

1 SAN JOSE, CALIFORNIA

NOVEMBER 1, 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 CLERK: CALLING CASE NUMBER 10-1177,
6 MCKINNEY V. GOOGLE. ON FOR DEFENDANT'S --

7 THE COURT: COUNSEL, YOU MAY WISH TO HAVE
8 YOUR ORIGINAL DOCUMENT BACK JUST IN CASE THERE ARE
9 FURTHER PROCEEDINGS ON THIS.

10 THE CLERK: ON FOR DEFENDANT T-MOBILE'S
11 MOTION TO COMPEL AND ARBITRATION MOTION TO DISMISS
12 AND DEFENDANT HTC AND GOOGLE'S MOTION TO DISMISS.

13 FIFTEEN MINUTES EACH SIDE.

14 COUNSEL, COME FORWARD AND STATE YOUR
15 APPEARANCES.

16 MR. ROBINSTEIN: MY NAME IS HOWARD
17 ROBINSTEIN FOR THE PLAINTIFF MS. MCKINNEY.

18 MR. PLANT: YOUR HONOR, ADAM PLANT FROM
19 BIRMINGHAM, ALABAMA FOR MCKINNEY.

20 MR. WEISBURD: GOOD MORNING, YOUR HONOR.
21 STEVEN WEISBURD FOR DEFENDANT GOOGLE.

22 MS. RING: ROSEMARIE RING FOR DEFENDANT
23 HTC CORPORATION.

24 MR. GRANT: AND GOOD MORNING, YOUR HONOR.
25 JIM GRANT ON BEHALF OF T-MOBILE U.S.A.

1 THE COURT: DID YOU BRING MR. PLANT IN
2 BECAUSE I'M FROM ALABAMA?

3 MR. ROBINSTEIN: NO.

4 THE COURT: THERE ARE A BUNCH OF MOTIONS,
5 MOTION TO COMPEL ARBITRATION, MOTION TO DISMISS,
6 HTC'S MOTION TO COMPEL AND STAY, AND GOOGLE AND
7 HTC'S MOTION TO DISMISS.

8 SO WHO WANTS TO GO FIRST?

9 MR. WEISBURD: YOUR HONOR, IF I MAY, WE
10 HAD PROPOSED TO ARGUE FIRST THE GOOGLE AND HTC
11 MOTION TO DISMISS FOLLOWED BY MR. GRANT, T-MOBILE'S
12 COUNSEL, TO ARGUE T-MOBILE'S MOTION TO DISMISS AND
13 T-MOBILE'S MOTION TO ARBITRATE.

14 THE COURT: ALL RIGHT. GO AHEAD.

15 MR. WEISBURD: THANK YOU, YOUR HONOR.

16 YOUR HONOR, THE CLAIMS IN THE FIRST
17 AMENDED COMPLAINT WHICH GOOGLE AND HTC'S MOTION TO
18 DISMISS ARE A CLAIM UNDER THE FEDERAL
19 COMMUNICATIONS ACT, A CALIFORNIA STATE LAW EXPRESS
20 WARRANTY AND IMPLIED WARRANTY OF MERCHANTABILITY
21 CLAIM, AND A FEDERAL MOSS MAGNUSON WARRANTY ACT
22 CLAIM. PARDON ME.

23 ALL OF THE CLAIMS RELATE TO THE NEXUS ONE
24 ADVANCED MOBILE DEVICE. THE NEXUS ONE IS DESIGNED
25 TO OPERATE AND DOES OPERATE ON BOTH 2G OR 3G

1 NETWORKS AND THAT'S UNDISPUTED AND ALLEGED IN THE
2 COMPLAINT.

3 YET ALL OF THE CLAIMS ARE PREMISED ON A
4 SUPPOSED PROMISE OR AFFIRMATION OF FACT OR ALLEGED
5 MISREPRESENTATION THAT THE GOOGLE PHONE, AS
6 PLAINTIFFS CALL IT, THE NEXUS ONE DEVICE, WAS
7 GUARANTEED TO PROVIDE CONSISTENT 3G CONNECTIVITY
8 AND THAT'S A PROMISE THAT AS OUR MOTION TO DISMISS
9 MAKES CLEAR, WAS NOT MADE.

10 AND THE FIRST ISSUE IN OUR MOTION TO
11 DISMISS THE FEDERAL COMMUNICATIONS ACT CLAIM, IS
12 THE FACT THAT THAT CLAIM SOUNDS AS PLED FALSE
13 ADVERTISING OR MISREPRESENTATION AND YET IT ISN'T
14 PLED CONSISTENT WITH RULE 9(B)'S SPECIFICITY
15 REQUIREMENT.

16 THE PLAINTIFFS TRY TO ARGUE THAT RULE
17 9(B), THAT DOES NOT APPLY TO A FEDERAL
18 COMMUNICATION ACT CLAIM, BUT IT DOESN'T MATTER
19 WHETHER THERE'S AN ESSENTIAL ELEMENT OF THE F.C.A.
20 CLAIM FOR MISREPRESENTATION BECAUSE UNDER THE NINTH
21 CIRCUIT'S KEARNS AND VESS DECISIONS WHAT MATTERS IS
22 HOW THE PLAINTIFFS HAVE PLED THEIR THEORY AND THIS
23 THEORY IS A FALSE ADVERTISING THEORY SOUNDING IN
24 MISREPRESENTATION.

25 SO WE LOOK THROUGH THE COMPLAINT TO FIND

1 ANY INSTANCE WHERE ANY OF THE DEFENDANTS PROMISED
2 THIS CONSISTENT 3G CONNECTIVITY WITH THE NEXUS ONE
3 DEVICE, AND IT'S TOTALLY LACKING.

4 THE ONLY PARTICULARLY PLED ALLEGED
5 MISSTATEMENT BY GOOGLE IS THEIR STATEMENT ON THEIR
6 WEB SITE, QUOTE, "EXPERIENCE THE NEXUS ONE, THE NEW
7 ANDROID PHONE FROM GOOGLE."

8 WELL, THAT'S NOT A MISREPRESENTATION.
9 IT'S REALLY NOT EVEN A STATEMENT OF FACT. AND IT
10 CERTAINLY DOESN'T MAKE THE KIND OF PROMISE OF 3G
11 CONNECTIVITY THAT THE PLAINTIFFS' CLAIMS ARE
12 FOUNDED IN.

13 HTC IS NOT EVEN ALLEGED TO MAKE ANY
14 STATEMENT. SO THE F.T.C. MAKES A MISREPRESENTATION
15 CLAIM SOUNDING IN FRAUD WITH A PARTICULAR
16 REQUIREMENT BY RULE 9(B).

17 THERE ARE MULTIPLE OTHER REASONS THAT THE
18 FEDERAL COMMUNICATION ACT CLAIM FAILS THOUGH.

19 FIRST, GOOGLE AND HTC ARE NOT EVEN
20 ALLEGED TO BE COMMON CARRIERS AND THE FEDERAL
21 COMMUNICATION ACT CAN ONLY BE ASSERTED AGAINST
22 COMMON CARRIERS UNDER THE NINTH CIRCUIT'S HOWARD
23 DECISION.

24 IN ADDITION, THE NINTH CIRCUIT REQUIRES
25 IN THE NORTH COUNTY CASE THE PLAINTIFFS TO PLEAD A

1 PRIOR F.C.C. DETERMINATION THAT THE DEFENDANT'S
2 PARTICULAR CHALLENGED CONDUCT VIOLATE SECTION 201
3 OF THE FEDERAL COMMUNICATIONS ACT.

