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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HBCU MESSAGING US LP *
* January 23, 2026
VS. *
* CIVIL ACTION NO. 1:24-CV-1199
APPLE, INC., ET AL. *

BEFORE THE HONORABLE ALAN D ALBRIGHT
MARKMAN HEARING (via Zoom)

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Proceedings recorded by mechanical stenography,

01:38

transcript produced by computer-aided transcription.

01:38 1 (Hearing begins.)

01:38 2 DEPUTY CLERK: A civil action in Case
01:38 3 AU:24-CV-1199, HBCU Messaging US LP versus Apple,
01:38 4 Incorporated, et al. Case called for a Markman
01:39 5 hearing.

01:39 6 THE COURT: Announcements from counsel,
01:39 7 please.

01:39 8 MR. DEVLIN: For plaintiff HBCU
01:39 9 Messaging, Tim Devlin of Devlin Law Firm.

01:39 10 THE COURT: Mr. Devlin, it's been forever
01:39 11 since I've seen you. How are you doing?

01:39 12 MR. DEVLIN: Doing well, Judge. Thank
01:39 13 you.

01:39 14 THE COURT: How are things up in
01:39 15 Delaware?

01:39 16 MR. DEVLIN: They're good. They're
01:39 17 chilly but not as bad as it is for some folks on this
01:39 18 line. We've been chatting about it. Get through all
01:39 19 this fine as well. But thank you for asking, Judge.

01:39 20 THE COURT: It's a pleasure to see you.
01:39 21 It's been too long.

01:39 22 MR. DEVLIN: You as well.

01:39 23 With me I have Neil Benchell of Devlin
01:39 24 Law Firm. And I believe on the phone we may have Tracy
01:39 25 Stark and Anabel Manaloor, also from Devlin Law Firm.

01:39 1 And we also have Mr. Michael Shore of The Shore Firm
01:39 2 with us today.

01:39 3 THE COURT: Mr. Shore of The Shore law
01:39 4 firm? I haven't seen you either, Mr. Shore. How are
01:39 5 you doing?

01:39 6 MR. SHORE: Just fine. Your hearing has
01:39 7 gotten me out of rounding up cows. So thank you very
01:39 8 much.

01:39 9 THE COURT: I would rather be rounding up
01:39 10 cows, for gosh sakes. I think you made the wrong
01:40 11 decision.

01:40 12 (Laughter.)

01:40 13 THE COURT: Occasionally, at a discovery
01:40 14 hearing, that's kind of -- I feel like that's kind of
01:40 15 what I'm doing. So it's probably a good analogy. So.

01:40 16 MR. SHORE: It's warmer here.

01:40 17 THE COURT: Where are you at?

01:40 18 MR. SHORE: I'm about 65 miles southeast
01:40 19 of Dallas.

01:40 20 THE COURT: Oh, okay.

01:40 21 Mr. Nash?

01:40 22 MR. NASH: Good afternoon, Your Honor.
01:40 23 Brian Nash of Morrison Foerster. Joined today with
01:40 24 client representatives Chris Han and Jenny Liu and
01:40 25 colleagues Ryan Malloy, Nima Kiaei, and Nomin

1 Jagdagdorj, Your Honor.

01:40 2 And I'll note, in the interest of
01:40 3 reducing the number of cattle you have to round up
01:40 4 today, Apple has withdrawn its position on third-party
01:40 5 provider, and we are willing to rest on the briefing on
01:40 6 cellular core network. But of course happy to answer
01:40 7 any questions Your Honor might have as to that
01:40 8 construction. So that just leaves two terms for today.

01:40 9 THE COURT: I can't wait to get to
01:41 10 "bearer." That sounds like it'll be very exciting.
01:41 11 But I'm going to hold off on the -- on that excitement
01:41 12 and start with "wherein, ellipses, when."

01:41 13 And let's see. Give me one second. I'm
01:41 14 just trying to figure out who should start.

01:41 15 MR. NASH: Your Honor's preliminary
01:41 16 construction on that one aligns with Apple's position,
01:41 17 and so I would understand that to typically be the
01:41 18 Court's practice to start with plaintiff on that one.

01:41 19 THE COURT: I think we're all just
01:41 20 stunned by the fact my construction aligns with Apple's
01:41 21 position. So if for no other reason, we'll start with
01:41 22 Mr. Devlin.

01:41 23 MR. NASH: Understood, Your Honor.

01:41 24 MR. DEVLIN: Thank you, Your Honor. I'm
01:41 25 going to try to share a set of slides that we've

01:41 1 provided to the Court. Is that on the screen?

