

Exhibit “1”

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

4 GOMELSKY, ET AL) CV-08-4969-JF
5 VAIL,) CV-09-1649-JF
6 HUF,) CV-09-1-64-JF
 HOVSEPIAN,) CV-08-5788-JF
)
7 PLAINTIFF,) SAN JOSE, CALIFORNIA
)
8 VS.) AUGUST 14, 2009
)
9 APPLE, INC.,) PAGES 1-34
)
10 DEFENDANT.)

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

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

15
16 FOR THE PLAINTIFF: MEISELMAN DENLEA
 GOMELSKY, HUF BY: CHRISTINE FORD
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 WHITE PLAINS, NY 10605

18
19
20 FOR THE DEFENDANT: MORRISON & FOERSTER, LLP
 APPLE BY: PENELOPE PREOVOLOS
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22
23 (APPEARANCES CONTINUED ON THE NEXT PAGE)

24
25 OFFICIAL COURT REPORTER: SUMMER CLANTON, CSR, RPR
 CERTIFICATE NUMBER 13185

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VAIL BY: DOUGLAS MCNAMARA
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21 FOR THE PLAINTIFF: SEEGER WEISS, LLP
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24 FOR THE DEFENDANT: PAUL, HASTINGS LLP
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1 SAN JOSE, CALIFORNIA

AUGUST 14, 2009

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

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

5 THE COURT: THE LAST MATTER AT 9:00 IS
6 ACTUALLY FOUR RELATED CASES. THEY ALL INVOLVE
7 APPLE LAPTOPS AND DESKTOPS.

8 GOMELSKY, VAIL, HUF AND HOVSEPIAN VERSUS
9 APPLE.

10 THE COURT: WHENEVER YOU ARE READY.

11 MS. FORD: GOOD MORNING, YOUR HONOR. I'M
12 CHRISTINE FORD FROM MEISELMAN DENLEA. I REPRESENT
13 THE PLAINTIFFS IN THE GOMELSKY BERENBLAT MATTER AS
14 WELL AS THE PLAINTIFF IN THE HUF MATTER.

15 MR. LEON: GOOD MORNING, YOUR HONOR.
16 JEFF LEON. I REPRESENT THE PLAINTIFFS IN THE
17 HOVSEPIAN MATTER.

18 MR. SHUB: GOOD MORNING, YOUR HONOR.
19 JONATHAN SHUB, SEEGER WEISS, REPRESENTING
20 PLAINTIFFS IN THE HOVSEPIAN MATTER AS WELL.

21 MR. SEEGER: ANOTHER HOVSEPIAN,
22 YOUR HONOR. THIS IS KEN SEEGER FROM SEEGER SALVAS.

23 THE COURT: GOOD MORNING.

24 MR. MCNAMARA: GOOD MORNING, YOUR HONOR.
25 DOUG MCNAMARA, COHEN MILSTEIN, WASHINGTON, D.C.

1 REPRESENTING MS. VAIL IN THE VAIL CASE.

2 MR. MUNROE: GOOD MORNING.

3 GEOFFREY MUNROE FROM GIRARD GIBBS, ALSO
4 REPRESENTING PLAINTIFF VAIL.

5 MS. PREOVOLOS: YOUR HONOR, PENELOPE
6 PREOVOLOS FROM MORRISON FOERSTER FOR DEFENDANT
7 APPLE IN GOMELSKY WHICH IS NOW BERENBLAT, THE CASE
8 FORMERLY KNOWN AS GOMELSKY, AND IN VAIL.

9 THOSE TWO CASES ARE RELATED TO EACH
10 OTHER. THE OTHER TWO CASES, ALTHOUGH THEY INVOLVE
11 APPLE, ARE RELATED TO EACH OTHER BUT NOT THE
12 BERENBLAT AND VAIL, JUST SO WE ARE ALL CLEAR.

13 THE COURT: UNDERSTOOD. THANK YOU FOR
14 THE CLARIFICATION.

15 MR. MUHLBACK: GOOD MORNING, YOUR HONOR.
16 ANDREW MUHLBACH, ALSO MORRISON & FOERSTER, FOR
17 DEFENDANT APPLE IN THE VAIL AND GOMELSKY MATTERS.

18 MR. WALSH: GOOD MORNING, YOUR HONOR.
19 DAVID WALSH OF PAUL HASTINGS ON BEHALF OF APPLE ON
20 THE HUF AND HOVSEPIAN MATTERS.

21 MR. LONG: GOOD MORNING, YOUR HONOR.
22 ERIC LONG FROM THE SAME FIRM, AND I'M ALSO ON THE
23 HUF AND HOVSEPIAN MATTERS.

24 THE COURT: THANK YOU.

25 COUNSEL, PLEASE MAKE YOURSELVES

1 COMFORTABLE. I APPRECIATE COUNSEL'S CLARIFICATION.
2 THE FOUR CASES ARE NOT ALL RELATED. THERE ARE TWO
3 SETS OF RELATED CASES; HOWEVER, I HAVE CHOSEN
4 CONSCIOUSLY TO HEAR ARGUMENT AT THE SAME TIME
5 BECAUSE THERE ARE SOME OVERLAPPING ISSUES, EVEN
6 THOUGH THEY INVOLVE DIFFERENT PRODUCTS.

7 AND ONE OF THE ISSUES -- WELL, ACTUALLY
8 SINCE SOMETHING I NEED TO START WITH IS A QUESTION,
9 MY HOUSEHOLD OWNS ONE APPLE LAPTOP, I WANT TO MAKE
10 SURE I'M NOT A CLASS MEMBER. IT WAS PURCHASED IN
11 2008 -- IT'S AN, I'M NOT SURE THE EXACT APPELLATION
12 OF THE EQUIPMENT, BUT IT IS A POWERBOOK. I BELIEVE
13 IT'S A POWERBOOK G4, BUT IT WAS PURCHASED IN 2008.

14 I WANT TO MAKE SURE THAT'S NOT GOING TO
15 CREATE A PROBLEM.

16 MS. FORD: YOUR HONOR, CHRISTINE FORD, I
17 DON'T BELIEVE THAT WITH THAT PURCHASE DATE IT WOULD
18 BE A MEMBER OF THE CLASS.

19 ON BEHALF OF THE PLAINTIFFS IN THE
20 GOMELSKY/BERENBLAT MATTER AND THE HUF MATTER, WE
21 WOULD BE WILLING TO FRAME A CLASS DEFINITION THAT
22 WOULD EXCLUDE MEMBERS OF THE FEDERAL JUDICIARY.

23 THE COURT: I DON'T HAVE ANY PROBLEM
24 HEARING THE CASE, I JUST WANT TO MAKE SURE YOU ARE
25 AWARE THAT I OWN SOME APPLE PRODUCTS.

1 AND I'M PRESIDING OVER A NATIONWIDE CLASS
2 ACTION INVOLVING HP PRINTERS, AND I SUSPECT MOST
3 PEOPLE IN THIS ROOM HAVE HP PRINTERS. AND I WANT
4 TO MAKE THE SAME DISCLOSURE.

5 MS. FORD: YES, YOUR HONOR.

6 MR. MCNAMARA: DOUG MCNAMARA. OUR CLASS
7 DEFINITION SPECIFICALLY EXCLUDED THE JUDGE. SO YOU
8 WOULD NOT BE A CLASS MEMBER.