4 PLAINTIFFS DON'T PLEAD SUCH AN F.C.C.
5 DETERMINATION HERE.

6 SO THERE'S MULTIPLE REASONS THAT THE
7 FEDERAL COMMUNICATION ACT FAILS. THAT FIRST REASON
8 THAT WE TALKED ABOUT, THE FAILURE TO PLEAD ANY
9 MISSTATEMENT OR FALSE PROMISE OF 3G CONNECTIVITY
10 CARRIES RIGHT OVER TO THE EXPRESS WARRANTY CLAIM,
11 THE SECOND CLAIM, BECAUSE PLAINTIFFS DON'T ALLEGE
12 THAT GOOGLE OR HTC MADE ANY AFFIRMATION OF FACT OR
13 PROMISE ABOUT THE NEXUS ONE PHONE THAT COULD GIVE
14 RISE TO AN EXPRESS WARRANTY CLAIM PROFOUNDED ON A
15 CONSISTENT 3G CONNECTIVITY, CONSISTENT CONNECTIVITY
16 TO T-MOBILE'S 3G NETWORK.

17 IN ADDITION, AS WE EXPLAINED IN OUR
18 BRIEFS, BOTH HTC AND GOOGLE DISCLAIM THE SORT OF
19 EXPRESS WARRANTY THAT PLAINTIFFS' CLAIM IS FOUNDED
20 UPON.

21 AND UNDER YOUR HONOR'S OWN DECISION IN
22 LONG, THE KIND OF DISCLAIMER THAT GOOGLE HAS MADE
23 HERE IN ITS TERMS OF USE THAT ARE PROPERLY BEFORE
24 THE COURT UNDER ITS LONG DECISION PROVIDES ANOTHER
25 REASON WHY THE EXPRESS WARRANTY FAILS, APART FROM

1 THE FACT THAT PLAINTIFFS DON'T ALLEGE TO HAVE
2 REASONABLY RELIED ON ANY STATEMENT THAT, FRANKLY,
3 GOOGLE AND HTC NEVER MADE AND AREN'T PARTICULARLY
4 PLED TO HAVE MADE TO BEGIN WITH.

5 ON THE IMPLIED WARRANTY OF
6 MERCHANTABILITY CLAIM, YOUR HONOR, WE HAVE MULTIPLE
7 GROUNDS FOR CHALLENGING THAT CLAIM AND THE
8 PLAINTIFFS DIDN'T EVEN RESPOND TO IT IN THEIR
9 OPPOSITION BRIEF BECAUSE THE CLAIM IS LEGALLY
10 WITHOUT MERIT, APART FROM THE FACT THAT GOOGLE
11 AGAIN EXPRESSLY DISCLAIMS, CONSPICUOUSLY AND IN ALL
12 BOLD CAPS, ANY IMPLIED WARRANTY OF MERCHANTABILITY.
13 WE RAISE THAT AND THEY DON'T RESPOND.

14 FINALLY IN OUR MOTION TO DISMISS, THE
15 MOSS MAGNUSON FEDERAL WARRANTY CLAIM, JUST AS IN
16 THE I-PHONE LITIGATION, THE COURT DISMISSED THAT
17 CLAIM BECAUSE IT DEPENDED UPON A VIABLE STATE LAW
18 CLAIM. HERE PLAINTIFFS HAVE NO VIABLE STATE LAW
19 CLAIM THAT CAN SURVIVE THE MOTION TO DISMISS. SO
20 THAT CLAIM FAILS AS WELL.

21 WE ALSO RAISED PREEMPTION AT THE END.
22 POINTING TO YOUR HONOR'S I-PHONE CASE, THE
23 PLAINTIFFS' OPPOSITION DIDN'T RESPOND TO THE
24 MULTIPLE GROUNDS OF PREEMPTING. WE CITED THE NINTH
25 CIRCUIT SHROYER AND IN OUR MOTION TO DISMISS AND

1 DISTINGUISHED SHROYER IN OUR CASE AND EVEN FROM THE
2 I-PHONE CASE.

3 REMEMBER IN THE I-PHONE CASE 3G IS PART
4 OF THE PRODUCT'S NAME. THE NEXUS ONE DOES NOT HAVE
5 3G AS PART OF THE PROVIDER'S NAME.

6 NEITHER HTC NOR GOOGLE NOR T-MOBILE FOR
7 THAT MATTER HAVE MADE ANY PROMISE OF CONSISTENT 3G
8 CONNECTIVITY. SO THE WHOLE ESSENCE OF THIS CASE
9 LACKS ANY BASIS IN THE LAW AND ALL OF THE CLAIMS
10 FAIL.

11 IF I COULD RESERVE THE REMAINDER OF MY
12 TIME, YOUR HONOR.

13 THE COURT: VERY WELL.

14 MR. GRANT: YOUR HONOR, JIM GRANT ON
15 BEHALF OF T-MOBILE. AND I HAVE TWO MOTIONS TO
16 ADDRESS HERE AND I KNOW WE HAVE LIMITED TIME AND
17 SOME OF IT NECESSARILY WILL BE SOMEWHAT SUMMARY.
18 UNLESS THE COURT HAS A DIFFERENT PREFERENCE, I'M
19 GOING TO DO THE MOTION TO DISMISS AND THEN MOTION
20 TO COMPEL ARBITRATION.

21 THE COURT: VERY WELL. AND --

22 MR. GRANT: PRIMARILY TO EMPHASIZE ALL OF
23 THE GROUNDS THAT GOOGLE AND HTC HAVE MOVED TO
24 DISMISS THE CLAIMS TO DISMISS ALSO APPLIED TO
25 T-MOBILE AND WE HAVE MORE GROUNDS AND MORE BASES TO

1 DISMISS THE CLAIMS.

2 IN FACT, THERE'S A NUMBER OF REASONS WHY
3 T-MOBILE SHOULD NOT BE IN THIS CASE AND SHOULDN'T
4 BE BEFORE THIS COURT AND IT'S PRETTY SIMPLE.

5 T-MOBILE DIDN'T SELL THE PHONE TO MS. MCKINNEY AND
6 NEVER SOLD IT TO ANYONE, NEVER MARKETED THE PHONE,
7 DID NOT MANUFACTURE THE PHONE, NEVER SAID ANYTHING
8 ABOUT THE PHONE AT ALL.

9 SO IT'S A SITUATION WHERE YOU HAVE A
10 PLAINTIFF WHO IS BRINGING A CLAIM AGAINST A COMPANY
11 THAT DIDN'T SELL HER ANYTHING. SHE DIDN'T BUY
12 SERVICE IN CONNECTION WITH THIS PHONE, SHE DIDN'T
13 BUY -- EXTEND HER SERVICE WITH T-MOBILE, BUT SHE'S
14 BRINGING THAT CLAIM AGAINST T-MOBILE SIMPLY BECAUSE
15 SHE COULD USE THE NEXUS ONE PHONE ON HER T-MOBILE
16 SERVICE AND SHE CHOSE TO DO THAT.

17 SHE ALSO COULD HAVE USED THE NEXUS ONE
18 PHONE ON AT & T SERVICE OR ANY OTHER GSM CARRIER IN
19 THE UNITED STATES AND SHE CHOSE TO USE IT ON HER
20 EXISTING T-MOBILE SERVICE.

