
6 WERE TRUE, THAT THERE WAS A DEFECT IN THE PART.
7 THAT'S THE KIND OF PARTICULARITY I HAVE BEEN HOPING
8 TO GET.

9 AND OF COURSE WE'RE AT THE PLEADING STAGE
10 AND YOU DON'T HAVE TO PROVE IT, BUT YOU HAVE TO SAY
11 WELL, SO-AND-SO AT APPLE OR THE MANUFACTURING
12 PEOPLE AT APPLE KNEW THAT THE PRODUCT WAS DEFECTIVE
13 AND THAT'S WHY THEY DECIDED TO GET RID OF IT OR
14 WHAT HAVE YOU.

15 AND I KNOW YOU'VE TRIED TO DO THAT, THE
16 QUESTION IS WHETHER YOU'VE DONE THAT WITH ENOUGH
17 PARTICULARITY THAT MEET THE REQUIREMENTS OF 9(B).
18 AND THE FACT THAT THERE ARE COMPLAINTS, I DON'T
19 THINK -- THAT DOESN'T GET YOU THERE. I THINK YOU
20 HAVE TO SHOW THAT THERE'S ACTION OR INACTION ON THE
21 PART OF APPLE THAT IS HAS THE REQUISITE MENS REA;
22 THAT'S WHERE I'M STRUGGLING AT THE MOMENT.

23 MR. MCNAMARA: THIS IS DOUG MCNAMARA ON
24 BEHALF OF WAGNER.

25 PLAINTIFFS JUST -- WE HAVEN'T JUST

1 ALLEGED COMPLAINTS PER SE. SPECIFICALLY, THE
2 NOVEMBER 2004 COMPLAINT THAT MR. BERG ALLEGED IN
3 PARAGRAPH 31 THE SECOND AMENDED COMPLAINT, WE CARRY
4 A CONVERSATION BETWEEN A CUSTOMER AND HIS
5 EXPERIENCE WITH APPLE WHERE HE WAS TOLD QUOTE,
6 "ONLY THE 15-INCH POWERBOOKS HAD THE PROBLEM." IT
7 WAS MORE THAN JUST, HEY, I'M HAVING A PROBLEM WITH
8 THIS AND LETTING APPLE KNOW. THERE WAS A GIVE AND
9 TAKE, THERE WAS A RESPONSE, AND HE WAS TOLD BY
10 APPLE THAT DON'T WORRY, IT'S JUST THE 15-INCH, NOT
11 THE 17-INCH.

12 AMONG THESE COMPLAINTS WE CITED THERE IS
13 DISCUSSION BETWEEN WHAT APPLE HAD TOLD THE
14 CUSTOMERS AND WHAT CUSTOMERS HEARD BACK. THERE WAS
15 DISCUSSION ABOUT CUSTOMERS TAKING THEIR MACHINES TO
16 APPLE HAVING IT "REPAIRED" AND HAVING THE PROBLEM
17 REPEAT.

18 APPLE'S COUNSEL ALLUDED TO THIS WASN'T
19 JUST A COMPLAINT, THERE IS A PROBLEM, THERE IS A
20 DEFECT. APPLE ADDRESSED IT BUT THEY ADDRESSED IT
21 ON A VERY NARROW NUMBER OF MACHINES BUILT OVER A
22 FOUR-MONTH PERIOD. AND THEY DIDN'T ADDRESS IT
23 UNTIL AFTER THE CLASS REPRESENTATIVES BOUGHT THEIR
24 MACHINE, AND THEY WERE NOT ELIGIBLE FOR THIS VERY
25 NARROW WARRANTY EXTENSION PROGRAM.

1 SO APPLE ADDRESSED THE DEFECT BUT NOT FAR
2 ENOUGH. NOT ENOUGH TO REACH THE NUMEROUS PEOPLE
3 AMONG THIS CLASS.

4 SO THIS ISN'T CUSTOMERS CRYING WOLF ON
5 THE INTERNET OR DISPLEASED WITH THE PRODUCT, THIS
6 IS A VERY SPECIFIC DEFECT WHICH HAS CAUSED PEOPLE A
7 LOT OF MONEY AND THEY HAVE GONE AND GOTTEN
8 REPAIRED, SOMETIMES MULTIPLE TIMES, AND APPLE'S
9 RESPONSE WAS INADEQUATE.