9 THE COURT: THEN WE ARE FINE.

10 NOW TO GET TO THE SUBSTANCE, ONE OF THE
11 ISSUES THAT I THINK IS COMMON IN ALL THE CASES IS
12 WHETHER RULE 9(B) APPLIES TO THE CLRA CLAIMS AND
13 THE UCL CLAIMS.

14 AND MY VIEW IS THAT IT DOES BECAUSE THE
15 NATURE OF THE CLAIMS IN BOTH, ACTUALLY ALL FOUR
16 ACTIONS, SUGGEST THERE WAS AN INTENTIONAL
17 CONCEALMENT OR FRAUDULENT NON-DISCLOSURE ON THE
18 PART OF APPLE ON THE DEFECT. THAT'S THE ONLY WAY
19 YOU GET AROUND THE WARRANTY.

20 AND THAT BEING THE CASE, I THINK THE WAY
21 THAT THE AUTHORITY IN THE NINTH CIRCUIT IS YOU HAVE
22 TO MEET THE PLEADING STANDARDS OF RULE 9(B). AND I
23 DON'T THINK ANY OF THE COMPLAINTS DO.

24 I DON'T MEAN TO SUGGEST THEY COULDN'T,
25 BUT I THINK THERE IS MORE PARTICULARITY REQUIRED AS

1 TO ALL OF THE ELEMENTS OF FRAUD THAN IS PROVIDED
2 HERE.

3 YOU CAN'T -- PARTICULARLY, I THINK UNDER
4 THE IQBAL STANDARD, YOU CAN'T SAY APPLE MUST HAVE
5 KNOWN OR APPLE MUST HAVE DONE THIS OR THAT. THERE
6 HAS TO BE SOME TYPE OF PARTICULARITY AS TO EACH OF
7 THE ELEMENTS, AND I DON'T THINK THAT'S HERE.

8 SO THAT'S A GLOBAL OBSERVATION I WOULD
9 MAKE ABOUT ALL THE COMPLAINTS. AND I THINK THEY
10 ALL NEED TO BE AMENDED TO REFLECT 9(B) PLEADING
11 STANDARDS AND THE HEIGHTENED PLEADING STANDARD,
12 GENERALLY, THAT WE ARE NOW LIVING WITH.

13 I THINK WITH REGARD TO WHETHER IMPLIED
14 WARRANTY CLAIMS SURVIVE THE EXPLICIT LIMITATION
15 THAT'S INCLUDED IN THE EXPRESS WARRANTY, THAT'S AN
16 INTERESTING QUESTION AND I WOULD RESERVE JUDGMENT
17 ON THAT UNTIL I SEE WHAT THE PARTICULARITIES ARE IN
18 THE FRAUD/CONCEALMENT CLAIMS THAT THE PLAINTIFFS
19 ARE MAKING.

20 THE MEXIA CASE, WHICH IS THE ONE
21 DISCUSSED IN SOME LENGTH IN THE HUF AND HOVSEPIAN
22 CASES, I DON'T THINK THAT'S PERSUASIVE AUTHORITY AS
23 TO WHAT THE LAW IS.

24 I THINK IT'S BEEN POINTED OUT, AND
25 DEFENDANTS MAKE THIS POINT, THAT IF YOU LOOK AT

1 THAT CASE LITERALLY, IT WOULD MEAN THAT ANY TIME
2 YOU HAVE A LATENT DEFECT YOU DON'T HAVE A ONE YEAR
3 LIMITATION, AND THAT CAN'T BE RIGHT. THERE HAS TO
4 BE SOMETHING MORE TO IT THAN THAT, OTHERWISE
5 THERE'S NOTHING LEFT OF THE ONE YEAR LIMITATION.
6 SO THERE HAS TO BE SOMETHING MORE THAN THE FACT
7 THAT THE DEFECT WAS LATE.

8 SO I THINK THIS ALL GOES TO THE IDEA THAT
9 BEFORE I'M REALLY READY TO WEIGH IN WITH A
10 SUBSTANTIVE OPINION AS TO THE MERITS OF CLAIMS, I
11 WOULD LIKE TO SEE MORE DETAIL FROM THE PLAINTIFFS
12 THAN IS PROVIDED IN THE PLEADINGS, AND I'M HAPPY TO
13 GIVE THEM LEAVE TO PROVIDE THAT.

14 HAVING SAID THAT, LET ME HEAR FROM
15 PLAINTIFF'S COUNSEL. I THINK IT MAY END UP
16 SHORTENING TODAY'S PROCEEDING CONSIDERABLY.

17 GO AHEAD.

18 MS. FORD: YOUR HONOR, IF I MAY. I DO
19 REPRESENT PLAINTIFFS IN THE BERENBLAT AND HUF
20 CASES, SO WE REPRESENT BOTH PRODUCTS, PLAINTIFFS IN
21 BOTH PRODUCTS.

22 THE COURT: BOTH SIDES.

23 MS. FORD: AS AN INITIAL MATTER I WANTED
24 TO POINT OUT TO YOUR HONOR WE DON'T ASSERT ANY CLRA
25 CLAIMS. AND ON THE UCL CLAIM WE ASSERT CAUSE OF

1 ACTION UNDER THE UNFAIR/UNLAWFUL PRONGS, NOT THE
2 FRAUDULENT PRONGS, AS WELL AS THE APPLIED WARRANTY
3 CASE.

4 SO IT SHOULD BE CONSIDERED UNDER RULE 8
5 STANDARD, BUT I UNDERSTAND YOUR HONOR'S CONCERNS.

6 THE COURT: IN REGARDS TO WHAT LABEL YOU
7 ATTACH TO THESE THINGS, I'M TRYING TO LOOK AT THIS
8 IN A VERY PRACTICAL -- WHAT YOU ARE SAYING IS NOT
9 SIMPLY THAT THERE WAS A LATENT DEFECT, BUT APPLE
10 KNEW THERE WAS A LATENT DEFECT.

11 AND FRANKLY, THAT'S THE ONLY WAY YOU GET
12 AROUND THE EXPRESS WARRANTY. WHETHER YOU WANT TO
13 CALL IT FRAUD OR NOT, YOU HAVE A ONE YEAR
14 LIMITATION.

15 SO THE ONLY WAY YOU CAN SAY THAT ONE YEAR
16 LIMITATION DOESN'T BAR YOU IS TO SAY THAT APPLE
17 KNEW THEY HAD A DEFECTIVE PRODUCT AND DIDN'T TELL
18 YOU.

19 SO REGARDLESS OF WHAT STATUTE YOU ARE
20 PLEADING UNDER, THAT'S WHAT YOUR CLAIM IS ABOUT. I
21 THINK THE RECENT CASES I'VE SEEN ON THIS ARE IF
22 THAT'S WHAT YOUR CLAIM IS, YOU GOT TO BEAT A 9(B)
23 PLEADING STANDARD.

24 MS. FORD: I UNDERSTAND, YOUR HONOR.

25 WITH RESPECT TO THE MEXIA CASE AND THE

1 ONE YEAR LIMITATION, THERE IS THE CALIFORNIA CASE
2 LAW THAT SAYS THAT THE DEFECT -- THE INHERENT
3 DEFECT HAS TO EXIST AT THE TIME OF MANUFACTURE.