21 BEAR IN MIND SHE WAS A SUBSCRIBER OF
22 T-MOBILE FOR EIGHT YEARS BEFORE THE TIME THAT SHE
23 BOUGHT THE GOOGLE PHONE FROM GOOGLE AND AT THAT
24 TIME SHE EXTENDED HER SERVICE WITH T-MOBILE 68
25 TIMES. SO THIS IS NOT A TRANSACTION THAT HAD TO DO

1 WITH T-MOBILE.

2 ON THAT BASIS WE HAVE GIVEN YOU THREE
3 GROUNDS TO DISMISS THEM ALTOGETHER. FIRST UNDER
4 12(B)(1) SHE HAS NO STANDING TO SUE T-MOBILE FOR
5 ANYTHING. AGAIN, SHE DIDN'T HAVE A TRANSACTION
6 CONCERNING THIS PHONE, T-MOBILE DIDN'T SAY ANYTHING
7 ABOUT THE PHONE, AND T-MOBILE DIDN'T MANUFACTURE
8 THE PHONE.

9 SECONDLY, SHE CAN'T BRING A CLAIM FOR
10 BREACH OF WARRANTY WHEN T-MOBILE CLEARLY DIDN'T
11 WANT IT, AND, IN FACT, THE TERMS AND CONDITIONS
12 WITH MS. MCKINNEY DISCLAIM ALL WARRANTIES.

13 SO A WARRANTY DOESN'T APPLY TO T-MOBILE
14 AND BEYOND THAT EVEN IF HER CLAIM WAS SHE DIDN'T
15 LIKE T-MOBILE SERVICE AND SHE DIDN'T THINK IT WAS
16 ADEQUATE SERVICE, THAT'S A CLAIM ABOUT A SERVICE,
17 THAT'S NOT A CLAIM ABOUT A PRODUCT AND THERE ISN'T
18 A WARRANTY CLAIM HERE BASED ON A SERVICE BUT NOT A
19 PRODUCT.

20 WHICH THEN GOES TO ANY OTHER STATE LAW
21 CLAIMS THAT, THAT MS. MCKINNEY WOULD LIKE TO BRING
22 BECAUSE UNDER SECTION 3332 UNDER THE FEDERAL
23 COMMUNICATIONS ACT, CLAIMS TO WIRELESS CARRIERS
24 THAT ATTACK MARKET ENTRY OR RATES OF SERVICE ARE
25 PRECLUDED UNDER THAT ACT.

1 THAT'S THE I-PHONE CASE THAT THE COURT
2 HAS ALREADY RULED ON. THE CLAIMS THAT MS. MCKINNEY
3 WOULD HAVE AGAINST T-MOBILE WOULD HAVE NOTHING TO
4 DO EXCEPT WITH HER SERVICE BECAUSE THAT'S ALL SHE
5 EVER BOUGHT FROM T-MOBILE, SEPARATE AND APART FROM
6 THE GOOGLE PHONE.

7 AND AS MR. WEISBURD POINTED OUT, THE
8 FOURTH GROUND FOR OUR MOTION TO DISMISS IS THE
9 NORTH COUNTY COMMUNICATIONS DECISION. THERE HAS
10 NEVER BEEN A DETERMINATION BY THE F.C.C. THAT
11 ANYTHING THAT T-MOBILE HAS EVER SAID ABOUT ITS
12 NETWORK OR ITS NETWORK IN ITSELF IS INADEQUATE OR
13 MISLEADING OR DECEPTIVE.

14 THAT'S THE BASIS FOR THE MOTION TO
15 DISMISS. UNLESS YOU HAVE FURTHER QUESTIONS, I
16 WOULD LIKE TO BRIEFLY TOUCH ON THE MOTION TO COMPEL
17 ARBITRATION.

18 THE COURT: YOU MAY STAY IN THE CASE WITH
19 ALL OF THAT ARGUMENT THOUGH.

20 MR. GRANT: OR YOU CAN DISMISS THE CASE
21 ALTOGETHER AND WE DON'T HAVE TO TALK ABOUT
22 ARBITRATION. EITHER WAY.

23 THE COURT: I'M NOT SURE I CAN GO BOTH
24 WAYS. IN OTHER WORDS, DON'T I HAVE TO CONSIDER THE
25 MOTION TO COMPEL ARBITRATION, AND IF I DECIDE IT IS

1 ARBITRATABLE, GET RID OF IT WITHOUT REACHING THE
2 MOTION TO DISMISS?

3 MR. GRANT: IN LOGIC, I THINK YOU'RE
4 RIGHT. THE LOGICAL PREDICATE IS YOU WOULD ADDRESS
5 THE QUESTION TO THE COURT'S JURISDICTION BASICALLY
6 FIRST AND TO THE EXTENT THAT ARBITRABILITY IS YOU
7 MAKE THE DECISION WHETHER OR NOT THIS CASE GOES TO
8 ARBITRATION. YOU COULD SAY THERE'S NO BASIS FOR A
9 CLAIM WHATSOEVER AND DISMISS T-MOBILE FROM THE CASE
10 REGARDLESS BECAUSE IF THERE'S NO CLAIM IN
11 LITIGATION, THERE'S NO CLAIM IN ARBITRATION EITHER.
12 BUT I UNDERSTAND THE LOGICAL PREMISE.

13 THE COURT IS FAMILIAR WITH THE
14 ARBITRATION ACT AND IS IN STRONG FAVOR OF
15 ARBITRATION. AND WE ALREADY SAID SHE SIGNED UP 68
16 DIFFERENT TIMES AND ACCEPTED THEM IN THE TERMS AND
17 CONDITIONS 68 DIFFERENT TIMES.

18 PLAINTIFFS' ARGUMENT AGAINST ARBITRATION
19 IS SOMEHOW THIS COURT SHOULD APPLY CALIFORNIA LAW.
20 WE HAVE GONE THROUGH THIS AT SOME LENGTH IN THE
21 PAPERS, BUT THERE'S NO BASIS WHATSOEVER HERE OF AN
22 OUT OF STATE PLAINTIFF BRINGING A CLAIM AGAINST AN
23 OUT OF STATE, AND THEN COMING INTO THE STATE OF
24 CALIFORNIA AND SAYING JUST BECAUSE I LIKE THE
25 PUBLIC POLICY OF THE STATE OF CALIFORNIA, I GET TO

1 INVOKE THAT AND WE DON'T APPLY THE CONTRACTUAL
2 CHOICE OF LAW THAT IS IN MY CONTRACT, PENNSYLVANIA
3 LAW.

4 WE CITED TO THE COURT FOUR DIFFERENT
5 CASES INCLUDING DETWHILER (PHONETIC) FROM THE NINTH
6 CIRCUIT; AND JANSTER (PHONETIC) CASE FROM THE
7 SOUTHERN CIRCUIT; AND IN THIS CASE AND THE MCMELLON
8 (PHONETIC) CASE FROM THIS COURT.

9 TWO OF THOSE BOTH ENFORCED T-MOBILE'S
10 TERMS AND CONDITIONS AND HELD THAT PLAINTIFFS FROM
11 OUT OF STATE AND MARYLAND AND ILLINOIS AND OTHER
12 STATES HAD TO WORK TO COMPEL TO ARBITRATE BECAUSE
13 OF THE STATE LAWS OF THOSE STATES.