10 SO I BELIEVE WE HAVE MET THE CONCERNS
11 YOUR HONOR HAS RAISED IN TERMS OF MENS REA.

12 MR. BERG: AS A MATTER OF FACT, BRIEFLY
13 TO FOLLOW UP ON MR. MCNAMARA'S COMMENT.

14 AND I AGREE COMPLETELY, THIS IS NOT A
15 CASE OF PEOPLE GRIPING ON THE INTERNET ABOUT A
16 LOUSY COMPUTER. THESE ARE FACTUALLY ACCURATE
17 STATEMENTS ABOUT A DEFECT IN THE MEMORY SLOT.

18 IN ADDITION, I THINK IT'S IMPORTANT TO
19 TAKE A STEP BACK, AND MAYBE THIS IS WHAT YOUR HONOR
20 IS IN PART ASKING US TO DO, IS TO LOOK AT
21 SUBSTANTIVE REQUIREMENTS OF THE CAUSE OF ACTION AND
22 TO ALSO LOOK AT THE PLEADING STANDARD.

23 NOW WITH RESPECT TO THE PLEADING
24 STANDARD, IF I HEARD THE COURT RIGHT, WE ARE BEING
25 ASKED TO PROVIDE PARTICULARITY WITH RESPECT TO THE

1 MENS REA THAT APPLE WAS LABORING UNDER WHEN IT
2 FAILS TO DISCLOSE THE DEFECT.

3 THE COURT: I THINK YOU HAVE TO.

4 MR. BERG: YOUR HONOR, WITH ALL DUE
5 RESPECT, MY READING OF RULE 9(B) IS MALICE INTENDS
6 KNOWLEDGE AND OTHER CONDITIONS OF A PERSON'S MIND
7 MAY BE ALLEGED.

8 THE COURT: I'M NOT -- WITH ALL DUE
9 RESPECT, I'M NOT TALKING ABOUT IT IN THAT SENSE.
10 RULE 9(B) DOES NOT REQUIRE YOU TO PLEAD EVERYTHING
11 WITH EXQUISITE PARTICULARITY BUT IT DOES REQUIRE
12 YOU, IN A CASE WHERE YOU ARE PLEADING FRAUD OR
13 SOMETHING THAT SOUNDS IN FRAUD, YOU HAVE TO PROVIDE
14 MORE DETAIL THAN IN A SITUATION WHERE YOU ARE NOT.

15 AND ALL I'M SAYING IS THIS CLAIM ONLY
16 WORKS, YOU ONLY GET AROUND THE -- IN MY OPINION,
17 YOU ONLY GET AROUND THE EXPRESS WARRANTY IF YOU
18 SHOW THAT THERE WAS A DUTY TO DISCLOSE SOMETHING
19 THAT WASN'T DISCLOSED OR THERE WAS A
20 MISREPRESENTATION, SO IT SOUNDS IN FRAUD.

21 AND THAT'S TRUE FOR THE IMPLIED WARRANTY
22 CLAIM TO SURVIVE IN THE FACE OF THE EXPRESS
23 WARRANTY, AND IT'S TRUE OF THE UCL CLAIM. THAT'S
24 MY LEGAL OPINION. AND THAT'S NOT NEW, THAT WAS IN
25 THE PREVIOUS ORDER.

1 SO I THINK THE POINT IS YOU NEED RULE 9
2 PARTICULARITY. YOU DON'T NEED TO SHOW THAT
3 MR. JOBS WOKE UP ONE MORNING AND SAID, LET'S GET
4 THOSE CONSUMERS AND PUT A BAD MEMORY SLOT ON THE
5 MARKET. I MEAN, THAT'S NOT WHAT I'M SAYING.

6 BUT WHAT I AM SAYING IS YOU HAVE TO HAVE
7 SOME EVIDENCE THAT APPLE KNEW THAT IT HAD A BAD
8 PRODUCT NOT JUST BECAUSE PEOPLE WERE COMPLAINING
9 ABOUT IT BUT THAT SOMEONE THERE KNEW, HEY, THESE
10 COMPLAINTS ARE TRUE, WE'VE GOT A PROBLEM, AND THEY
11 DIDN'T DO ANYTHING ABOUT IT OR THEIR RESPONSE WAS
12 COMMERCIALY UNREASONABLE OR SOMETHING SPECIFIC
13 LIKE THAT.

