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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: APPLE AND AT&T) C-10-02553 RMW
IPAD UNLIMITED DATA PLAN)
LITIGATION,) SAN JOSE, CALIFORNIA
)
) JULY 15, 2011
ALL CONSOLIDATED ACTIONS)
) PAGES 1-12
-----)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

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

FOR THE PLAINTIFF: LIEFF, CABRASER, HEIMANN
& BERNSTEIN
BY: MICHAEL W. SOBOL AND
ALLISON ELGART
275 BATTERY STREET, 29TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

FOR DEFENDANT MAYER BROWN, LLP
AT&T: BY: ARCHIS A. PARASHARAMI
1999 K STREET, N.W.
WASHINGTON, D.C. 20006

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

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APPEARANCES (CONTINUED)

FOR DEFENDANT CROWELL & MORING
AT&T: BY: KATHLEEN TAYLOR SOOY
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

FOR DEFENDANT MORRISON & FOERSTER
APPLE: BY: STUART PLUNKETT
425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105

1 SAN JOSE, CALIFORNIA

JULY 15, 2011

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: LAST MATTER ON THE CALENDAR,
6 C-10-02553, IN RE: APPLE AND AT&T IPAD UNLIMITED
7 DATA PLAN LITIGATION, ON FOR A MOTION TO COMPEL
8 ARBITRATION AND TO STAY CLAIMS.

9 THE COURT: THANK YOU FOR YOUR PATIENCE.

10 MS. ELGART: GOOD MORNING, YOUR HONOR.

11 THE CLERK: YOUR APPEARANCES.

12 MS. ELGART: GOOD MORNING, YOUR HONOR.

13 ALLISON ELGART FOR THE PLAINTIFFS.

14 MR. SOBOL: GOOD MORNING, YOUR HONOR.

15 MICHAEL SOBOL FOR THE PLAINTIFFS.

16 MR. PARASHARAMI: GOOD MORNING, YOUR
17 HONOR. ARCHIS PARASHARAMI FOR THE DEFENDANT AT&T
18 MOBILITY.

19 MR. PLUNKETT: STUART PLUNKETT FOR
20 DEFENDANT APPLE.

21 MS. SOOY: GOOD MORNING, YOUR HONOR.
22 KATHLEEN SOOY FROM CROWELL & MORING FOR AT&T.

23 THE COURT: IT SEEMS TO ME GIVEN THE --
24 THAT THIS IS A CONTENTION THAT THE ARBITRATION
25 CLAUSE IS VALID AND THE CLAIMS NEED TO BE

1 ARBITRATED, EXCEPT FOR HANNA'S CLAIM, AND I DON'T
2 SEE A BASIS FOR ARBITRATING HANNA'S CLAIM.

3 THE ARGUMENT THAT THE ARBITRATION
4 AGREEMENT HE SIGNED WAS BROAD ENOUGH TO COVER THE
5 PRODUCT HERE I JUST THINK IS -- TO SAY THAT IT GOES
6 BEYOND IPADS IS -- IT JUST STRIKES ME AS
7 UNREASONABLE.

8 AND JUST THINKING ABOUT IT MYSELF,
9 THERE'S NO WAY I WOULD HAVE THOUGHT THAT BY
10 AGREEING TO THAT ARBITRATION AGREEMENT, I WAS
11 AGREEING THAT YOU COULD ARBITRATE A DISPUTE THAT
12 DIDN'T DEAL WITH THE IPAD.

13 I MEAN, WITH -- I'M SORRY -- THAT YOU
14 COULD ARBITRATE DEALING WITH THE IPADS BECAUSE THE
15 ARBITRATION CLAUSE WAS WITH RESPECT TO THE -- AS I
16 RECALL, IT WAS THE IPHONES.