14 AS TO PENNSYLVANIA LAW IT'S PRETTY CLEAR
15 WHY PLAINTIFFS DON'T LIKE IT. WE CITED THE COURT
16 EIGHT CASES, ALL OF WHICH OPPOSE CLASS ACTION
17 WAIVERS WHERE A PLAINTIFF HAS A RIGHT TO GET ANY
18 REMEDIES OR RECOVERY SHE COULD GET ON HER
19 INDIVIDUAL CLAIMS AS SHE MIGHT GET IN A COURT OF
20 LAW AND CAN RECOVER ATTORNEYS' FEES, AND CAN
21 RECOVER COSTS, AND AS IN THIS CASE CAN OPT OUT OF
22 ARBITRATION ALTOGETHER. UNDER ARBITRATION LAW
23 THAT'S CLEARLY NOT UNCONSCIONABLE.

24 I DID THAT ALL RATHER SUMMARILY BUT IF
25 YOU HAVE ANY QUESTIONS, I'M HAPPY TO ADDRESS THEM.

1 THE COURT: THERE'S BOTH SUBSTANTIVE AND
2 PROCEDURAL AND UNCONSCIONABILITY. DO YOU THINK YOU
3 PASS BOTH?

4 MR. GRANT: I THINK THERE'S NEITHER.
5 UNDER PROCEDURAL UNCONSCIONABILITY AND THE
6 PENNSYLVANIA CASES MS. MCKINNEY CANNOT SHOW EITHER
7 BECAUSE SHE COULD OPT OUT OF ARBITRATION, THEY HAD
8 A RIGHT, SEVERAL RIGHTS NUMEROUS TIMES. SHE COULD
9 HAVE SAID I DON'T WANT TO HAVE THE ARBITRATION
10 CLAUSE APPLIED TO ME. SO SHE CAN'T BE FORCED TO
11 ACCEPT AN AGREEMENT SO THERE CAN'T BE
12 UNCONSCIONABILITY.

13 ALSO UNDER THE LINSTIN (PHONETIC) CASE IN
14 PENNSYLVANIA, IF THE PLAINTIFF HAS THE CHOICE TO
15 GET THE SERVICE FROM SOME OTHER PROVIDER,
16 MS. MCKINNEY COULD BUY FROM AT & T AND VERIZON,
17 THERE COULD NOT BE UNCONSCIONABILITY.

18 ON SUBSTANTIAL UNCONSCIONABILITY, THERE
19 IS NO PER SE RULE THAT JUST BECAUSE YOU WAIVE
20 REMEDIES IT'S SUBSTANTIALLY UNCONSCIONABILITY.
21 THAT MAY BE THE LAW OF CALIFORNIA UNTIL THE SUPREME
22 COURT RULES, WHICH IS A PENDING ISSUE IN THE
23 EPSEPSIAN (PHONETIC) CASE.

24 BUT IS THERE A RIGHT TO RECOVER THE SAME
25 KINDS OF REMEDIES YOU COULD IN A COURT? AND IF YOU

1 COULD RECOVER ALL OF THOSE SAME REMEDIES AND YOU
2 CAN RECOVER ATTORNEYS' FEES, AND YOU CAN RECOVER
3 COSTS, UNDER THE KRONAN DECISION FROM THE THIRD
4 CIRCUIT AND ACTUALLY SEVEN OTHER CASES WE CITED TO
5 YOU, PENNSYLVANIA LAW IS THAT THAT'S NOT
6 SUBSTANTIALLY UNCONSCIONABLE?

7 THE COURT: DO YOU WANT TO ADD TO THIS?

8 MS. RING: JUST A LITTLE BIT.

9 GOOD MORNING, YOUR HONOR. ROSEMARIE RING
10 FOR HTC. HTC IS MOVING TO COMPEL ARBITRATION AND
11 MOVING TO DISMISS FOR FAILURE TO STATE A CLAIM.

12 MR. WEISBURD HAS DONE THE HEAVY LIFTING
13 WITH THE MOTION TO DISMISS AND MR. GRANT HAS DONE
14 THAT ON THE MOTION TO COMPEL ARBITRATION, AND I'M
15 JUST GOING TO ADDRESS THE ISSUE TO COMPEL
16 ARBITRATION UNIQUE TO HTC SINCE HTC IS ENFORCING
17 THAT AGREEMENT AS A THIRD PARTY BENEFICIARY. AND
18 THAT'S A VERY SIMPLE ARGUMENT, YOUR HONOR.

19 THE PLAINTIFFS' ARBITRATION AGREEMENT
20 WITH T-MOBILE PROVIDES FOR ARBITRATION WITH CLAIMS
21 RELATED TO T-MOBILE SERVICE BROUGHT BY OTHER
22 PARTIES SUCH AS, QUOTE, SUCH AS OUR SUPPLIERS AND
23 RETAIL DEALERS WHEN THERE ARE CLAIMS BROUGHT
24 AGAINST T-MOBILE IN THE SAME PROCEEDING.

25 THE ARBITRATION AGREEMENT HERE IS

1 ENFORCEMENT FOR THE REASONS STATED IN T-MOBILE'S
2 MOTION TO COMPEL WHICH HTC HAS JOINED AND
3 PLAINTIFFS' CLAIMS AGAINST HTC ARE CLEARLY WITHIN
4 THE SCOPE OF THAT PROVISION AND AS THEY RELATE
5 AGAINST SERVICE AND THEY WERE BROUGHT AGAINST THIS
6 AGAINST T-MOBILE.

7 PLAINTIFFS HAVE RAISED A NUMBER OF
8 ARGUMENTS IN OPPOSITION, ARGUING THAT HTC IS NOT A
9 THIRD PARTY BENEFICIARY. ALL OF THEIR ARGUMENTS
10 ARE INCONSISTENT WITH THE EXPRESS TERMS OF THE
11 AGREEMENT WHICH CLEARLY EXPRESS AN INTENT, AN
12 INTENT TO ALLOW, TO ALLOW T-MOBILE, AND THIRD
13 PARTIES WHO ARE LITIGATING CLAIMS RELATING TO
14 T-MOBILE SERVICE IN THE SAME PROCEEDING, TO
15 ARBITRATE THOSE CLAIMS TOGETHER.

16 AND ON THE MOTION TO DISMISS, YOUR HONOR,
17 I WOULD JUST SAY THAT THIS CASE IS A
18 MISREPRESENTATION CASE WITH NO MISREPRESENTATION.

19 ALL OF THE PLAINTIFFS' CLAIMS ARE BASED
20 ON HER CONTENTION THAT SHE SHOULD HAVE RECEIVED
21 SOME HIGHER LEVEL OF 3G CONNECTIVITY THAN THEY
22 ALLEGEDLY DID, BUT WHICH NO DEFENDANT EVER
23 PROMISED, EVER WARRANTED, AND WHICH IS NOT REQUIRED
24 FOR THE, FOR THE NEXUS ONE TO FUNCTION IN ITS
25 ORDINARY PURPOSE WHICH IS AS A SMART PHONE THAT IS

1 DESIGNED TO PROVIDE PHONE AND DATA SERVICES ON
2 EITHER OF THE 2G OR 3G NETWORKS AND TO SWITCH
3 BETWEEN THOSE NETWORKS BASED ON NETWORK
4 AVAILABILITY.

5 THANK YOU, YOUR HONOR.

6 THE COURT: COUNSEL. WHO WILL ARGUE FOR
7 THE PLAINTIFF?

8 MR. PLANT: I WILL, YOUR HONOR.

9 YOUR HONOR, ASIDE FROM BEING OUTNUMBERED,
10 I THINK I'M GOING TO TRY TO ADDRESS THESE ARGUMENTS
11 BACK TO FRONT AND SEE IF I CAN MAKE SENSE WITH
12 REGARD TO IT THAT WAY.