4 AND WE'VE ALLEGED THAT. WE'VE ALLEGED
5 THAT, AND THE MEXIA CASE SAYS SONG-BEVERLEY EXPANDS
6 THAT. UNDER THE UCC IT MUST EXIST AT THE TIME OF
7 DELIVERY. SONG-BEVERLEY EXPANDS THAT, PERIOD.

8 SO THERE'S A DIFFERENCE BETWEEN AN
9 INHERENT DEFECT IN A PRODUCT AND SAY, WHAT'S AT
10 ISSUE IN THE STEARNS V. SELECT COMFORT CASE WHICH
11 IS A MOLD PROBLEM THAT DEVELOPS OVER TIME --

12 THE COURT: THAT'S MY CASE. I WILL SEE
13 THOSE PEOPLE NEXT WEEK.

14 MS. FORD: I UNDERSTAND, YOUR HONOR. I
15 DID CHECK YOUR DOCKET.

16 BUT THAT'S A DIFFERENT CASE WHERE THE
17 DEFECT DEVELOPS OVER TIME. WE ALLEGED THE DEFECT
18 EXISTS AT THE TIME THE PRODUCT WAS DELIVERED.

19 AND I WOULD LIKE TO POINT OUT IN THAT
20 RESPECT THAT THE DAUGHERTY CASE IS AN EXPRESS
21 WARRANTY CASE, THAT LINE OF AUTHORITY. AND TO THE
22 EXTENT IT INFORMS YOUR HONOR'S CONSIDERATION, I
23 WOULD LIKE TO POINT OUT THE CLEMENS CASE DECIDED BY
24 THE NINTH CIRCUIT DID NOT, COULD EASILY HAVE
25 EXPANDED THE RATIONAL OF DAUGHERTY TO IMPLIED

1 WARRANTY CLAIMS AND IT DIDN'T.

2 THE COURT: WELL, I UNDERSTAND, BUT LET
3 ME JUST TURN THAT INSIDE OUT. THAT'S A GOOD POINT.

4 IF I READ MEXIA THE WAY THAT YOU ARE ALL
5 ASKING ME TO DO IT, IT JUST MEANS ANY TIME YOU HAVE
6 AN INHERENT DEFECT YOU CAN'T HAVE A LIMITATION ON
7 IMPLIED WARRANTY.

8 MS. FORD: I THINK THE MEXIA CASE DID
9 ADDRESS THIS POINT AND SAID, WITH A CLAIM WHERE YOU
10 HAVE A DEFECT THAT EXISTS AT THE TIME OF DELIVERY,
11 THE CAUSE OF ACTION UNDER THE UCC ACCRUES AT
12 DELIVERY, AND THEN YOU HAVE A FOUR-YEAR STATUTE OF
13 LIMITATIONS.

14 YOU CAN'T BRING A CLAIM AFTER THE
15 FOUR-YEAR STATUTE OF LIMITATIONS. AND THE MEXIA
16 COURT SPECIFICALLY ADDRESSED THIS ISSUE AND SAID
17 THAT THAT WAS WHAT THE LEGISLATURE WAS LOOKING AT,
18 THE CONCERN OF CORPORATE RECORD KEEPING AND
19 EXTENDING WARRANTIES INDEFINITELY.

20 THE COURT: BUT IF YOU -- I WANT TO MAKE
21 SURE I GET THIS. THE EXPRESS WARRANTY SAYS WE ARE
22 WARRANTING A PRODUCT FOR A YEAR. THAT'S IT, THERE
23 AREN'T ANY OTHER WARRANTIES.

24 YOU ARE SAYING UNDER THE UCC --

25 MS. FORD: WHERE THE WARRANTY ARISES BY

1 OPERATION OF LAW.

2 THE COURT: RIGHT. BECAUSE THE UCC IS AN
3 IMPLIED WARRANTY OF MERCHANTABILITY, AND THAT IS A
4 FOUR-YEAR STATUTE. THAT CANNOT BE ABROGATED,
5 WAIVED, SHORTENED OR LIMITED BY AN EXPRESS
6 WARRANTY.

7 SO YOU'VE GOT FOUR YEARS TO BRING A CLAIM
8 FOR INHERENT DEFECT NO MATTER WHAT THE EXPRESS
9 WARRANTY SAYS.

10 MS. FORD: BECAUSE THE INHERENT DEFECT
11 EXISTS WITHIN THAT ONE YEAR PERIOD BECAUSE IT
12 EXISTS AT THE TIME OF MANUFACTURER.

13 SO THE DEFECT EXISTS WITHIN THE ONE YEAR
14 PERIOD AND YOU HAVE THE FOUR YEARS FROM DELIVERY TO
15 BRING A CLAIM.

16 SO THERE'S TWO SEPARATE POINTS. WHEN THE
17 DEFECT EXISTS, WHICH HAS TO BE WITHIN ONE YEAR, AND
18 WHEN YOU CAN BRING A CLAIM, THE FOUR-YEAR STATUTE
19 OF LIMITATIONS.

20 THE COURT: I GOT IT.

21 AS TO THAT, IT DOESN'T MATTER WHETHER YOU
22 CAN SHOW FRAUD OR NOT BECAUSE IT'S NOT A CLAIM THAT
23 SOUNDS LIKE FRAUD OR IS BASED ON FRAUD.

24 MS. FORD: EXACTLY, YOUR HONOR.

25 THE COURT: THANK YOU.

1 ANYONE ELSE WANT TO BE HEARD?

2 MR. MCNAMARA: IF I MAY, JUDGE.

3 DOUG MCNAMARA ON BEHALF OF MS. VAIL,
4 SINCE I ALSO HAVE A LAPTOP G4 POWERBOOK CASE.

5 WE BELIEVE WE WILL BE ABLE TO MEET
6 YOUR HONOR'S REQUIREMENTS OF THE 9(B) PLEADING
7 STANDARD. WE BELIEVE WE DID PLEAD SPECIFICALLY
8 THAT MS. VAIL SAW REPRESENTATIONS, RELIED UPON
9 THEM, WHEN SHE SAW THEM, WHAT APPLE KNEW AND WHEN.
10 WE WILL GO BACK AND MAKE SURE WE CROSSED THE T'S
11 AND DOTTED ALL THE I'S.

12 THE ONLY THING I WANT TO RAISE WITH
13 YOUR HONOR NOW BECAUSE OF WHAT APPLE RAISED, APPLE
14 SAYS IN ORDER TO SURVIVE OUR CLRA CLAIMS AND UCL
15 CLAIMS, WE HAVE TO ESTABLISH APPLE MADE A
16 REPRESENTATION ABOUT LIFE SPAN OR THAT THERE'S SOME
17 TYPE OF SAFETY DEFECT AT ISSUE FOR IT TO BE
18 MATERIAL.

19 WE BELIEVE THAT'S A MISREADING OF
20 DAUGHERTY AND BARDIN. IN FACT, BARDIN ITSELF IS A
21 CASE WHERE IT TALKED ABOUT SAFETY ISSUES. IT
22 TALKED ABOUT THEM VIS A VI THE UCL CLAIM AND THE
23 UNFAIRNESS PRONG THAT IT WASN'T UNFAIR TO NOT TELL
24 PEOPLE YOU USED TUBULAR STEEL EXHAUST MANIFOLD
25 BECAUSE IT WOULDN'T NECESSARILY AFFECT ANY SAFETY.