14 AND I THINK THAT'S THE KIND OF
15 SPECIFICITY I'M LOOKING FOR. SO HOPEFULLY THAT
16 RESPONDS TO YOUR PROBLEM -- OR TO YOUR QUESTION,
17 RATHER, EXCUSE ME.

18 MR. BERG: OF COURSE, YOUR HONOR.

19 I APPRECIATE IT. BUT WE BELIEVE THAT THE
20 ALLEGATIONS OF THE COMPLAINT PROVIDE EVERYTHING
21 THAT CAN BE REASONABLY EXPECTED OF A PLAINTIFF TO
22 ALLEGE KNOWLEDGE OF A SPECIFIC DEFECT AND APPLE'S
23 ACKNOWLEDGEMENT OF THE DEFECT AND ITS CONTINUING TO
24 MARKET THE PRODUCT.

25 THE COURT: OKAY. COULD YOU ADDRESS THE

1 NOTICE ISSUE THAT WAS RAISED IN THE MOTION?

2 MR. BERG: YES, YOUR HONOR.

3 THE -- UNDER SECTION 2316 OF THE CALIFORNIA
4 COMMERCIAL CODE, A WRITTEN DISCLAIMER OF WARRANTY,
5 INCLUDING ONE THAT'S LIMITED DURATION, MUST BE
6 CONSPICUOUS.

7 OUR COMPLAINT ALLEGES THAT APPLE'S
8 REPORTED DISCLAIMER WAS PROVIDED IN THE PACKAGING,
9 WAS NOT PROVIDED AND IS NOT GENERALLY PROVIDED TO
10 CONSUMERS UNTIL AFTER THEY PURCHASE AND PAY FOR
11 THEIR POWERBOOKS AND BRING THEM HOME. THAT'S
12 SIMPLY NOT A CONSPICUOUS DISCLOSURE.

13 WE ALSO WOULD SUBMIT THAT THE ARGUMENT OF
14 APPLE JUST FAILS TO DEAL WITH WHAT, HOW CONSUMERS
15 ACTUALLY BEHAVE IN THE REAL WORLD. YOU KNOW, IT
16 IS -- WE ARE ALLEGING A PATTERN AND PRACTICE
17 WHEREBY THE WARRANTY IS NOT MADE AVAILABLE TO THE
18 CONSUMER. IT IS PUT IN THE PACKAGING AND THEY
19 GET -- THEY ARE ABLE TO SEE IT WHEN THEY GET THEIR
20 COMPUTER HOME AND READ IT.

21 IT IS UNREALISTIC TO THINK THAT CONSUMERS
22 ARE REQUIRED ON THE PAIN OF LOSING THEIR LEGAL
23 RIGHTS TO BRING A WARRANTY CLAIM UNDER THE
24 STATUTORILY INACTIVE IMPLIED WARRANTY OF
25 MERCHANTABILITY IF THEY FAIL TO RESEARCH THE TERMS

1 OF --

2 THE COURT: ALL RIGHT. SO WHAT IS -- I
3 HAVE TWO --

4 MR. BERG: -- ONLINE, OR IF THEY DON'T
5 RETURN IT.

6 THE COURT: RIGHT. I UNDERSTAND WHAT YOU
7 ARE SAYING. BUT WHAT IS -- WHAT SHOULD A
8 MANUFACTURER DO IF IT WISHES ITS EXTENDED
9 WARRANTY -- EXCUSE ME, ITS EXPRESS WARRANTY TO BE
10 THE ONLY WARRANTY?

11 WHAT DOES IT HAVE TO DO THEN? DOES IT
12 HAVE TO SAY, BEFORE YOU BUY THIS COMPUTER LET ME
13 TELL YOU THERE'S ONLY A ONE-YEAR LIMITED EXPRESS
14 WARRANTY AND THAT'S IT.

15 THEY HAVE TO TELL YOU THAT BEFORE YOU BUY
16 AND THEY HAVE TO HAVE A PATTERN AND PRACTICE IN
17 PLACE BEFORE DOING THAT, CORRECT?