17 SO THAT'S WHERE I AM.

18 MR. PARASHARAMI: THANKS, YOUR HONOR.
19 ARCHIS PARASHARAMI FOR AT&T.

20 SO WE AGREE WITH VIRTUALLY ALL OF YOUR
21 TENTATIVE RULING. I THINK CONCEPCION IS CLEAR.

22 AND I'M GOING TO TRY TO MAKE THINGS A
23 LITTLE BIT EASIER FOR THE COURT TODAY.

24 WHILE WE RESPECTFULLY DISAGREE ON HANNA,
25 WE THINK IT MAKES SENSE TO NARROW THE ISSUES BEFORE

1 THE COURT.

2 SO WITHOUT CONCEDEDING THE POINT, WE'D BE
3 PREPARED TO WITHDRAW THE PORTION OF OUR ARBITRATION
4 MOTION WITH RESPECT TO HANNA IF THE COURT'S WILLING
5 TO ALLOW US TO DO SO, AND MY COLLEAGUE, MS. SOOY,
6 HAS INFORMED THE PLAINTIFFS OF THAT PRIOR TO THE
7 HEARING TODAY.

8 THE COURT: WHAT'S THE DIFFERENCE BETWEEN
9 WITHDRAWING IT AND HAVING IT DENIED?

10 MR. PARASHARAMI: I SUPPOSE MAYBE IT
11 MAKES IT MORE EASY FOR YOUR HONOR TO ENTER AN ORDER
12 FOCUSSED ON CONCEPCION AND THE ARBITRATION
13 AGREEMENTS WITH RESPECT TO THE IPAD.

14 I MEAN, IF YOUR HONOR DOESN'T THINK IT'S
15 APPROPRIATE, I SUPPOSE YOU COULD DENY IT.

16 THE COURT: OKAY.

17 MR. PARASHARAMI: THANK YOU, YOUR HONOR.

18 MS. ELGART: YOUR HONOR, JUST AS TO THAT
19 LAST POINT ABOUT HANNA, IF -- WE BELIEVE THE COURT
20 SHOULD ENTER AN ORDER AS TO HANNA DENYING THE
21 MOTION TO COMPEL ARBITRATION WITH PREJUDICE IN
22 ORDER TO PROTECT THE ABSENT CLASS MEMBERS.

23 THE -- HANNA REPRESENTS A SUBSET OF THE
24 CLASS OF SIMILARLY SITUATED CLASS MEMBERS, SO WE
25 WOULD ARGUE THAT THAT MOTION SHOULD NOT BE ABLE TO

1 BE RENEWED AS TO THOSE PEOPLE WHEN WE TRY TO
2 CERTIFY OUR CLASS LATER ON. SO WE THINK THE ORDER
3 SHOULD BE ENTERED.

4 AND AS TO CONCEPCION, YOUR HONOR, WE
5 BELIEVE THAT THIS CASE IS DIFFERENT FROM
6 CONCEPCION.

7 CONCEPCION MADE VERY CLEAR THAT THE
8 F.A.A. SAVINGS CLAUSE REMAINED IN TACT AND THAT
9 SECTION II APPLIES FOR GENERALLY APPLICABLE
10 CONTRACT DEFENSES, AND WE SUBMIT THAT WE HAVE A
11 GENERALLY APPLICABLE CONTRACT DEFENSE HERE.

12 OUR ARGUMENT HAS TO DO WITH THE
13 ARBITRATION PROVISION IN ITS ENTIRETY.

14 SO WHILE CONCEPCION PREEMPTED THE
15 DISCOVER BANK RULE, IT DID NOT PREEMPT ALL
16 GENERALLY APPLICABLE CONTRACT DEFENSES.

17 AND HERE CALIFORNIA CONTRACT CODE, CIVIL
18 CODE 1668 --

19 THE COURT: WHICH DISCOVER BANK WAS
20 DECIDED ON.

21 MS. ELGART: DISCOVER BANK WAS DECIDED ON
22 THAT IN PART, BUT DISCOVER BANK RELIED ON THE FACT
23 THAT THERE WAS A CLASS ACTION WAIVER CLAUSE.

24 WE'RE NOT RELYING ON JUST THE CLASS
25 ACTION WAIVER CLAUSE HERE.

1 WE'RE LOOKING AT THE ENTIRE ARBITRATION
2 PROVISION, AND WE THINK THAT THE ENTIRE PROVISION
3 ITSELF SERVED TO EXEMPT AT&T FROM LIABILITY FOR
4 THEIR FALSE ADVERTISING.