1 THERE WAS NO ALLEGATIONS OF THE SECOND AMENDED
2 COMPLAINT IN THAT CASE.

3 THE COURT: THAT'S SORT OF THE ESSENCE OF
4 THE COMPUTER IS YOU WANT TO BE ABLE TO SEE WHAT'S
5 ON THE SCREEN.

6 MR. MCNAMARA: TRUE.

7 THE COURT: YEAH.

8 MR. MCNAMARA: IN OUR CASE WITH THE
9 EXPANSION SLOT ISSUE, THE EXPANSION SLOT IS ONE
10 WHERE BECAUSE IT'S AN EXPANSION SLOT, THE
11 EXPECTATION IS YOU ARE NOT GOING USE IT RIGHT AWAY.

12 OUR CLASS IS FOLKS WHO BOUGHT IT WITH THE
13 EXPANSION SLOT EMPTY. APPLE MADE REPRESENTATIONS
14 ABOUT FUTURE UPGRADES, AND WITH THAT IN MIND HAVING
15 WHAT BARDIN AND DAUGHERTY USES AS THE DEFAULT,
16 WELL, THERE'S NO SPECIFIC REASONABLE EXPECTATION OF
17 USE OF THIS PRODUCT, WE ARE GOING TO GO WITH THE
18 ONE YEAR WARRANTY BECAUSE THAT'S THE ONLY THING
19 AVAILABLE. IT'S INCONSISTENT WITH THIS CASE LAW.

20 I ALSO POINT OUT THE IDEA OF
21 REPRESENTATIONS ABOUT THE LIFE SPAN BEING REQUIRED.
22 AGAIN, I WOULD ASK YOUR HONOR TO REVIEW BARDIN AND
23 SPECIFICALLY AT PAGE 1274 WHERE IT TALKED ABOUT,
24 WITH REGARDS TO THE FRAUD PRONG, THAT THE PROBLEM
25 IN THAT CASE IS THE MEMBERS OF THE PUBLIC HAD NO

1 EXPECTATIONS OR ASSUMPTIONS REGARDING EXHAUST
2 MANIFOLDS.

3 THE PUBLIC HAD NO EXPECTATIONS ABOUT LIFE
4 SPAN, THE PUBLIC HAD NO EXPECTATIONS -- OR THERE
5 WERE FACTS WHERE DAIMLER CHRYSLER HAD MADE
6 REPRESENTATIONS.

7 THERE'S NOT A REQUIREMENT IN THE CASE LAW
8 IN CALIFORNIA THAT THERE HAS TO BE SPECIFIC
9 REPRESENTATION REGARDING LIFE SPAN.

10 THE QUESTION IS: WAS THERE A REASONABLE
11 EXPECTATION OR ASSUMPTION AMONG THE PUBLIC? WE
12 BELIEVE WITH THE RAM MEMORY SLOT, THERE IS, WHEN
13 YOU HAVE TO EXPAND YOUR MEMORY. HERE, THERE'S
14 ACTUALLY SPECIFIC REPRESENTATIONS THAT THERE'S TWO
15 GIGABYTE CAPACITY IN FUTURE USE.

16 THERE'S NOT A REQUIREMENT OF SPECIFIC
17 REPRESENTATION LIFE SPAN IN ORDER TO AVOID THE
18 DISMISSAL IN THE BARDIN AND DAUGHERTY.

19 THE COURT: THANK YOU. SIR.

20 MR. LEON: YOUR HONOR, JEFF LEON ON
21 BEHALF OF THE HOVSEPIAN PLAINTIFFS.

22 WE BROUGHT OUR CLIENT'S COMPUTER TO LOOK
23 AT IF YOU HAVE THE MORBID CURIOSITY TO SEE WHAT THE
24 PROBLEM IS.

25 THE COURT: I THINK YOU DESCRIBED IT

1 ADEQUATELY IN YOUR PAPERS.

2 MR. LEON: THE 9(B) STANDARDS, WE
3 PATTERNED OUR COMPLAINT TO SOME EXTENT AFTER THE
4 FALK COMPLAINTS. FALK HELD, WHICH IS A SISTER
5 COURT HERE, EXPLICITLY THAT 9(B) DOES APPLY TO
6 FRAUDULENT OMISSIONS CASES BUT IN A RELAXED MANNER.

7 BY ITS NATURE, IT'S AN OMISSION. TO
8 QUOTE WHAT FALK SAID, "CLEARLY A PLAINTIFF IN A
9 FRAUD BY OMISSION SUIT WOULD NOT BE ABLE TO SPECIFY
10 THE TIME AND PLACE AND SPECIFIC CONTENT OF THE
11 OMISSION AS PRECISELY AS WOULD A PLAINTIFF IN A
12 FALSE REPRESENTATION CLAIM."

13 WHAT WE'VE DONE IN OUR COMPLAINT,
14 YOUR HONOR, IS POINT OUT WITH SPECIFICITY AN ONLINE
15 PETITION WHERE APPLE KNOWS ABOUT THOUSANDS OF
16 COMPLAINTS. WE POINTED OUT WITH SPECIFICITY
17 SPECIFIC COMPLAINT FORMS WHERE THOUSANDS OF
18 COMPLAINTS HAVE BEEN POSTED.

19 SO APPLE HAS KNOWLEDGE OF THE DEFECT, AND
20 IT'S A DEFECT. WE'VE ALSO PLED SPECIFIC FACTS THAT
21 THIS VERTICAL SCREEN LINE DEFECT IS NOT AN EXPECTED
22 SYMPTOM OF AN AGING COMPUTER MONITOR.

23 WE HAVE VERY SPECIFIC FACTS ON THIS THAT
24 THE WAY THE MONITOR AGES, THE BACKLIGHT DIMS, THE
25 SCREEN IS NOT AS SHARP AS IT USED TO BE, SOME OF

1 THE PIXELS MAY POP. THOSE ARE EXPECTED WAYS THAT
2 MONITORS AGE AND DIE.

3 IF YOU GO AND LOOK AT OTHER COMPUTER
4 MAKERS' MONITOR COMPLAINT FORMS, YOU DO NOT SEE FOR
5 ANY OF THEM A VERTICAL SCREEN DEFECT ISSUE.

6 WE'VE PLED ALL THESE THINGS AND THEY'RE
7 ALL IN THE CONTEXT OF WHAT YOU HAVE TO SHOW TO GET
8 A DUTY TO DISCLOSE IN A FRAUD BY OMISSION CASE.

9 IN OUR CASE WE ARE RELYING ON THE SECOND
10 AND THIRD PRONG OF THE LIMANDRI CASE. AND THE
11 SECOND PRONG IS EXCLUSIVE KNOWLEDGE. STANDING HERE
12 TODAY I STILL CAN'T TELL YOU EXACTLY WHY THAT
13 HAPPENS BECAUSE I'M NOT AN ENGINEER.

14 APPLE HAS EXCLUSIVE KNOWLEDGE OF THE
15 PROBLEM. AND IT IS INCONCEIVABLE TO ME OR ANYBODY
16 ELSE THAT UNDER A 9(B) STANDARD WHERE YOU HAVE TO
17 TAKE THE REASONABLE INFERENCES THAT FLOW FROM THE
18 COMPLAINT IN FAVOR OF THE PLAINTIFF, THAT APPLE HAS
19 NOT STUDIED THIS PROBLEM AND REACHED A CONCLUSION.