01:41 2 THE COURT: Yes, sir.

01:41 3 MR. DEVLIN: Okay. Thank you.

01:41 4 I'll note at the outset, Your Honor, on
01:42 5 this wherein/when clause, the issue is not so much the
01:42 6 verbiage of the construction, it's the legal effect of
01:42 7 the construction. And I'll of course explain what I
01:42 8 mean by that.

01:42 9 But the words "when" or "whenever" could
01:42 10 kind of each go a different direction. Our
01:42 11 understanding is that Apple's intent with its proposal
01:42 12 and what the Court has adopted as a tentative results
01:42 13 in some -- has a legal effect that we think is
01:42 14 problematic. And that's really what I'm going to be
01:42 15 talking about.

01:42 16 As long as we're on the same page that
01:42 17 the legal effect is not so problematic, then the words
01:42 18 of the construction are fine. But it's the import that
01:42 19 we'll be talking about here.

01:42 20 I'll note first, just very briefly, Your
01:42 21 Honor, see if I can go through these slides. I'll skip
01:42 22 all this.

01:42 23 I will note Apple submitted a series of
01:42 24 IPRs. And each of the IPRs, Apple submitted to the
01:43 25 PTAB that no formal constructions were necessary.

01:43 1 Now, there's, you know, I think a variety
01:43 2 of reasons that they might suggest that that was
01:43 3 appropriate for the IPRs, but it is inconsistent with
01:43 4 the positions that they've taken here. They did it in
01:43 5 each IPR.

01:43 6 I'm on Slide 5 right now, which just
01:43 7 collects a bunch of those statements.

01:43 8 And I'll just briefly run through this
01:43 9 Slide 6, which is a timeline showing that all of this
01:43 10 claim construction disclosure was done before they
01:43 11 submitted their IPRs. So everyone knew their own
01:43 12 positions before those petitions were submitted.

01:43 13 So we think it's a little incongruous for
01:43 14 them to be arguing things here that they did not argue
01:43 15 or apply in the IPR petitions.

01:43 16 Unless the Court has questions on that,
01:43 17 I'll just set that aside and move into the substance.

01:43 18 THE COURT: All good.

01:43 19 MR. DEVLIN: All right. So let me go
01:43 20 to -- let me just back up to the constructions here and
01:43 21 talk a little bit about what I mean by this legal
01:43 22 issue, Your Honor.

01:43 23 So first, let's get our terminology right
01:44 24 because there's a little bit of back and forth in the
01:44 25 briefs about condition X and result Y or condition Y,

01:44 1 result X.

01:44 2 A number of claims have this phrasing,
01:44 3 wherein/when something -- when the some condition is
01:44 4 true, which I'm going to call X, then there is, you
01:44 5 know, an event or action or a result Y. Okay. So when
01:44 6 X the condition is satisfied, then the claim says Y the
01:44 7 event or action takes place. Okay?

01:44 8 And the concern that we have legally is
01:44 9 that Apple's construction would negate or cancel or
01:44 10 obviate, erase from existence actual instances of
01:44 11 infringement if there are certain instances where
01:44 12 there's not infringement.

01:44 13 So to be more specific, if there's a
01:44 14 single instance or a set of circumstances in which the
01:45 15 condition -- sorry, the action Y does not follow X,
01:45 16 which we all agree that particular instance is not
01:45 17 infringing. There's no debate about that.

01:45 18 But if there's also instances or
01:45 19 circumstances or conditions where of course all the
01:45 20 other elements of the claim are met and Y does result
01:45 21 from the condition X, are those instances of
01:45 22 infringement canceled out? If that's what Apple is
01:45 23 getting at, it's utterly wrong factually and utterly
01:45 24 wrong legally. And that's what I'm going to be
01:45 25 speaking about.

01:45 1 So factually, I'll just note quickly.
01:45 2 The word "whenever" doesn't appear in the claims. Any
01:45 3 of the claims at issue. The word "whenever" does not
01:45 4 appear in the specification. Apple's pointed to
01:46 5 nothing in the prosecution history at all, disclaimer
01:46 6 or otherwise, related to this term.

01:46 7 The same with the word "always." Because
01:46 8 in a sense, what we're worried about, the thing, the
01:46 9 legal impact that I'm worried about is in effect that
01:46 10 says something always has to happen. If it doesn't
01:46 11 always happen, then when it does doesn't count. That's
01:46 12 also legally wrong. And factually wrong because the
01:46 13 word "always" doesn't appear in the claims. The word
01:46 14 "always" never appears in the patent spec. It's not
01:46 15 there. Nothing like that.