5 WE THINK AT&T HAD TO HAVE KNOWN WHEN THEY
6 OFFERED THE IPADS UP FOR SALE WITH UNLIMITED DATA
7 PLANS THAT THEY WERE GOING TO REMOVE THAT OPTION,
8 AND BY PUTTING AN ARBITRATION PROVISION INTO THEIR
9 DATA SERVICE PLAN, WE THINK THEY SERVED THAT --
10 THAT SERVES AS THEIR OBJECT -- THE OBJECT OF
11 PUTTING THAT IN THERE WAS TO EXEMPT THEM FROM
12 LIABILITY FOR THEIR FRAUD AND UNLAWFUL CONDUCT.

13 AND WE THINK DISCOVERY HERE WOULD
14 DEMONSTRATE THAT THE PURPOSE BEHIND AND THE
15 MOTIVATION BEHIND PUTTING THAT ARBITRATION
16 PROVISION INTO THEIR SERVICE AGREEMENT WAS TO
17 EXEMPT THEM FROM LIABILITY, NOT TO MAKE THINGS
18 EASIER FOR CONSUMERS BY GOING TO ARBITRATION, BUT
19 TO ACTUALLY SERVE TO FRUSTRATE CONSUMERS' EFFORTS
20 TO PARTICIPATE IN THE CIVIL JUSTICE SYSTEM.

21 WE THINK THE CASE HERE REQUIRES A
22 PARTICULARIZED EVIDENTIARY ANALYSIS OF THE IMPACT
23 OF THE ARBITRATION CLAUSE ON THE CONSUMERS AND THE
24 FACT THAT WE WOULD ARGUE THAT CONSUMERS ARE NOT
25 LIKELY TO GO TO ARBITRATION BASED ON THIS CLAUSE

1 AND, THEREFORE, AT&T IS -- WOULD BE EXEMPTED FROM
2 ANY LIABILITY FOR THEIR CONDUCT.

3 THE COURT: OKAY. THANK YOU.

4 ANYTHING FURTHER?

5 MR. PARASHARAMI: I MEAN, I'LL JUST BE
6 EXTRAORDINARILY BRIEF, YOUR HONOR.

7 THOSE WERE THE ARGUMENTS THAT THE SUPREME
8 COURT HEARD IN CONCEPCION AND REJECTED.

9 THE ARGUMENT BASICALLY DEPENDS ON THE
10 NOTION THAT CLASS ACTIONS ARE NECESSARY, BUT THE
11 SUPREME COURT REJECTED THAT CLEARLY.

12 THE COURT: OKAY.

13 MR. PARASHARAMI: THANK YOU, YOUR HONOR.

14 THE COURT: ALL RIGHT. I'M GOING TO
15 STICK WITH THE TENTATIVE ON THIS. I THINK THE
16 MOTION SHOULD BE DENIED AS TO HANNA AND GRANTED AS
17 TO THE OTHER PLAINTIFFS.

18 OKAY. THANK YOU.

19 MS. SOOY: YOUR HONOR, WE ARE ALSO
20 SCHEDULED TO BE BEFORE YOU JUST MOMENTS FROM NOW ON
21 OUR CMC.

22 COULD WE TAKE UP ANY ISSUES THAT THE
23 COURT WANTS TO ADDRESS ON THAT? WE -- I MEAN, OUR
24 POSITION FOR AT&T IS THAT THERE REALLY ISN'T
25 ANYTHING FURTHER WE NEED TO DEAL WITH TODAY. THE

1 COURT WILL ISSUE THIS RULING.

2 YOU ALSO HAVE A TENTATIVE PENDING ON THE
3 MOTION TO DISMISS THAT WAS ARGUED BACK IN MARCH.

4 AND SO WE THINK THOSE RULINGS NEED TO
5 COME OUT BEFORE WE DETERMINE WHETHER THERE ARE ANY
6 NEXT STEPS HERE BECAUSE YOUR TENTATIVE ON THE
7 MOTION TO DISMISS DISMISSED ALL CLAIMS -- I THINK
8 THAT'S RIGHT -- AS TO PLAINTIFF HANNA.