13 WITH REGARD TO THE MOTION TO COMPEL, AS
14 WE SAID IN OUR PAPERS, WE BELIEVE IT WAS A DEVICE
15 USED SOME TIME IN THE FUTURE WHEN THE ARBITRATION
16 PROVISION WAS ENTERED INTO. WE DON'T BELIEVE THAT
17 HTC COULD BE A THIRD PARTY BENEFICIARY BECAUSE WE
18 THINK IT CREATES SOME SORT OF SITUATION WHERE THE
19 SUBSTANTIVE PROBLEM IS WITH THE NETWORK OR THE
20 PHONE OR BOTH THEN THAT WOULD PUT HTC AT
21 CROSS-PURPOSES FROM THE INTENT OF THE ARBITRATION
22 CLAUSE WHICH WOULD BE TO ARBITRATE AGAINST T-MOBILE
23 AND HTC BECAUSE IT'S THE MAKER OF THE PHONE COULD
24 HAVE CROSS-PURPOSES THERE.

25 WITH REGARD TO THE T-MOBILE MOTION TO

1 COMPEL, COUNSEL HAS CITED THEIR CASES AND OURS ARE
2 IN THE BRIEF AS WELL, INCLUDING TIBIDO. ONE THAT
3 WAS NOT IN THE BRIEF WAS CLARK VERSUS BANK AND
4 WHICH WAS A 2010 CASE WHICH WAS FROM THE EASTERN
5 DISTRICT OF PENNSYLVANIA. AND MOST IMPORTANTLY,
6 YOUR HONOR, WITH REGARD TO CALIFORNIA CHOICE OF
7 LAW, THAT ARGUMENT IS A LITTLE THIN RIGHT NOW.

8 HOWEVER, IF AMENDMENT --

9 THE COURT: ON YOUR PART OR THEIR PART?

10 MR. PLANT: ON OUR PART. WITH REGARD TO
11 THE AMENDMENT OF THE COMPLAINT, IF IT'S ALLOWED, WE
12 WOULD INCLUDE, FOR EXAMPLE, U.C.L. CLAIMS WHICH
13 REQUIRE INJUNCTIVE RELIEF, WHICH CAN'T BE
14 ARBITRATED.

15 AND IF CALIFORNIA LAW IS APPLIED IN THAT
16 REGARD, AFTER WE AMEND THE COMPLAINT, IF IT'S
17 ALLOWED, WHICH IS SET FOR NOVEMBER THE 29TH, THEN
18 THAT WOULD CHANGE THE ANALYSIS.

19 I'M NOT SURE WE COULD REALLY REACH
20 RESOLUTION HERE THAT WOULD CARRY THROUGH TO THE NEW
21 CLAIMS THAT ARE BASED ON STATE LAW.

22 THE COURT: WHAT IS CALIFORNIA'S
23 INTEREST?

24 MR. PLANT: CALIFORNIA'S INTEREST WOULD
25 BE THE PUBLIC ATTORNEY GENERAL FUNCTION -- EXCUSE

1 ME -- THE PRIVATE ATTORNEY FUNCTION PROSECUTING
2 THIS CASE.

3 THE COURT: WHAT DO YOU HAVE IN YOUR
4 CURRENT COMPLAINT?

5 MR. PLANT: THERE IS NOT MUCH, YOUR
6 HONOR.

7 THE COURT: WELL, WHAT IS LEFT THEN?

8 MR. PLANT: WELL, WHAT IS LEFT IS THE
9 FEDERAL COMMUNICATIONS ACT CLAIM AGAINST -- WELL,
10 WITH REGARD TO THESE PAPERS SPECIFICALLY, HTC,
11 T-MOBILE, GOOGLE ARE UNDER SECTIONS 201 AND 207 OF
12 THE FEDERAL COMMUNICATIONS ACT.

13 AND THIS BLEEDS OVER A LITTLE BIT TO THE
14 MOTION TO DISMISS. THIS IS NOT JUST A
15 MISREPRESENTATIONS CASE. IT'S A CASE THAT, YES,
16 THE MISREPRESENTATION OF THE 3G NATURE OF THE
17 DEVICE BUT ALSO THE CUSTOMER SERVICE FOLLOWING THE
18 SALE AND THE ABILITY TO USE THE PHONE WHEN IT
19 DOESN'T WORK, YOU KNOW, IF YOU SEND AN E-MAIL TO
20 GOOGLE AND YOU DON'T HEAR BACK FOR THREE DAYS, YOU
21 HAVE LOST THREE DAYS WORTH OF SERVICE. IF YOU CALL
22 THEM, THEN YOU LOST THAT TIME PERIOD OF SERVICE FOR
23 WHICH YOU HAVE PAID AND WHICH WE BELIEVE THE CLIENT
24 SHOULD BE GIVEN RESTITUTION FOR.

25 PLAINTIFF MCKINNEY HAS STANDING. THEIR

1 ARGUMENT DEPENDS ON THE FACT THAT SHE, SHE DID NOT,
2 DID NOT HAVE AN AGREEMENT WITH T-MOBILE IN A SENSE
3 BECAUSE SHE ALREADY WAS UNDER CONTRACT. SHE BOUGHT
4 THIS PHONE LATER. AND SHE USED IT ON THEIR
5 NETWORK. THEY WERE HER SERVICE PROVIDER AND SHE
6 DID NOT, SHE BELIEVES, REFUSE THE BENEFIT OF HER
7 BARGAIN WITH T-MOBILE.

8 SHE BELIEVES THAT IT WAS, IT WAS AN
9 UNJUST CHARGE TO PAY FOR PREMIUM SERVICE AND NOT
10 HAVE THAT PREMIUM SERVICE WITH REGARD TO THE GOOGLE
11 PHONE AND THE T-MOBILE NETWORK.

12 AND MORE IMPORTANTLY, WITH REGARD TO THE
13 T-MOBILE MOTION TO DISMISS AND TO SOME DEGREE THE
14 GOOGLE AND HTC MOTION TO DISMISS IS THE NORTH
15 COUNTY CASE.

16 PRIMARY JURISDICTION IS NO BAR, UNLIKE
17 NORTH COUNTY IN WHICH IT WAS ABSOLUTELY AN
18 INTRICATE TECHNICAL ISSUE INVOLVING CLICKS AND
19 ILECS. AND AS A GENERAL RULE ANYTHING THAT HAS
20 THAT MANY ACRONYMS HAS SPECIALIZED KNOWLEDGE WHICH
21 I BELIEVE THIS CASE DOESN'T HAVE.

22 IT WOULD BE WHETHER UNDER SECTIONS 201
23 AND 207 OF THE FEDERAL COMMUNICATIONS ACT
24 MS. MCKINNEY RECEIVED THE SERVICE THAT SHE WAS
25 PROMISED, WHETHER HER -- UNDER THE PREVIOUS F.T.C.