18 MR. BERG: THEY HAVE TO MAKE YOU AWARE OF
19 IT BEFORE YOU BUY AND THERE ARE -- I CAN'T SAY THE
20 MANY DIFFERENT WAYS THAT THEY CAN DO THAT, BUT THEY
21 COULD PUT THE WARRANTY ON THE OUTSIDE OF THE BOX.
22 THE SALESMAN COULD HAND YOU A STATEMENT WITH A
23 DESCRIPTION OF THE PRODUCT AND THE WARRANTY TERMS.

24 YOU KNOW, THERE'S ANY NUMBER OF WAYS THEY
25 CAN DO IT BUT, YOU KNOW, IN THIS INSTANCE AND IN

1 THE ALLEGATION OF OUR COMPLAINT IS THAT APPLE DOES
2 NOT DO ANYTHING LIKE THAT. THEY EFFECTIVELY
3 INSTILL THE TERM BY PLACING IT INSIDE THE PACKAGING
4 AND LETTING YOU READ IT WHEN YOU GET HOME

5 THE COURT: DON'T THEY ALSO -- JUST TWO
6 FOLLOWUPS ON THAT. SOME OF THE NAMED PLAINTIFFS
7 BOUGHT EXTENDED WARRANTIES, CORRECT? APPLE CARE OR
8 WHATEVER THE EXTENDED WARRANTY IS CALLED.

9 MR. BERG: RIGHT, YOUR HONOR.

10 THE COURT: ALL RIGHT. SO IN ORDER TO
11 BUY THE EXTENDED WARRANTY, PRESUMABLY THEY KNEW
12 THERE WAS A LIMITED EXPRESS WARRANTY?

13 MR. BERG: PRESUMABLY THOSE INDIVIDUALS
14 MAY HAVE KNOWN THAT BUT WHAT THEY DID NOT KNOW
15 ABOUT -- THE CONCEALMENT HERE ISN'T THE TERM OF THE
16 WARRANTY IT'S THE LATENT DEFECT IN THE PRODUCT.

17 THEY MAY HAVE BOUGHT THAT EXTENDED
18 WARRANTY FOR ANY NUMBER OF REASONS, YOU KNOW, MAYBE
19 THEY LIKE THAT --

20 THE COURT: THIS LEADS TO A DIFFERENT
21 QUESTION NOW.

22 WHAT YOU ARE SAYING IS EVEN IF THEY KNEW,
23 BECAUSE ONE OF THE ARGUMENTS APPLE MAKES IS THAT
24 YOUR CLIENTS DO NOT ALLEGE AFFIRMATIVELY THAT THEY
25 DIDN'T KNOW THAT THERE WAS A LIMITED WARRANTY.

1 SO YOU ARE SAYING IT DOESN'T MATTER THAT
2 IF THEY BUY A LIMITED EXPRESS WARRANTY AND AT THE
3 TIME IF THEY DO THAT APPLE KNOWS THAT THERE'S A
4 DEFECT AND THEY DON'T TELL PEOPLE, SO IT'S ALMOST
5 CIRCULAR. IT GOES BACK TO THE ISSUE OF WHETHER
6 YOU'VE ADEQUATELY ALLEGED CONCEALMENT. BECAUSE YOU
7 ARE SAYING IT DOESN'T MATTER.

8 EVEN IF THEY KNEW THAT THERE WAS A
9 WARRANTY, THIS ISSUE OF WHETHER THE WARRANTY IS IN
10 THE BOX OR WHETHER IT'S ON A BIG SIGN IN THE APPLE
11 STORE IS, IN A WAY, KIND OF A RED HERRING BECAUSE
12 THE ULTIMATE QUESTION IS EVEN IF THEY KNEW, WAS THE
13 DEFECT CONCEALED, RIGHT?

14 MR. BERG: I THINK THAT IS THE ULTIMATE
15 QUESTION.

16 I THINK ONE WAY -- I HOPE THIS IS
17 HELPFUL -- ONE WAY TO PUT THIS IN PERSPECTIVE MAY
18 BE TO SAY THAT WE'RE TALKING ABOUT OBVIOUSLY THE
19 EXPRESS WARRANTY, THE PROMISE OF THE MANUFACTURER,
20 THAT RUNS ON A PARALLEL TRACK WITH THE IMPLIED
21 WARRANTY ADOPTED BY THE LEGISLATURE.