01:46 16 So there's nothing factually that draws
01:46 17 in this concept that something always needs to happen.

01:46 18 Legally it would be wrong for a couple of
01:46 19 reasons. One is here on the screen now. These are --
01:46 20 I skipped a slide, Your Honor.

01:46 21 And it won't go back. Let me -- thank
01:46 22 you.

01:46 23 Sorry. I'm on Slide 10 now. And it just
01:46 24 notes that fact that we all understand --

01:47 25 THE COURT: Can you hold on one second?

01:47 1 I want to check something with my clerk. I'll be back
01:47 2 in just a second. Give me a minute or two.

01:47 3 MR. DEVLIN: Thank you, Your Honor.

01:47 4 (Pause in proceedings.)

01:47 5 THE COURT: Okay. I'm back.

01:47 6 MR. DEVLIN: Thank you, Your Honor. And
01:47 7 are we seeing Slide 10 on the screen?

01:48 8 THE COURT: We are.

01:48 9 MR. DEVLIN: Thank you.

01:48 10 So the claims at issue are all comprising
01:48 11 claims, which we all know allow for noninfringing
01:48 12 features, elements, steps, whole systems outside the
01:48 13 scope of the claims. And they don't negate
01:48 14 infringement. That's just a basic fundamental
01:48 15 principle of patent law that is applicable here.
01:48 16 Because of what we -- I'm worried that Apple's trying
01:48 17 to do.

01:48 18 There's more specific case law on this.
01:48 19 I'm moving to Slide 11. A product that sometimes, but
01:48 20 not always, embodies a claimed method infringes.

01:48 21 The Fed Circuit has said this over and
01:48 22 over and over again. If you've got a system performing
01:48 23 a method -- and I'll get to system claims in a minute,
01:48 24 but this is specifically about method claims and it's
01:48 25 very clear for method claims.

01:48 1 If you sometimes perform the method and
01:48 2 you sometimes don't, then you're sometimes infringing
01:48 3 and sometimes not. Of course when you're not, you're
01:48 4 not. Those don't count for liability, for damages, for
01:49 5 whatever. But the instances where you do practice the
01:49 6 claimed method, those are infringing. And so if
01:49 7 Apple's construction negates those instances of
01:49 8 infringement, that's the problem.

01:49 9 Slide 12 says the same thing but even
01:49 10 more strongly. A single instance of a claimed method
01:49 11 being performed is infringement. Just a single
01:49 12 instance. And obviously here, we have -- we would
01:49 13 submit and we'll demonstrate eventually -- billions and
01:49 14 billions and billions of instances of infringement.

01:49 15 And there's other cases that say the same
01:49 16 thing. Direct infringement of a method claim can be
01:49 17 based on even one instance of the method being
01:49 18 performed.

01:49 19 And so the fact that there might be
01:49 20 instances where the method is not performed, where the
01:49 21 claimed condition and event or condition and result is
01:49 22 not met, those instances should not erase the times
01:49 23 when it is met.

01:50 24 And I'll note, I mentioned this method
01:50 25 and system claim issue a minute ago. One of the

01:50 1 citations here on the screen, the UltimatePointer case,
01:50 2 816 F.3d 816, involved a system claim. It touched upon
01:50 3 this issue, but the Fed Circuit sort of states the same
01:50 4 principle with respect to a system claim.

01:50 5 And here, just by the way, there's two
01:50 6 patents for which this is relevant. One of the
01:50 7 patents, the '127 patent is all method claims. The
01:50 8 other's about 50/50 method and system claims. But to
01:50 9 the extent there's any differentiation, and the method
01:50 10 claim law seems somehow different than the system claim
01:50 11 law to the Court, many of the claims here are method
01:50 12 claims. In fact, the majority of the claims at issue
01:50 13 for this issue -- for this particular claim term are
01:50 14 method claims.

01:50 15 And so we think -- I'll get to Apple's
01:51 16 adjustment a minute ago, but we put together an
01:51 17 example. And this is not to insult anyone's
01:51 18 intelligence, this simple claim I'm going to go
01:51 19 through, to explore this legal issue and to just make
01:51 20 sure we understand -- stripping away all the
01:51 21 technology, the jargon, the whatever of the claims
01:51 22 we're dealing with and just isolate this issue.

01:51 23 There's a simple claim on the screen.
01:51 24 It's in the box at the top. A method of eating three
01:51 25 meals a day, eating breakfast, eating lunch, eating

01:51 1 dinner. And now we have our "wherein/when" clause.
01:51 2 Wherein orange juice is consumed when breakfast is
01:51 3 eaten. So there's -- when is our condition, when
01:51 4 breakfast is eaten. And the result is the Y, you
01:51 5 consume orange juice.