1 AND F.C.C. DECISIONS REGARDING MISREPRESENTATIONS,
2 THEY LIVED UP TO THE SERVICE THEY PROMISED HER.

3 THE COURT: WHAT WAS THE SERVICE THAT
4 THEY PROMISED?

5 MR. PLANT: 3G CONNECTIVITY ON A 3G
6 DEVICE.

7 THE COURT: WHERE WAS THAT PROMISED?

8 MR. PLANT: SEVERAL ADS REGARDING WHERE
9 -- WHAT THE PHONES CAPABILITIES WERE. UPLOADING
10 SPEEDS AT 7.2 MEGS.

11 THE COURT: AND SO WHAT I WAS HEARING
12 FROM YOUR OPPONENT IS THE WORD "CONSISTENT."

13 I TAKE IT YOU ACKNOWLEDGE THAT THE PHONE
14 IS CAPABLE OF SUPPORTING 3G CONNECTIVITY.

15 MR. PLANT: IT IS UNDER CERTAIN
16 CIRCUMSTANCES.

17 THE COURT: AND THAT THERE IS 3G
18 CONNECTIVITY PROVIDED BY T-MOBILE?

19 MR. PLANT: THAT'S THE CONNECTIVITY
20 PROMISED BUT NOT ALWAYS PROVIDED.

21 THE COURT: RIGHT. BUT IT IS AVAILABLE.
22 SO IF YOU WERE LIVING IN A WORLD WHERE THERE WAS
23 ONLY ONE PHONE STANDING RIGHT NEXT TO A 3G TOWER,
24 NO PROBLEM.

25 MR. PLANT: IF THE SOFTWARE AND FIRMWARE

1 WERE THEN I BELIEVE THAT WOULD BE ACCURATE.

2 THE COURT: WELL, ASSUMING THAT IF IT IS
3 PROPERLY TURNED ON AND OPERATING.

4 THE COURT: IS THERE SOME DEFECT THAT
5 WILL NOT ALLOW IT TO CONNECT TO 3G SIGNAL OR THAT
6 NETWORK?

7 MR. PLANT: AT THIS POINT WE'RE NOT SURE
8 WHETHER THERE WAS A DISCONNECT IN THE PHONE OR IN
9 THE PHONE OR --

10 THE COURT: WELL, ARE YOU ALLEGING THAT
11 THERE IS A DEFECT SOMEWHERE SO THAT THE PHONE IS
12 NOT ABLE TO CONNECT TO 3G?

13 MR. PLANT: YES.

14 THE COURT: WHERE DO YOU ALLEGE THAT?

15 MR. PLANT: I BELIEVE WE HAVE ALLEGED
16 THAT IN OUR COMPLAINT.

17 THE COURT: WHERE? SHOW ME THE LANGUAGE.

18 MR. PLANT: I'M LOOKING THROUGH IT RIGHT
19 NOW.

20 THE COURT: I SEE CONSISTENT
21 CONNECTIVITIES, BUT I'M ASKING IS THERE A CLAIM OF
22 LACK OF CONNECTIVITY?

23 MR. PLANT: YOU MEAN UNDER ANY
24 CIRCUMSTANCE?

25 THE COURT: I DON'T QUALIFY A LACK OF

1 CONNECTIVITY. IN OTHER WORDS, THE PHONE WILL NOT
2 OPERATE ON A 3G NETWORK.

3 MR. PLANT: YOUR HONOR, IT'S NOT THE
4 PHONE WON'T OPERATE AT ALL. IT'S THAT THE PHONE
5 VACILLATES BETWEEN 2G AND 3G.

6 THE COURT: LET'S ASSUME THAT TO BE THE
7 CASE, THAT IT VACILLATES BETWEEN THE TWO. WHERE IS
8 THE PROMISE THAT IT WOULD NOT VACILLATE AND REMAIN
9 3G? IN FACT, THAT MIGHT BE A WEAKNESS IN THE PHONE
10 BECAUSE YOU WANT CONSISTENT CONNECTIVITY AT
11 WHATEVER SPEED, SOMETIMES YOU NEED 3G AND SOMETIMES
12 YOU DON'T AND YOU WOULDN'T WANT THE PHONE TO SAY,
13 OH, MY GOODNESS, YOU NEED 2G AND WE'RE ONLY GETTING
14 3G AND LET'S STOP. YOU WANT IT TO OPERATE, I
15 PRESUME, BUT WHERE IS IT THAT IT'S ALLEGED THAT THE
16 REPRESENTATION IS THAT IT WOULD ALWAYS OPERATE ON
17 3G ALL OF THE TIME?

18 MR. PLANT: YOUR HONOR, THAT HAS NOT BEEN
19 PLED SPECIFICALLY IN THIS COMPLAINT.

20 AS WE HAVE MENTIONED IN OUR BRIEFS --

21 THE COURT: CAN YOU? I MEAN, RULE 11
22 ALLOWS YOU, I'M WILLING TO GIVE YOU LEAVE IF YOU
23 WANT TO GO BACK AND SEE WHETHER OR NOT YOU CAN MEET
24 THE CHALLENGE THAT IS BEING OFFERED, NAMELY, TO
25 ALLEGE A MISREPRESENTATION BASED ON A

1 REPRESENTATION THAT IT WILL CONSISTENTLY FUNCTION
2 AT 3G ALL OF THE TIME.

3 MR. PLANT: YOUR HONOR, I BELIEVE THAT IT
4 CAN.

5 THE COURT: WHAT IS THAT BASED ON?

6 MR. PLANT: WELL, THAT'S BASED ON FURTHER
7 INVESTIGATION REGARDING THE ADVERTISING MATERIALS
8 AND PROMOTIONAL MATERIALS THAT THE DEFENDANTS
9 PRODUCED.

10 THE COURT: SO --

11 MR. PLANT: IT WOULD BE BASED ON FURTHER
12 EXPLANATION OF MS. MCKINNEY'S OWN EXPERIENCE.

13 THE COURT: WELL, I'LL TAKE THAT TO BE A
14 REQUEST THAT THE COURT LOOK TO SEE WHETHER OR NOT
15 LEAVE OUGHT TO BE GRANTED BUT IT ALSO SEEMS TO ME
16 ACKNOWLEDGEMENT THAT THE COMPLAINT AS IT'S
17 CURRENTLY WORDED SHOULD BE DISMISSED.

18 I DON'T KNOW WHAT TO MAKE ABOUT WHAT
19 COMES FIRST, THE ARBITRATION OR THE DISMISSAL. IT
20 SEEMS TO ME THAT ONCE I HAVE DECIDED THAT THERE IS
21 AN ARBITRATABLE ISSUE, I SHOULD STOP EVERYTHING
22 WITH RESPECT TO THAT AND SEND IT OUT FOR
23 ARBITRATION.

24 ARBITRATION CAN BE WAIVED. I DON'T HEAR
25 ANY WAIVER OF THAT SO I'LL LOOK AT THAT.

1 I'M NOT SURE I COULD JUSTIFY SAYING THAT
2 I'M GOING TO DISMISS THE CASE WITHOUT CONSIDERING
3 THE QUESTION OF ARBITRATION, BUT I'LL LOOK AT THAT.

4 MR. PLANT: YOUR HONOR, THERE WAS ONE
5 FURTHER ISSUE THAT I WOULD LIKE TO MENTION.

6 THE COURT: SURE.

7 MR. PLANT: BASED ON THE CURRENT STATE OF
8 THE LAW, TWO THINGS. FIRST OF ALL, THE F.C.A.
9 CLAIM IS NOT REQUIRED TO MEET THE 9(B) STANDARDS.
10 ALL THAT'S REQUIRED IS THE 8(A) NOTICE PLEADINGS
11 STANDARD. NO PART OF THIS CASE SOUNDS IN FRAUD.

12 THE COURT: SO YOU'RE NOT MAKING A CLAIM
13 THAT THERE WAS NOT ANY MISREPRESENTATION.

14 MR. PLANT: THAT IS ONE ELEMENT. THE
15 SECOND ELEMENT IS BECAUSE MS. MCKINNEY DID NOT
16 RECEIVE THE BARGAIN BECAUSE IF THE PHONE WASN'T
17 WORKING THEN SHE WOULD HAVE TO GO THROUGH THE
18 PROCESS AND SHE WAS LEFT WITHOUT PHONE SERVICE FOR
19 A COUPLE OF DAYS.