22 NOW, WE DON'T DENY THAT A MANUFACTURER,
23 UPON PROPER NOTICE TO THE CONSUMER, CAN LIMIT THE
24 TERM OF THE IMPLIED WARRANTY TO THE TERM OF THE
25 EXPRESS WARRANTY. WHAT WE SAY IS THAT THERE'S A

1 NARROW EXCEPTION TO THAT, THERE MAY BE MORE THAN
2 ONE, BUT THE RELEVANT PART IS THERE'S AN EXCEPTION
3 FOR A LATENT DEFECT KNOWN TO THE MANUFACTURER AND
4 SUBSTANTIALLY CERTAIN TO CAUSE DIFFICULTIES AND
5 IMPAIR THE USE OF THE PRODUCT; AND OBVIOUSLY IT HAS
6 TO BE MATERIAL, AND THIS IS, WITHIN ITS EXPECTED
7 USEFUL LIFE.

8 SO WE DON'T -- WE THINK THAT EXCEPTION
9 APPLIES HERE AS A MATTER OF PUBLIC POLICY.

10 THE COURT: OKAY. SO IT REALLY GOES BACK
11 TO THE QUESTION OF WHETHER THAT'S WHAT APPLE DID
12 AND WHETHER YOU'VE ALLEGED THAT ADEQUATELY.

13 MR. BERG: I AGREE, YOUR HONOR.

14 THE COURT: THANK YOU, COUNSEL.

15 BRIEF REPLY FOR APPLE AND THEN I WILL
16 WRAP IT UP.

17 MS. PREVOLOS: IT'S ALMOST HARD TO KNOW
18 WHERE TO START, PARTICULARLY GIVEN THE CHALLENGE TO
19 BE BRIEF.

20 BUT I THINK I WANT TO START WITH THE
21 IMPLIED WARRANTY ISSUE AND THE NOTICE ISSUE AND PUT
22 IT TO BED BECAUSE I THINK WHAT YOUR HONOR HAS HEARD
23 HERE IS THAT PLAINTIFFS DON'T REALLY CONTEND THAT
24 APPLE DIDN'T DISCLOSE THE WARRANTY PRESALE, AT
25 LEAST NOT TO THEM. AND PLAINTIFFS DON'T REALLY

1 CONTEND THAT THEY COULDN'T HAVE RETURNED THE
2 COMPUTERS, THEY DON'T EVEN ADDRESS THAT ARGUMENT.

3 PLAINTIFFS REALLY ARE JUST BACK TO WHAT
4 YOUR HONOR HAS DESCRIBED AS COMMON LAW FRAUD.
5 BECAUSE, I MEAN MAGNUSON -- THE PLAINTIFFS ARE
6 SEEKING TO IMPOSE A WARRANTY STANDARD BEYOND
7 MAGNUSON-MOSS IN TERMS OF DISCLOSURE, BEYOND
8 SONG-BEVERLY AND BEYOND THE CASE LAW.

9 THE COURT: THEY ARE THROWING A LOT OF,
10 TO USE A VERY POOR METAPHOR, THEY ARE THROWING A
11 LOT OF CAKE AT THE WALL. BUT I THINK WHAT THEY'RE
12 HOPING WILL STICK IS THE IDEA THAT IT'S SIMPLY NOT
13 CONSCIONABLE FOR A MANUFACTURER TO KNOW THAT ITS
14 PRODUCT IS DEFECTIVE, THAT IT'S GOING TO FAIL
15 SOMETIME OUTSIDE THE WARRANTY PERIOD AND THEN TRY
16 TO LIMIT ITS DUTIES UNDER MAGNUSON-MOSS, THE
17 IMPLIED WARRANTY OF MERCHANTABILITY.

18 SO I THINK THAT'S CONTRARY TO THE
19 CALIFORNIA PUBLIC POLICY, AND FEDERAL POLICY IS
20 EXPRESSED IN MAGNUSON-MOSS.

21 IT'S ALMOST LIKE A COMMON SENSE SHADY
22 DEALING KIND OF ARGUMENT. AND SO THEN THE FOCUS
23 IS, WELL, HAVE THEY ALLEGED THAT WITH ENOUGH
24 PARTICULARITY TO SATISFY RULE 9? I THINK THAT'S
25 WHAT THIS COMES DOWN TO AT THIS POINT.