20 THIS IS NOT NORMAL. THAT'S WHAT OUR
21 COMPLAINT SAYS, AND WE HAVE FACTS.

22 THE COURT: OKAY.

23 SO BASICALLY WHAT YOU ARE SAYING IS IF I
24 LOOK CAREFULLY AT THIS, YOU REALLY -- YOU DON'T
25 REALLY HAVE TO DO ANYTHING ELSE TO MEET 9(B)

1 STANDARD, IN YOUR INSTANCE.

2 MR. LEON: WE DON'T BELIEVE SO,
3 YOUR HONOR.

4 AND ALSO SINCE WE STARTED GETTING INTO
5 THE DAUGHERTY LINE OF CASES, I HAVE TO AGREE WITH
6 WHAT OTHER PLAINTIFF'S COUNSEL HAVE SAID ABOUT WHAT
7 DAUGHERTY MEANS.

8 IN SOME CASES YOU HAVE BROADER STATEMENTS
9 OF LAW THAT REALLY HAVE A DIFFERENT MEANING UNLESS
10 YOU APPLY THEM TO THE FACTS OF THE CASE FROM WHICH
11 THEY FLOW.

12 THAT'S A CASE WHERE WE HAD A SIMILAR CASE
13 IN THE SEVENTH CIRCUIT, YOUR HONOR, WHERE
14 JUDGE POSNER JUST RIPPED A PLAINTIFF BECAUSE HE
15 FILED A CASE -- THIS IS THE CARNIGE VERSUS SEARS
16 CASE (SIC) WHERE THERE WAS NOT ALL STAINLESS STEEL
17 DRUMS IN A WASHING MACHINE.

18 THE JUDGE SAYS, DOES ANYBODY BELIEVE THAT
19 THIS IS A MATERIAL THING OTHER THAN THE PARTICULAR
20 PLAINTIFF? HE POSTED HIS COMPLAINT ON A COMPLAINT
21 SITE, AND IN THAT CASE NOBODY ELSE POSTED A SIMILAR
22 COMPLAINT.

23 THERE'S BROADER STATEMENTS OF LAW THAT
24 FLOW FROM THAT CASE, BUT AGAIN, YOU HAVE THE SAME
25 ISSUE.

1 IF YOU LOOK THE AT LIMANDRI CASE WHICH IS
2 THE CALIFORNIA LEADING CASE FOR A FRAUDULENT
3 OMISSIONS CLAIM, ONE OF THE FOUR -- ALL YOU HAVE TO
4 DO IS MEET ONE OF THE FOUR -- NONE OF THEM SAY
5 ANYTHING ABOUT SAFETY.

6 JUDGE PATEL IN THE ALIENWARE CASE, IN THE
7 OESTRICHER CASE, READ IN THAT REQUIREMENT. THE
8 REAL QUESTION, YOUR HONOR, IS: WHAT WOULD THE
9 CALIFORNIA SUPREME COURT DO? AND IF ANYTHING,
10 SOMETHING THAT WASN'T AVAILABLE TO JUDGE PATEL, OR
11 FRANKLY, THE NINTH CIRCUIT.

12 THE COURT: AS I SAID EARLIER, AND I WAS
13 COMMENTING ABOUT THE WRONG CASE BUT IT WAS MEANT TO
14 ADDRESS YOUR CASE, YOU'RE TALKING ABOUT A TYPE OF
15 FAILURE THAT GOES TO THE VERY HEART OF WHAT YOU BUY
16 A COMPUTER FOR.

17 MR. LEON: RIGHT.

18 THE POINT I WAS GOING TO MAKE, YOUR
19 HONOR, IS THE TOBACCO II CASE WAS DECIDED
20 SUBSEQUENT TO THE OESTRICHER CASE.

21 IF YOU WANT TO TRY TO DEFINE WHERE THE
22 CALIFORNIA SUPREME COURT IS GOING WITH REGARD TO
23 THE UCL AND THE CLRA, THAT TELLS YOU THEY ARE
24 ERRING ON THE SIDE OF EXPANSIVENESS.

25 THE COURT: THEY ALWAYS HAVE WITH REGARD

1 TO THE UCL.

2 MR. LEON: THERE'S ONE OTHER THING I WANT
3 TO POINT OUT BECAUSE I DON'T WANT IT TO BE LOST.

4 WE HAVE A COMMON LAW FRAUD CLAIM UNDER
5 THE EXACT SAME FACTS. AND AS JUDGE PATEL NOTED IN
6 HER DISTRICT COURT OPINION, THE CLRA IS NARROWER,
7 IN HER PERSPECTIVE.

8 WE ARE NOT AGREEING WITH THAT, BUT SHE
9 EVEN CONCEDES THAT THE CLRA IS NARROWER THAN IS THE
10 COMMON LAW FRAUD, FRAUDULENT OMISSION CLAIM IN
11 CALIFORNIA.

12 AND SHE NOTES THE KHAN V. SHILEY CASE
13 WHICH INVOLVED A HEART PACEMAKER -- I BELIEVE IT
14 WAS A HEART PACEMAKER. BUT THAT COURT SAID IN A
15 TORT ACTION FOR DECEIT, WHICH IS WHAT THEY CALL THE
16 FRAUD BY OMISSION CLAIM IN THAT CASE, A
17 MANUFACTURER OF A PRODUCT MAY BE LIABLE FOR FRAUD
18 WHEN IT CONCEALS MATERIAL PRODUCT INFORMATION FROM
19 POTENTIAL USERS.

20 THIS IS TRUE WHETHER THE PRODUCT IS A
21 MECHANICAL HEART VALVE OR FROZEN YOGURT. THAT'S
22 WHAT A CALIFORNIA COURT SAID.

23 NOW JUDGE PATEL SAYS, PLAINTIFF ARGUES
24 THAT CALIFORNIA LAW HAS NO REQUIREMENT OF A SAFETY
25 HAZARD BEFORE DUTY TO DISCLOSE MATERIAL FACTS

1 BEFORE A PRODUCT ARISES. THOUGH THIS IS CORRECT
2 WITH RESPECT TO COMMON LAW, IT DOES NOT DEMONSTRATE
3 WHY THE CLRA MUST BE EXPANDED FROM ITS PRESENT
4 SCOPE.

5 SO JUDGE PATEL EVEN ACKNOWLEDGES THAT
6 THIS "SAFETY REQUIREMENT" DOES NOT EXIST IN
7 CALIFORNIA COMMON LAW. WE HAVE A COMMON LAW CLAIM.

8 THE COURT: YOU ARE A LEVEL AHEAD OF ME
9 IN THE SENSE THAT I'M STILL BACK ON THE PLEADING
10 STANDARD.

11 AND THE PLEADING STANDARD, EVEN THOUGH
12 THE ELEMENTS OF WHATEVER THE CLAIM IS ARE DEFINED
13 BY, IN THIS CASE, STATE LAW, THE PLEADING STANDARDS
14 IS A PROCEDURAL MATTER THAT'S DEFINED BY THE
15 FEDERAL RULES.

16 SEE, I THINK MY INITIAL INQUIRY WITH
17 REGARD TO EVEN THAT CLAIM IS GOING TO BE WHETHER
18 YOU'VE GOT ENOUGH UNDER RULE 9(B).