9 AND SO UNLESS THE COURT DECIDES TO GIVE
10 LEAVE TO AMEND, I THINK WE'RE BACK AT AN END POINT.

11 OUR POSITION THAT WE ASSERTED IN THAT
12 BRIEFING IS THAT THERE SHOULD NOT BE ANY LEAVE TO
13 AMEND.

14 I'M SURE MR. SOBOL WILL TAKE A DIFFERENT
15 VIEW OF THAT.

16 MR. SOBOL: DOES YOUR HONOR WANT TO HOLD
17 THE STATUS CONFERENCE NOW?

18 THE COURT: MIGHT AS WELL.

19 MR. SOBOL: OKAY. THERE ARE A COUPLE OF
20 HOUSEKEEPING MATTERS WE SHOULD ADDRESS AS PART OF
21 OUR CMC THIS MORNING.

22 AND PICKING UP WHERE AT&T COUNSEL JUST
23 LEFT OFF, WE DO THINK, NOW THAT WE HAVE A RULING ON
24 THE ARBITRATION MOTION, THERE ARE A COUPLE OF
25 THINGS THAT NEED TO BE SCHEDULED IN THE CASE.

1 ONE OF THEM IS WE DID ASK FOR LEAVE TO
2 AMEND, AND RATHER THAN GOING BACK AND REVISITING
3 THE TENTATIVE RULING THAT WAS PUT IN PLACE ON THE
4 MOTION TO DISMISS THAT WAS ARGUED ON MARCH 25TH, WE
5 WOULD REQUEST THAT WE BE ABLE TO SUBMIT A REVISED,
6 AMENDED PLEADING AND MOVE FROM THERE.

7 THE OTHER MATTER THAT WE WOULD WANT TO
8 DO, TO ADDRESS THIS MORNING, IS TO SET A DATE FOR
9 CLASS CERTIFICATION.

10 AT&T TOOK THE POSITION IN THE, IN OUR
11 JOINT FILING FOR THE CONFERENCE THIS MORNING THAT
12 IT WAS PREMATURE GIVEN THAT WE DON'T HAVE A RULING
13 YET ON THE ARBITRATION.

14 NOW WE HAVE A RULING ON THE ARBITRATION.

15 PLAINTIFFS WOULD REQUEST A DATE TO FILE
16 THEIR CLASS CERTIFICATION BRIEF IN JANUARY OF 2012.

17 AND NOW THAT -- NOW THAT -- WHEN WE --
18 WHEN WE FIRST ADDRESSED THE ARBITRATION ISSUE
19 EARLIER ON IN THE CASE, YOUR HONOR PUT A PARTIAL
20 STAY ON DISCOVERY DIRECTED TO LIMITING WHERE WE
21 COULD DIRECT DISCOVERY SO AS NOT TO BURDEN THE
22 PARTIES GIVEN THAT THE ARBITRATION ISSUE WAS LIVE.

23 NOW THAT WE'RE PAST THAT WITH RESPECT TO
24 APPLE, WHICH DOESN'T HAVE AN ARBITRATION ISSUE, AND
25 WITH RESPECT TO THE NONSUBSCRIBER CLASS, PUTATIVE

1 NONSUBSCRIBER CLASS REPRESENTED BY MR. HANNA, WE
2 SHOULD OPEN UP DISCOVERY FOR ALL PURPOSES AT THIS
3 POINT NOW THAT WE'RE PAST THE ARBITRATION ISSUE.

4 AND THE LAST THING I'D LIKE TO REPORT TO
5 THE COURT, I SUPPOSE IT IS SOMEWHAT GOOD NEWS --
6 AND WITH THE CONSENT OF APPLE'S COUNSEL -- WE HAVE
7 BEEN ENGAGED IN SERIOUS MEDIATION IN FRONT OF
8 RETIRED JUDGE WEINSTEIN.

9 WE'RE VERY CLOSE ON BEING ABLE TO RESOLVE
10 OUR ISSUES AND WE HOPE THAT THE NEXT TIME WE SHOW
11 UP, WE'LL BE ABLE TO REPORT THE CASE SETTLED WITH
12 RESPECT TO APPLE.

13 THE COURT: OKAY. LET'S TAKE ABOUT A
14 FIVE MINUTES RECESS AND THEN I'LL COME BACK AND
15 DISCUSS THIS WITH YOU FURTHER.

16 MR. SOBOL: OKAY. THANK YOU, YOUR HONOR.

17 (WHEREUPON, A RECESS WAS TAKEN.)

18 (WHEREUPON, THE CMC WAS HELD OFF THE
19 RECORD.)

20 (WHEREUPON, THE PROCEEDINGS IN THIS
21 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/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595