1 MS. PREVOLOS: I THINK YOU NEED TO BE
2 CAREFUL, THOUGH. I THINK COMMON LAW FRAUD, WHICH
3 IS WHAT YOUR HONOR SAID THIS COMES DOWN TO, IS A
4 DIFFERENT ARGUMENT THAN BREACH OF IMPLIED WARRANTY
5 AND I THINK IT'S A MISTAKE TO CONFLATE THE TWO.

6 THE COURT: RIGHT. BUT I'M NOT
7 CONFLATING THEM. I'M SAYING THE WAY YOU GET AROUND
8 THE LIMITATIONS IN DAUGHERTY AND THE LIMITATIONS IN
9 CALIFORNIA LAW WHERE YOU HAVE AN EXPRESS WARRANTY
10 THAT LIMITS ANY IMPLIED WARRANTIES, YOU SHOW THAT
11 IT WOULD BE UNCONSCIONABLE TO DO THAT. AND
12 UNCONSCIONABILITY ISN'T THE SAME THING AS FRAUD,
13 BUT THE FACTS THAT ARE BEING RELIED UPON HERE ARE
14 VERY SIMILAR.

15 MS. PREVOLOS: BUT THOSE FACTS DO NOT,
16 IN THE COMPLAINT OR IN PLAINTIFF'S OPPOSITION OR
17 ANYWHERE ELSE, THEY'RE NOT DIRECTED TO THE WARRANTY
18 ARGUMENT, THEY'RE DIRECTED TO A DIFFERENT ARGUMENT.

19 THEY ARE DIRECTED TO -- AND YOUR HONOR, I
20 THINK WE NEED TO BE A LITTLE CAREFUL HERE BECAUSE I
21 THINK LEGAL THEORIES DO MATTER. AND I THINK THE
22 PLAINTIFFS DID NOT ALLEGE THAT APPLE'S ALLEGED
23 KNOWLEDGE AND CONCEALMENT GETS THEM AROUND THE
24 WARRANTY, RIGHT? THAT'S NOT SOMETHING THEY ARGUED.
25 IT'S NOT IN THE PLEADINGS, THEY DON'T ALLEGE IT

1 IT'S NOT IN THEIR PAPERS.

2 THE COURT: THEY'RE ARGUING NOTICE AND
3 CONTRACT OF ADHESION AND THINGS LIKE THAT.

4 MS. PREVOLOS: RIGHT. AND I DON'T THINK
5 THOSE ARGUMENTS HOLD UP. I THINK YOUR HONOR
6 REJECTED THOSE ARGUMENTS ON THE FIRST GO AROUND
7 HERE AND THE PLAINTIFFS BASICALLY TOLD YOU THEY
8 HAVE NOTHING TO ADD TO THOSE ARGUMENTS.

9 AND THEY DON'T DENY AND THEY CAN'T DENY
10 THAT THE PLAINTIFFS WERE AWARE OF THE WARRANTIES
11 PRESALE.

12 IN TERMS OF PROMINENCE OF THE DISCLOSURE,
13 I THINK THAT MAY HAVE GONE AWAY. BUT I JUST WANT
14 TO BE CLEAR, A, THAT'S NOT A REQUIREMENT OF
15 MAGNUSON-MOSS, IT JUST HAS TO BE AVAILABLE.

16 IF YOU LOOK AT THE WARRANTY, NOBODY IS
17 ARGUING THAT THE LIMITATION IS HIDDEN. IT'S IN
18 BOLD TYPE THAT COMPLIES WITH THE FEDERAL TRADE
19 COMMISSION AND REGS, AND THAT'S JUST CLEAR.

20 SO I JUST WANT TO MAKE SURE THAT I DON'T
21 THINK IT'S A SLIPPERY SLOPE AND I DON'T THINK IT'S
22 CIRCULAR. I THINK YOUR HONOR HAS TO RULE ON
23 UNCONSCIONABILITY ARGUMENTS AS THEY'VE BEEN
24 DEVELOPED IN THE COURTS AS TO IMPLIED AND EXPRESS
25 WARRANTIES, AND I DON'T THINK THOSE ARE CHALLENGED

1 EFFECTIVELY.

2 THE COURT: SO REALLY WHAT YOU ARE SAYING
3 IS WHAT'S LEFT, AND THIS IS WHAT ENDED UP HAPPENING
4 IN TIETSWORTH WHICH YOU ALLUDED TO IS A FRAUDULENT
5 CONCEALMENT CASE.