19 MR. LEON: THANK YOU, YOUR HONOR.

20 THE COURT: ANYONE ELSE ON THE
21 PLAINTIFF'S SIDE BEFORE I GIVE APPLE A CHANCE TO BE
22 HEARD?

23 OKAY, COUNSEL.

24 MS. PREVOLOS: YOUR HONOR,
25 PENELOPE PREVOLOS WITH MORRISON & FOERSTER FOR

1 APPLE. I WILL BE VERY BELIEF.

2 I HAVE NO INTENTION OF ATTEMPTING TO
3 SEIZE DEFEAT FROM THE JAWS OF EVEN TEMPORARY
4 VICTORY.

5 THE COURT: THAT'S VERY SMART.

6 MS. PREVOLOS: AT THE SAME TIME I THINK
7 THERE'S THINGS I CAN'T GO AWAY LEAVING UNSAID AND
8 PERHAPS FESTERING IN THE COURT'S MIND.

9 THE FIRST IS WITH RESPECT TO THE MEXIA
10 CASE. I SHARE THE COURT'S VIEW THAT THAT CASE IS
11 JUST NOT INFORMATIVE HERE, BUT I WANT TO EMPHASIZE
12 THERE ARE A COUPLE OF REASONS FOR THAT.

13 FIRST, IF YOU READ THE CASE IT IS
14 STRICTLY ABOUT SONG-BEVERLY, AT LEAST AS TO VAIL
15 AND BERENBLAT THERE IS NO SONG-BEVERLY CLAIM.
16 THERE IS ONLY A UCC CLAIM. THEY ARE NOT CALIFORNIA
17 PLAINTIFFS AND THERE'S OTHER ISSUES.

18 SO SONG-BEVERLY IS NOT AT ISSUE. SO I
19 THINK IT'S A HUGE LEAP TO SAY THAT THE CALIFORNIA
20 COURT OF APPEAL CAN JUMP IN AND CHANGE A STATUTE --

21 THE COURT: I THINK THERE'S SOME LOOSE
22 LANGUAGE IN THERE. AND I DON'T MEAN TO BE CRITICAL
23 OF THE COURT, THEY DID WHAT THEY HAD TO DO TO
24 DECIDE THAT CASE, BUT I DON'T THINK THEY INTENDED
25 TO WIPE OUT THE STATUTE OF LIMITATIONS.

1 MS. PREVOLOS: NO. I DON'T THINK THAT.
2 I DON'T THINK THEY INTENDED TO WIPE OUT THE ABILITY
3 OF A MANUFACTURER TO LIMIT IMPLIED WARRANTIES TO
4 THE TERM OF THE EXPRESS WARRANTY FOR A COUPLE OF
5 REASONS.

6 ONE, THE CALIFORNIA COMMERCIAL CODE
7 SPECIFICALLY GIVES A MANUFACTURER THAT ABILITY.
8 SONG-BEVERLY ITSELF SPECIFICALLY SAYS --

9 THE COURT: SO LIVE BY THE UCC, DIE BY
10 THE UCC.

11 MS. PREVOLOS: NO. WELL, YES.

12 I MEAN, I THINK YOU CAN'T TAKE PART OF
13 THE UCC AND NOT TAKE THE OTHER PART. BUT I WOULD
14 ALSO SAY IF YOU WANT TO TALK ABOUT SONG-BEVERLY
15 LIVE BY SONG-BEVERLY AND DIE BY SONG-BEVERLY
16 BECAUSE SONG-BEVERLY SAYS THE MAXIMUM TERM OF AN
17 IMPLIED WARRANTY IS ONE YEAR, AND IT'S ALSO
18 AUTOMATICALLY LIMITED TO THE DURATION OF THE
19 EXPRESS WARRANTY.

20 SO I WOULD ARGUE THIS IS WHEN WE ARE KIND
21 OF HEADS, WE WIN; TAILS, WE WIN, IN TERMS OF THAT
22 CASE.

23 IN TERMS OF THE ARGUMENT THAT THE
24 DAUGHERTY RULE, I WILL CALL IT THAT FOR
25 CONVENIENCE, ONLY APPLIES IN EXPRESS WARRANTY

1 CASES. I WANT TO RESPOND TO THAT QUICKLY.

2 FIRST OF ALL, YOUR HONOR HAS REJECTED
3 THAT VIEW, I THINK, IN BOTH STEARNS AND TIETSWORTH.

4 I ALSO THINK IT'S JUST AN ARGUMENT THAT
5 DOESN'T MAKE ANY SENSE. BECAUSE IF YOU SAY, WELL,
6 THE WHOLE DAUGHERTY LOGIC ONLY APPLIES TO EXPRESS
7 WARRANTIES, THEN YES, I WOULD ARGUE THE DAUGHERTY
8 LOGIC IS DEAD.

9 BECAUSE YOU ARE SAYING, CONGRATULATIONS
10 APPLE, YOU CAN ENFORCE YOUR ONE-YEAR EXPRESS
11 WARRANTY, BUT THAT DOESN'T MEAN ANYTHING BECAUSE
12 THE IMPLIED WARRANTY WILL LAST FOUR YEARS, OR IF
13 YOU READ MEXIA, FOREVER.

14 I THINK THE POLICY ARGUMENT THE COURT
15 ADOPTED IN DAUGHERTY THAT THIS COURT HAS ADDRESSED
16 THAT JUDGE PATEL ADDRESSED I THINK VERY THOROUGHLY
17 AND THOUGHTFULLY IN THE OESTRICHER CASE, HAS TO DO
18 WITH THE CONTRACTURAL BARGAIN A MANUFACTURER CAN
19 STRIKE. IT HAS TO DO WITH SOUND ECONOMIC POLICY.
20 WHICH IS, IF WE HAVE INDEFINITE WARRANTIES, THE
21 COST OF CONSUMER PRODUCTS WILL GO UP.

22 THE COURT: THAT'S WHY I'M FOCUSSING ON
23 FRAUD THIS MORNING.

24 MS. PREVOLOS: I KNOW.

25 SO MY POINT IS, I DON'T THINK YOU CAN SAY

1 THE RULE IS DIFFERENT FROM IMPLIED WARRANTIES, I
2 DON'T THINK THAT MAKES SENSE.

3 YOU KNOW, THE POINT THAT THIS CASE IS
4 SOMEHOW MAGIC AND DIFFERENT BECAUSE OF THE
5 EXPANSION SLOT, NOW I'M FOCUSING ON OUR CASE,
6 BERENBLAT AND VAIL. I WANT TO TAKE UP QUICKLY FOR
7 A COUPLE OF MINUTES.

8 FIRST OF ALL, THE NOTION THAT THAT'S
9 SOMETHING THE CONSUMER DOESN'T USE UNTIL LATER,
10 THIS GETS INTO THE FACTS A BIT, BUT I THINK THOSE
11 FACTS ARE CLEAR FROM THE COMPLAINTS AND SUBMISSIONS
12 OF THE PLAINTIFFS, AND I WILL EXPLAIN WHY, IS JUST
13 NOT TRUE.

14 LOTS OF PEOPLE, I BEING ONE OF THEM, IS
15 SAYING, I WANT ALL THE MEMORY I CAN GET,
16 MR. MANUFACTURER, AND MR. RETAILER, PLEASE FILL
17 BOTH THOSE SLOTS AT ONCE.

18 THE SECOND FACT IS, IF YOU LOOK AT THE
19 COMPLAINTS, THE POSTINGS, VAIL PLAINTIFFS REFER TO
20 IN THEIR COMPLAINT AND ARGUMENT, PEOPLE TALK ABOUT
21 HOW, WELL, THE SECOND MEMORY SLOT WORKED FINE FOR A
22 YEAR AND THEN IT DIDN'T WORK ANYMORE.