20 THE COURT: SO THE CLAIM IS THAT IT DID
21 NOT -- THE INSTRUMENT DID NOT WORK?

22 MR. PLANT: WELL, YOUR HONOR, I DO NOT
23 BELIEVE THAT I COULD SAY WITH ANY CERTAINTY WHETHER
24 OR NOT IT WAS THE PHONE OR THE NETWORK. IT COULD
25 HAVE BEEN EITHER, IT COULD HAVE BEEN EITHER OR IT

1 COULD HAVE BEEN BOTH. I DON'T KNOW THAT STANDING
2 HERE TODAY.

3 THE COURT: AND WHAT ABOUT THE F.C.A.
4 ISSUE? HAVE YOU EXHAUSTED? CAN I TAKE THIS CASE?

5 MR. PLANT: YES, SIR, YOU CAN TAKE THIS
6 CASE BECAUSE IT'S NOT THAT THERE IS AN EXHAUSTION
7 REQUIREMENT. IT'S JUST THAT THE ISSUES HAVE BEEN
8 RESOLVED.

9 FOR EXAMPLE, WITH REGARD TO ADVERTISING,
10 THE F.C.C. DOESN'T EVEN HAVE A BODY OF
11 MISREPRESENTATION LAW THAT IT REGULARLY CHURNS OUT.

12 IT HAS ADOPTED F.T.C. POLICY STATEMENTS
13 AND THE JOINT STATEMENT ON ADVERTISING AND WE
14 BELIEVE THAT UNDER F.T.C. AND F.C.C.
15 REPRESENTATIONS, WITH REGARD TO THE
16 MISREPRESENTATIONS IN THE CASE, THOSE HAVE BEEN
17 RESOLVED.

18 THERE'S A BODY OF LAW OUT THERE THAT
19 WOULDN'T REALLY REQUIRE ANY SPECIALIZED KNOWLEDGE.
20 IN FACT, THIS COURT WOULD BE BETTER SUITED PROBABLY
21 THAN THE F.T.C. IS BECAUSE YOU DEAL WITH CONSUMER
22 CASES ON A REGULAR BASIS.

23 THE COURT: ANYTHING FURTHER?

24 MR. GRANT: YOUR HONOR --

25 MR. PLANT: YOUR HONOR, NOTHING FURTHER.

1 THE COURT: ANY RESPONSE?

2 MR. GRANT: A FEW. UNDER NORTH COUNTY
3 THE F.T.C. APPLIES IN THIS CASE. THE CARNEY CASE
4 CITED IN OUR BRIEFS WAS A DISTRICT COURT DECISION
5 IN WHICH THE PLAINTIFFS TRIED TO SAY THAT THE COURT
6 IS UNIQUELY SITUATED TO DETERMINE FRAUD. AND SO
7 YOU DON'T NEED AN F.C.C. DETERMINATION BECAUSE THE
8 COURT REJECTED IT BECAUSE THE F.C.C. IN NORTH
9 COUNTY MANDATES THAT ARGUMENT.

10 THE NOTION THAT THE ISSUES ARE SIMPLE
11 WHEN IT'S AN ALLEGED DECEPTIVE SPEECH CLAIM IS
12 CONTRARY TO THE SCHROEDER CASE WHERE THE SUPREME
13 COURT IN 1985, "A BIG COMMERCIAL SPEECH CASE SAYS
14 IT'S NOT TRUE THAT DISTINGUISHING NONDECEPTIVE
15 CLAIMS IN ADVERTISING INVOLVING PRODUCTS OR OTHER
16 LEGAL SERVICES IS A COMPARATIVELY SIMPLE AND
17 STRAIGHTFORWARD PROCESS."

18 WITH RESPECT TO THE MISREPRESENTATION
19 ALLEGATIONS, THAT'S THE GROUNDED CORE OF THIS
20 F.C.A. CLAIM AS PLEAD. UNDER KEARNS, AND IT
21 DOESN'T MATTER THAT THE F.C.A. -- IT DOESN'T ALWAYS
22 REQUIRE CLAIMS TO BE PLED WITH FRAUDULENT CONDUCT.
23 THIS CLAIM IS PLEAD AS A MISREPRESENTATION CLAIM.

24 THE NOTION THAT PLAINTIFFS CAN PLEAD A
25 MISSTATEMENT OF CONSISTENT CONNECTIVITY THAT, THAT

1 CONSISTENT WITH RULE 11 AND RULE 9(B) IS A DUBIOUS
2 ONE, YOUR HONOR, AND THE REASON I SUBMIT IT WOULD
3 BE FUTILE TO GRANT LEAVE TO AMEND IS THAT
4 PLAINTIFFS HAD MADE A PROFFER TO THE COURT OF WHAT
5 THEIR SECOND AMENDED COMPLAINT WOULD LOOK LIKE AND
6 WHAT I THINK IS AN IMPROPER MOTION FOR LEAVE TO
7 AMEND IN THE FACE OF THIS HEARING.

8 THE USUAL PROCEDURE IS THAT THEY WOULD
9 ADVANCE THEIR ARGUMENT ABOUT SHROYER OR ANY OTHER
10 ARGUMENTS THAT THEY WANT IN THEIR OPPOSITION BRIEF
11 AND ASK THE COURT FOR LEAVE TO AMEND, JUST LIKE
12 YOUR HONOR SEEMED TO BE SUGGESTING THAT THE COURT
13 WOULD ENTERTAIN.

14 WELL, NOW THE PLAINTIFFS HAVE MADE A
15 PROFFER, GO THROUGH THEIR COMPLAINT. THE CLAIMS
16 THAT ARE ADDED ARE ONES THAT THERE'S NO ARGUMENT
17 LIKE COMMON LAW FRAUD OR A FRAUDULENT COUNTERCLAIM
18 UNDER THE U.C.L. WHERE THE LAW IS CRYSTAL CLEAR
19 THAT THE MISSTATEMENTS MUST BE PLED WITH
20 PARTICULARITY.

21 YOUR HONOR HAS RULED MULTIPLE TIMES OF
22 WHAT THAT MEANS UNDER GOVERNING NINTH CIRCUIT LAW.
23 RULE 11 SHOULD APPLY HERE BECAUSE FOR PLAINTIFFS'
24 COUNSEL TO SAY, OH, WE CAN DO SUBSEQUENT
25 INVESTIGATION ABOUT WHAT STATEMENTS AND ADVERTISING

1 MS. MCKINNEY SAW AND RELIED UPON, AND THEY HAVE
2 SUGGESTED THEY NEED DISCOVERY IN THEIR BRIEF TO
3 FIND OUT WHAT STATEMENTS MS. MCKINNEY SAW AND
4 RELIED UPON AND IT'S A DUBIOUS PROPOSITION, YOUR
5 HONOR.

6 IF YOUR HONOR IS GOING TO ENTERTAIN THE
7 POSSIBILITY OF LEAVE TO AMEND, I WOULD SUGGEST
8 LOOKING AT THE AMENDED COMPLAINT THAT THEY HAVE
9 SUBMITTED, WHICH DOESN'T PLEAD ANY MORE
10 PARTICULARITY, ANY MORE STATEMENTS OTHER THAN AS TO
11 GOOGLE, EXPERIENCE THE NEXUS ONE, THE NEW ANDROID
12 PHONE FROM GOOGLE, YOUR HONOR.