6 MS. PREVOLOS: WELL, I THINK WHAT'S
7 LEFT, AS YOUR HONOR SAID, IS COMMON LAW FRAUD.
8 BECAUSE I DON'T THINK THEY'VE ALLEGED THE WHO,
9 WHAT, WHEN, SUFFICIENT FOR THE STANDARDS YOUR HONOR
10 SET OUT IN HOVSEPIAN OR, YOU KNOW JUDGE PATEL SET
11 OUT OR JUDGE WARE SET OUT OR WHOMEVER.

12 I DON'T MEAN TO PICK ON YOUR HONOR, BUT I
13 THINK THE 9(B) STANDARDS AS TO THE UCL AND THE CLRA
14 ARE CLEAR UNDER 9(B). YOUR HONOR FOUND THEY
15 WEREN'T MET IN HOVSEPIAN. THERE'S ABSOLUTELY
16 NOTHING ALLEGED HERE THAT'S NOT ALLEGED THERE, UP
17 TO AND INCLUDING THIS SUPPOSED STATEMENT IN 2004
18 THAT ONLY THE 15-INCH COMPUTERS WERE AFFECTED.

19 THERE ARE A FEW PROBLEMS WITH THAT
20 ALLEGATION. THE PLAINTIFFS HAVE 15-INCH COMPUTERS
21 AND APPLE DID DO A RECALL AS TO THE COMPUTERS IT
22 FELT WERE AFFECTED. SO I THINK SAYING THAT IS A
23 DENIAL IS A REAL STRETCH.

24 BUT I WANT TO COME BACK TO ONE POINT IS
25 THE PLAINTIFFS HAVEN'T PLED COMMON LAW FRAUDULENT

1 CONCEALMENT. IT WAS PLED IN HOVSEPIAN BUT IT WAS
2 NOT PLED HERE.

3 AND SO AT VERY LEAST I THINK WE WOULD
4 NEED TO HAVE IT PLEAD.

5 THE COURT: WELL, THEY ARE PLEADING THE
6 FRAUD PRONG OF THE UCL.

7 MS. PREVOLOS: RIGHT.

8 BUT YOUR HONOR HELD IN HOVSEPIAN THAT
9 THEY DIDN'T PLEAD ENOUGH FOR THAT, THAT ONLY THEIR
10 COMMON LAW FRAUDULENT CONCEALMENT CLAIM SURVIVED.

11 AND I URGE THE COURT NOT TO CHANGE THE
12 LAW. WE HAVE ENOUGH PROBLEMS UNDER THE UCL.

13 THE COURT: CAFA IS GIVING US ALL A GREAT
14 EDUCATION ABOUT CALIFORNIA LAW.

15 MS. PREVOLOS: WHICH CHANGES EVERYTHING.
16 BECAUSE WHEN I WAS HERE LAST TIME, YOUR HONOR, I
17 THOUGHT WE HAD A BIG ISSUE ABOUT MEXIA AND NOW THE
18 COURTS OF APPEALS HAVE TAKEN A DIFFERENT VIEW
19 THERE.

20 THE LAST THING I DO WANT TO COME BACK TO
21 THOUGH BECAUSE I DON'T WANT TO CONCEDE THE COMMON
22 LAW FRAUDULENT CONCEALMENT ISSUE BECAUSE I DON'T
23 THINK THAT'S APPROPRIATE HERE, I WANT TO POINT TO A
24 FEW THINGS THAT ARE IMPORTANT.

25 THE COURT: OKAY. I NEED TO ASK YOU,

1 COUNSEL, BECAUSE THIS HAS BEEN HELPFUL.

2 MS. PREVOLOS: I UNDERSTAND. I'LL BE
3 QUICK.

4 THE COURT: THERE'S A REASON WHY THE TREX
5 CASE WAS THE LAST ON THE CALENDAR. I WANT TO GIVE
6 THEM ADEQUATE TIME.

7 MS. PREVOLOS: I UNDERSTAND.

8 BUT I THINK, YOUR HONOR, FRAUDULENT
9 CONCEALMENT REQUIRES A FEW THINGS. I THINK IT
10 REQUIRES THE ALLEGATIONS OF THE DUTY. AND
11 DAUGHERTY AND ITS PREDECESSORS SAY THAT DUTY DOES
12 NOT ARISE JUST BECAUSE A MANUFACTURER CONTINUES TO
13 SELL A PRODUCT IT KNOWS HAS A DEFECT AS LONG AS THE
14 PRODUCT PERFORMS WITHIN WARRANTY.