23 IT'S FAIRLY CLEAR WE AREN'T TALKING ABOUT
24 A PRODUCT THAT IT CAN ONLY APPEAR AFTER THE
25 WARRANTY EXPIRES.

1 IN TERMS OF CONSUMER EXPECTATIONS, I
2 THINK THERE IS NOTHING HERE THAT WOULD TELL A
3 CONSUMER OKAY, THERE'S A ONE YEAR EXPRESS WARRANTY,
4 YOU READ IT, THERE'S A FINITE TERM TO THE IMPLIED
5 WARRANTY, BUT YOUR WARRANTY AS TO THE SECOND MEMORY
6 SLOT OR THE OTHER MEMORY SLOT LASTS FOR 2 YEARS,
7 3 YEARS, 5 YEARS, 7 YEARS, BECAUSE IF THAT'S THE
8 LAW THERE IS NO DAUGHERTY RULE.

9 SO I THINK OESTRICHER IS STILL GOOD LAW.
10 I THINK THAT THE MANUFACTURER HAS TO MAKE AN
11 EXPRESS REPRESENTATION ABOUT DURATION OR SOMETHING
12 THE COURT READS AS CREATING A CONSUMER EXPECTATION
13 IN THAT RESPECT. I DON'T THINK WE HAVE THAT HERE.

14 SO I THINK FOR ALL THOSE REASONS, EVEN
15 APART FROM WHAT THE COURT DECIDES UNDER RULE 9, I
16 THINK THE PLAINTIFFS DON'T PREVAIL BECAUSE I DON'T
17 THINK THE FACT THAT A MANUFACTURER HAS SOME
18 KNOWLEDGE TRUMPS DAUGHERTY OR THE DAUGHERTY RULE.

19 THE COURT: BUT IF YOU KNOW, I MEAN, I
20 THINK, AND I HAVE NOT HAD TO DECIDE THIS IN ANY OF
21 THE CASES WE HAVE BEEN TALKING ABOUT.

22 IF YOU KNOW THAT SOMETHING ISN'T GOING TO
23 WORK WHEN YOU PUT IT ON THE MARKET AND YOU DON'T
24 TELL THE PUBLIC, I SUPPOSE YOU COULD BE LIABLE
25 NOTWITHSTANDING WHATEVER YOU PUT IN THE CONTRACT.

1 THAT'S -- AT LEAST I CAN ENVISION A SET
2 OF FACTS THAT WOULD SUPPORT THAT CONCLUSION.

3 MS. PREVOLOS: LET ME RESPOND QUICKLY TO
4 THAT AND THEN I WILL SIT DOWN BECAUSE THAT REALLY
5 KIND OF -- IF YOUR HONOR VIEWS IT THAT WAY, IT'S AT
6 THE CRUX OF THIS CASE.

7 SO ONE RESPONSE IS BOTH DAUGHERTY AND
8 OESTRICHER TALK TO THAT PRECISE ISSUE. I THINK
9 OESTRICHER IS THE MOST HELPFUL CASE BECAUSE IT SAYS
10 LOOK, A MANUFACTURER IS ALWAYS GOING TO HAVE
11 EXPECTATIONS ABOUT THE LIFE SPAN OF COMPONENT
12 PARTS. BECAUSE THEY HAVE TO DO THAT, THEY HAVE TO
13 KNOW WHAT SUPPLIES TO HAVE POST 1-YEAR WARRANTY,
14 THEY HAVE TO KNOW WHAT PARTS TO HAVE. SO THE
15 NOTION -- AND THE MANUFACTURER IS GOING TO GET
16 PRODUCT COMPLAINTS.

17 SO I THINK AS A MATTER OF LAW THAT'S
18 PROBABLY NOT RIGHT. COULD YOU ENVISION SOME
19 CIRCUMSTANCES? MAYBE. I DON'T THINK THOSE ARE
20 PLEAD HERE.

21 THE COURT: THEY MAY OR MAY NOT BE. AND
22 ACTUALLY, THIS IS KIND OF SOUNDING LIKE THE
23 ARGUMENT THAT GOT MADE IN THE FRASER CASES, BUT MY
24 HYPOTHETICAL STATEMENT WASN'T PRECISE ENOUGH.

25 IF YOU THINK IT'S GOING TO FAIL WITHIN

1 THE IMPLIED WARRANTY PERIOD, OR LIKELY TO, THEN
2 WHAT'S THE IMPLIED WARRANTY WORTH, OR WHAT'S THE
3 EXPRESS WARRANTY WORTH?

4 IN OTHER WORDS, IF YOU'RE SELLING A BAD
5 PRODUCT, YOU KNOW IT'S A BAD PRODUCT, IT MAY NEVER
6 GET TO THE END OF THE REPRESENTATION YOU ARE
7 MAKING; AND NONETHELESS, YOU PUT IT ON THE MARKET
8 AND SAY WELL, I WILL TAKE MY CHANCES. AT SOME
9 POINT, IT SEEMS TO ME, THAT MENTAL STATE COULD
10 SUBJECT SOMEONE TO LIABILITY.

11 WHETHER THAT'S WHAT'S BEING ALLEGED HERE
12 IS SOMETHING I DON'T KNOW BECAUSE I DON'T HAVE
13 ENOUGH PARTICULARITY.

14 MS. PREVOLOS: I WOULD SAY TWO THINGS.

15 ONE, I DON'T THINK IT IS OR COULD BE
16 ALLEGED HERE. BUT YOUR HONOR IS TALKING ABOUT A
17 SUBSTANTIAL CERTAINTY TO FAIL NOTION, I THINK. AND
18 WHAT I WOULD SAY IS THE LONG CASE AT LEAST
19 EXPRESSLY SAID NO, THAT'S NOT AN EXCEPTION TO
20 DAUGHERTY BECAUSE IF IT IS IT'S AWFULLY EASY TO
21 ALLEGE.

22 THE COURT: I DON'T WANT TO GO OFF TOO
23 MUCH.

24 IF I SOLD YOU A KIT THAT SAID, THIS KIT
25 WILL PREDICT THE SEX OF YOUR BABY AND IT'S GOING TO

1 BE WRONG, IT'S TOTALLY RANDOM, THE KIT IS A
2 COMPLETE SHAM.

3 IT'S GOING TO BE WRONG 50 PERCENT OF THE
4 TIME, AND IT'S GOING TO BE RIGHT 50 PERCENT OF THE
5 TIME. THE ONLY PEOPLE COMPLAINING ARE THE PEOPLE
6 WHO ARE ON THE WRONG SIDE OF THE 50 PERCENT.

7 SO I'M STILL MAKING A PRETTY GOOD PROFIT
8 WITH THIS PRODUCT. THAT'S CLEARLY FRAUD AND IT
9 WOULD BE AN UNFAIR PRACTICE.

10 SO I THINK THERE'S GOTTA BE SOME ZONE FOR
11 WHICH THERE'S A REMEDY, I'M JUST NOT SURE THAT'S
12 THIS CASE. AND I WANT MORE IN THE PLEADINGS THAN
13 I'VE GOT.

14 MS. PREOVOLOS: I THINK THAT'S SAYING A
15 LOT MORE THAN SUBSTANTIALLY CERTAIN TO FAIL.
16 THAT'S SAYING YOU KNEW IT DIDN'T WORK WHEN YOU SOLD
17 IT.