13 THE COURT: WELL, IT IS SOMEWHAT OF A
14 CONCERN TO THE COURT TO HAVE SO MUCH OF WHAT I READ
15 IN THE PLAINTIFFS' COMPLAINT BASED UPON NEWS
16 ARTICLES AND THOSE KINDS OF COMMENTS ABOUT THE
17 PHONE AS OPPOSED TO STATEMENTS MADE BY THE
18 DEFENDANTS THEMSELVES.

19 AND I DON'T BELIEVE THAT IT'S PROPER TO
20 ATTRIBUTE WHAT MIGHT BE SAID IN THE PRESS ABOUT THE
21 FEATURES AND VALUES OF INSTRUMENTS AS OPPOSED TO
22 WHAT IS SAID BY THE VENDORS OF THOSE SERVICES AND
23 THOSE PRODUCTS.

24 AND I DO TAKE SERIOUSLY THE COURT'S
25 OBLIGATION TO MAKE SURE THAT THE F.C.A. CLAIM IS

1 PLACED ON THE PROPER FOOTING.

2 I'M NOT SURE WHERE ALL OF THIS WILL END
3 UP. I AM ALWAYS DISPOSED TO GIVE A RULING AND
4 GRANT LEAVE TO AMEND BECAUSE THERE MAY BE MATTERS
5 THAT ARE NOT OBVIOUS TO THE COURT. I WON'T HOLD
6 YOU TO THAT TENDERED COMPLAINT. THAT'S NOT BEFORE
7 ME NOW, AND I WON'T CONSIDER THAT. I'LL JUST MAKE
8 MY RULING ON YOUR EXISTING PAPERS AND SEE WHAT,
9 WHAT OCCURS FROM THAT.

10 DID YOU WANT TO SPEAK?

11 MR. GRANT: I DID, YOUR HONOR. I WANTED
12 TO RAISE ONE OTHER POINT. BEAR IN MIND THAT THE
13 MOTION THAT WE HAVE BROUGHT TO DISMISS IS NOT ONLY
14 A 12(B)(6) MOTION, IT'S NOT JUST ABOUT PLEADING
15 STANDARDS. IT'S A 12(B)(1) MOTION. SO THAT GOES
16 TO JURISDICTION AND STANDING BUT IT'S ALSO A
17 FACTUAL CHALLENGE, NOT JUST A FACIAL CHALLENGE AND
18 WE WENT THROUGH THAT IN THE BRIEFING.

19 BUT WHAT THAT MEANS IS THE PLAINTIFFS'
20 OBLIGATION, THEIR BURDEN ON A FACTUAL OBLIGATION IS
21 TO COME BACK TO THE COURT WITH EVIDENCE, SOME
22 CLARIFICATION OR TANGIBLE EVIDENCE SAYING WE DIDN'T
23 SELL A PHONE AND SAY ANYTHING ABOUT THE PHONE AND
24 YOU DON'T HAVE ANY INJURY BASED ON T-MOBILE, AND,
25 THEREFORE, YOU CAN'T PURSUE A CLAIM AGAINST US.

1 SO WHERE THE RECORD STANDS ON THE 12(B)
2 MOTION IS THAT ABSOLUTELY NO EVIDENCE IN RESPONSE
3 TO OUR MOTION.

4 SO IT'S REALLY, IT'S UNREBUTTED AT THIS
5 POINT.

6 I DO HAVE TO ADD ONE WORD AS WELL THAT
7 THE PLAINTIFFS COULD AMEND THE COMPLAINT I SUPPOSE
8 HOWEVER THEY LIKE, IT DOESN'T CHANGE THE MOTION TO
9 COMPEL ARBITRATION AND IT DOESN'T CHANGE THE FACT
10 THAT MS. MCKINNEY CANNOT ESTABLISH STANDING AGAINST
11 T-MOBILE FOR SOMETHING SHE DIDN'T BUY, FOR A
12 PRODUCT SHE DIDN'T PURCHASE FROM US AND FOR
13 SERVICES SHE DID NOT EXTEND OR GET IN CONNECTION
14 WITH THAT PHONE.

15 THAT'S ALL VERY --

16 MR. PLANT: THE LAST REBUTTAL ON THAT IS
17 THAT PRESUMES THE CASE IS SOLELY MISREPRESENTATIONS
18 AS OPPOSED TO CUSTOMER FEES AND FEES AND
19 MISREPRESENTATIONS. THAT'S ALL.

20 MS. RING: YOUR HONOR, IF I MAY, IT'S A
21 HOUSEKEEPING MATTER REALLY, BUT AS I'M SURE YOU'RE
22 AWARE THE PLAINTIFFS HAVE FILED A MOTION FOR LEAVE
23 TO AMEND AND WHICH IS SET FOR HEARING ON NOVEMBER
24 29TH AND WHICH WE ARE SUPPOSED TO BE FILING AN
25 OPPOSITION TO.

1 IT SOUNDS TO ME, BASED ON THE DISCUSSION
2 TODAY, THAT THAT MOTION IS MOOT AND THE COURT WILL
3 BE CONSIDERING THE MOTION OF LEAVE.

4 THE COURT: YOU KNOW, I DIDN'T PAY MUCH
5 ATTENTION TO THAT. IT IS THE CASE THAT THE
6 PLAINTIFF HAS THE ABILITY TO AMEND ONCE AS A MATTER
7 OF COURSE EVEN WITH THE MOTION PENDING AND THEY
8 DON'T HAVE TO AMEND.

9 NOW, THERE MUST HAVE BEEN A CIRCUMSTANCE
10 WHERE THERE'S A FIRST AMENDED PLEADING, AND I
11 HAVEN'T PAID ATTENTION TO THAT. BUT I'LL SORT THAT
12 ALL OUT AND SEE.

13 I'M CONSIDERING THIS ON THE CURRENT
14 COMPLAINT IS WHAT I WAS TRYING TO COMMUNICATE, NOT
15 UNDER ANY PROPOSED AMENDED COMPLAINT.

16 MR. PLANT: YOUR HONOR, WITH REGARD TO
17 THE LEAVE TO AMEND, WE DID THE AMENDMENT AS OF
18 RIGHT IN THE MCKINNEY CASE TO CONFORM THIS
19 COMPLAINT TO YOUR RULINGS IN THE I-PHONE CASE.

20 AND THERE'S STILL AN AMENDMENT AS OF
21 RIGHT WITH REGARD TO THE NEIGHBOR'S COMPLAINT,
22 WHICH IS RELATED BUT HAS NOT YET BEEN CONSOLIDATED.

23 THE COURT: WELL, I'M STILL NOT SURE WHAT
24 TO MAKE OF ALL OF THAT. IN OTHER WORDS, I'LL SORT
25 OUT PROCEDURALLY WHAT PLEADING I'M TO LOOK AT FOR

1 PURPOSES OF THIS MOTION AND SINCE THE MOTIONS ARE
2 MADE AND THE PLEADINGS WERE NOT DISMISSED
3 VOLUNTARILY, I'LL GIVE YOU A RULING ON THAT AND
4 WE'LL SEE WHERE YOU GO FROM THERE.

5 MR. PLANT: YES, YOUR HONOR.

6 MR. RING: YES, YOUR HONOR.

7 (WHEREUPON, THE PROCEEDINGS IN THIS
8 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.

/s/

IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

DATED: JANUARY 5, 2011