15 AND I DON'T THINK WE'VE HAD ALLEGATIONS
16 HERE ABOUT THE WHO, WHAT, WHEN OR WHERE OF
17 FRAUDULENT CONCEALMENT THAT WOULD CREATE AN
18 AFFIRMATIVE -- ACTIVE CONCEALMENT, IF YOU WILL. I
19 DON'T SEE THAT. IT'S NOT HERE. YOUR HONOR DIDN'T
20 FIND IT IN HOVSEPIAN. THERE'S NOTHING MORE HERE.

21 AND THE LAST THING I WANT TO SAY IS YOU
22 HAVE TO BE REALLY CAREFUL ABOUT THEIR ARGUMENT THAT
23 THERE ARE A LOT OF COMPLAINTS ABOUT ONE PRODUCT OR
24 ONE COMPONENT ISSUE ONLINE BECAUSE, YOU KNOW, IF
25 YOU SELL TWO MILLION PRODUCTS AND ONE PERCENT ARE

1 DEFECTIVE, THAT'S 20,000 COMPLAINTS. AND SO I JUST
2 THINK THAT IS TROUBLESOME.

3 THE COURT: OKAY. I GOT YOU.

4 MR. BERG: MAY I BRIEFLY --

5 THE COURT: THIS ORAL ARGUMENT IS GOING
6 TO END. BUT COUNSEL, YES, IF COUNSEL RAISED
7 SOMETHING NEW YOU MAY RESPOND TO IT.

8 MR. BERG: THANK YOU. ON THE COMMON LAW
9 FRAUD --

10 THE COURT: YES, SIR. GO AHEAD.

11 MR. BERG: WHICH IS THAT UNDER THE -- I'M
12 SURE YOUR HONOR IS WELL AWARE, BUT UNDER THE
13 CALIFORNIA LAW THE UCL REQUIRES ACTUALLY LESS OF A
14 SHOWING THAN COMMON LAW FRAUD.

15 SO YOU KNOW WE'VE GOT THIS UPSIDE DOWN
16 ARGUMENT THAT WE HAVE, YOU KNOW, SOME HEIGHTENED
17 BURDEN HERE TO SATISFY THE UCL.

18 THE COURT: YOUR HEIGHTENED BURDEN IS A
19 PLEADING BURDEN UNDER RULE 9 AS FAR AS I'M
20 CONCERNED, AND THAT'S IT.

21 MR. BERG: YES. WE ACCEPT THAT WITH
22 RESPECT TO THE FRAUDULENT PRONG, ALTHOUGH AS WE SAY
23 IN OUR BRIEF NOT THE UNFAIRNESS PRONG OF THE UCL.

24 BUT IT'S MY UNDERSTANDING, FOR EXAMPLE,
25 THAT WE NEED TO SHOW -- WE NEED TO ALLEGE AT THIS

1 STAGE THAT THE OMISSION OR NONDISCLOSURE OF THE
2 DEFECT WAS REASONABLY LIKELY TO DECEIVE CONSUMERS
3 AS OPPOSED TO PROVING THAT IN FACT EVERY CONSUMER
4 WAS DECEIVED AS A RESULT.

5 THE COURT: I THINK THAT'S PROBABLY
6 RIGHT, BUT I'M GOING TO -- I'LL PUT THAT IN MY
7 WRITTEN DECISION. BUT I THINK YOU'RE RIGHT ON THAT
8 POINT.

9 OKAY. I WILL GET THIS OUT AS SOON AS I
10 CAN. I KNOW WE'VE BEEN SLOGGING A LONG TIME WITH
11 THIS, BUT I THINK THIS ARGUMENT WAS HELPFUL AND I
12 THINK IT WILL HELP ME NARROW AT LEAST WHAT'S IN
13 DISPUTE.

14 MR. BERG: THANK YOU, YOUR HONOR.

15 (WHEREUPON, THE PROCEEDINGS IN THIS
16 MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185