18 AND IF WE REDUCE IT TO THAT AND YOUR
19 HONOR DOESN'T GO WITH US ON THAT, I THINK WE HAVE A
20 VERY QUICK SUMMARY JUDGEMENT.

21 THE COURT: THANK YOU.

22 COUNSEL, ANYONE ELSE WANT TO WEIGH IN ON
23 THE APPLE SIDE?

24 DAVID WALSH: YOUR HONOR, MY LEARNED
25 CO-COUNSEL COVERED EVERY POINT I COULD HAVE

1 IMAGINED AS MAKING.

2 I WILL JUST CONFIRM THAT -- I'M SORRY,
3 DAVE WALSH, PAUL HASTINGS, ON BEHALF OF APPLE FOR
4 THE HUF AND HOVSEPIAN CASES.

5 NEITHER OF OUR CASES IS SONG-BEVERLY ACT,
6 SO THE SAME ANALYSIS APPLY.

7 AND TO COUNSEL'S ARGUMENT REGARDING
8 WHETHER OR NOT HE HAS ADEQUATELY PLED FRAUD
9 UNIQUELY IN HOVSEPIAN, THE FACTS LEADING TO THE
10 DUTY TO DISCLOSE ARE IMPORTANT AND INHERENT AND
11 CRITICAL TO FRAUD, HOWEVER HE WANTS TO PLEAD IT,
12 AND THAT HASN'T BEEN PLEAD.

13 THE COURT: I THINK I'VE GOT ENOUGH FOR
14 WHAT I WANT TO DO THIS MORNING.

15 I THINK WE WILL REVISIT A LOT OF THIS
16 AGAIN, SO I DON'T WANT TO LEAVE THE FEELING THAT
17 COUNSEL WON'T HAVE A RIGHT TO SAY ANYTHING FURTHER,
18 BUT IF THERE'S ANYTHING ELSE YOU FEEL YOU MUST SAY
19 THIS MORNING, PLEASE GO AHEAD.

20 THE COURT: IF YOU COULD KEEP IT BRIEF.

21 MR. SHUB: YOUR HONOR, JONATHAN SHUB OF
22 SEEGER WEISS ON THE HOVSEPIAN CASE. THERE IS A
23 MOTION TO STRIKE CLASS ALLEGATIONS HERE.

24 THE COURT: I'M SORRY, I SHOULD'VE
25 ADDRESSED THAT. I'M NOT GOING TO DEAL WITH THAT

1 UNTIL I SEE WHETHER WE HAVE A COMPLAINT OR NOT.

2 THE COURT: ANYONE ELSE, COUNSEL?

3 GO AHEAD.

4 MS. FORD: YOUR HONOR, I'M SORRY. I WANT
5 TO MAKE TWO BRIEF POINTS AND ASK ONE QUESTION.

6 JUST MY QUESTION FIRST, WITH RESPECT TO
7 THE IMPRESS WARRANTY, IS IT THE COURT'S POSITION
8 THAT IT WOULD CONSIDER THE TERMS OF THE EXPRESS
9 WARRANTY? WE WOULD ARGUE THE COURT SHOULDN'T
10 CONSIDER IT AT THIS STAGE. OR IS THAT SOMETHING
11 THE COURT IS GOING TO RESERVE UNTIL --

12 THE COURT: I'M RESERVING. AND AS I SAID
13 TO YOUR CO-COUNSEL, I WANT TO SEE -- BASICALLY,
14 GIVE ME THE NUTS AND BOLTS, THE DETAILS OF THE
15 FRAUDULENT CONCEALMENT SO I CAN THEN STACK THAT UP
16 AGAINST THE CASE LAW AND THE TERMS OF THE EXPRESS
17 WARRANTY AND THE UCC AND SAY, DOES THIS FIT? DOES
18 THIS GET THROUGH THE KEYHOLE YOU HAVE TO GET
19 THROUGH TO GET AROUND THOSE WARRANTIES?

20 MS. FORD: OKAY, YOUR HONOR. IF I COULD
21 MAKE TWO BRIEF COMMENTS WITH THE RESPECT TO THE
22 COMMENTS MS. PREVOLOS MADE. THE MEXIA CASE RELIES
23 ON LANGUAGE THAT GOES WELL BEYOND SONG-BEVERLY ACT
24 GOING BACK TO BURR V. SHERWIN WILLIAMS --

25 THE COURT: IF IT'S A SONG-BEVERLY CASE,

1 SHE'S RIGHT ABOUT THAT. BUT THERE'S DICTA IN THERE
2 THAT WHEN I'M TRYING TO PREDICT WHERE CALIFORNIA
3 COURTS ARE GOING TO GO, I OBVIOUSLY HAVE TO
4 CONSIDER.

5 MS. FORD: AND WITH RESPECT TO THE POLICY
6 ARGUMENTS RAISED IN THE OESTRICHER CASE, I JUST
7 POINT OUT THEY ARE BASED UPON THE ABRAMS CASE WHICH
8 IS A 1986 CASE OUT OF THE SECOND CIRCUIT, WHICH
9 LIKE THE NINTH CIRCUIT IN CLEMENS DREW A VERY SHARP
10 DISTINCTION IN THEIR ANALYSIS BETWEEN THE EXPRESS
11 WARRANTY CLAIMS AND IMPLIED WARRANTY CLAIMS. SO
12 IT'S CONSISTENT WITH THAT DIFFERENTIATION.

13 SO WITH THAT I WILL SIT DOWN, YOUR HONOR.

14 THE COURT: I THINK I'VE GOT THE PICTURE.

15 YES, COUNSEL, A SURREPLY TO THE SURREPLY,
16 AND I WANT TO TALK CASE MANAGEMENT.

17 MR. WALSH: THAT'S WHAT I WAS GOING
18 ADDRESS. MOST OF US ARE HERE FOR A CMC.

19 THE COURT: RIGHT. I THINK WE OUGHT TO
20 WAIT UNTIL WE GET THE PLEADING SETTLED. SO I WAS
21 GOING TO SUGGEST PUSHING THE CMC'S EITHER 60 OR
22 90-DAYS IN ALL OF THE CASES.

23 AND PROBABLY 90 JUST GIVEN THE COMPLEXITY
24 OF THE LEGAL ISSUES. AND I HAVE TO GET A RULING
25 OUT TO YOU, AND THEN YOU'VE GOT TO FIGURE OUT WHAT

1 YOU ARE GOING TO DO, AND THERE'S PROBABLY ANOTHER
2 12(B)(6) MOTION.

3 SO HOW ABOUT NOVEMBER 13TH FOR A CMC?

4 MS. FORD: THAT'S FINE.

5 THE COURT: NOVEMBER 13TH, 10:30, FOR
6 CASE MANAGEMENT IN ALL FOUR CASES.

7 THANKS VERY MUCH. IT'S ALWAYS
8 INTERESTING. THANK YOU.

9 (WHEREUPON, THE PROCEEDINGS IN THIS
10 MATTER WERE CONCLUDED.)
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4 CERTIFICATE OF REPORTER
5
6
7

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

13 THAT THE FOREGOING TRANSCRIPT,
14 CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
15 CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
16 SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
17 HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
18 TRANSCRIPTION TO THE BEST OF MY ABILITY.
19
20
21

22 SUMMER A. CLANTON, CSR, RPR
23 CERTIFICATE NUMBER 13185
24
25