01:51 6 Well, there's lots of instances under Fed
01:51 7 Circuit law where this claim is not going to be
01:51 8 infringed. Not going to be infringed if you don't eat
01:51 9 lunch or don't eat dinner. Not going to be infringed
01:51 10 when you don't eat breakfast on a given day. It's not
01:51 11 going to be infringed if you eat breakfast, lunch, and
01:51 12 dinner but not orange juice.

01:51 13 But on those days where you have
01:52 14 breakfast, lunch, and dinner and you have orange juice
01:52 15 with breakfast, those days are instances of
01:52 16 infringement. That's that simple application of the
01:52 17 Federal Circuit law that we just looked at.

01:52 18 The concern is that Apple's proposal
01:52 19 would be interpreted legally to have the opposite
01:52 20 result. If there's a single day, so same claim is on
01:52 21 the screen and in this first black text bullet is about
01:52 22 a single day of noninfringement.

01:52 23 You eat breakfast, you eat lunch, you
01:52 24 have dinner, but you don't have orange juice with your
01:52 25 breakfast. Every other day of the year you have all

01:52 1 three meals and you have orange juice with breakfast.

01:52 2 And what should not happen is that single
01:52 3 instance of noninfringement on the one day cancels or
01:52 4 negates or erases all the other infringement that takes
01:52 5 place every other day. That's the legal concern that
01:52 6 we have. And that's totally contrary to law and
01:53 7 there's really no support for it here factually, as I
01:53 8 mentioned a minute ago.

01:53 9 And here, Your Honor, there's been a
01:53 10 proposal by Apple -- I'll go through there's some other
01:53 11 things in our brief I'll just rest on. There's some
01:53 12 claim differentiation arguments that to us aren't
01:53 13 applicable because they just hit different issues.
01:53 14 They're sort of orthogonal to the question here.
01:53 15 They're just different sets of things that don't
01:53 16 isolate the question of sometimes infringing, sometimes
01:53 17 not versus if you ever don't, then you never can
01:53 18 infringe at all even when you meet the claim.

01:53 19 They just -- the claim differentiation
01:53 20 issues that Apple has raised don't address that. I'm
01:53 21 happy to talk about those in more detail. We've got
01:53 22 them collected on a couple of slides here. But I'll
01:53 23 skip those and get to something else. Which is Apple's
01:53 24 reply brief.

01:53 25 So I think they sensed that the

01:53 1 construction that they proposed originally was
01:54 2 overreaching. Because even in cases of fault or error
01:54 3 in the system, a bug in the system where something
01:54 4 didn't happen would, again, if the claim is legally
01:54 5 interpreted -- or the claim construction is legally
01:54 6 interpreted in a way I'm worried about, then, you know,
01:54 7 a simple single instance of a message being directed
01:54 8 the wrong way would negate infringement for an entire
01:54 9 system or for the billions and billions of times when
01:54 10 the method claims are met.

01:54 11 And so --

01:54 12 THE COURT: Mr. Devlin, I don't
01:54 13 understand. I'm just too simple.

01:54 14 MR. DEVLIN: Sure.

01:54 15 THE COURT: I'm too simple minded. How a
01:54 16 construction could excuse -- or if instances infringe
01:55 17 the claim term on Monday through Saturday, to use your
01:55 18 vernacular, regardless of what the claim term is, the
01:55 19 fact that they don't -- if Apple were to take the
01:55 20 position under the construction they don't infringe on
01:55 21 Sunday, I don't see any scenario where Apple wouldn't
01:55 22 be liable for the infringement Monday through Saturday.

01:55 23 MR. DEVLIN: Thank you, Your Honor.

01:55 24 That's what we're worried about. It kind
01:55 25 of flows from -- I otherwise don't understand what this

01:55 1 construction's getting at and so maybe it's a -- maybe
01:55 2 I'll just stop there and Apple's counsel can speak and
01:55 3 we can see, you know, if this is really an issue. It
01:55 4 felt like an issue based on the communications we had
01:55 5 with them over time and how they developed and what we
01:55 6 ended up seeing in the briefing.

01:55 7 But, Your Honor, I can stop here if the
01:55 8 Court has enough. Because I'm in total agreement with
01:55 9 what Your Honor just said, the Saturday through -- I'm
01:56 10 sorry. Yeah.

01:56 11 THE COURT: And for example, and I don't
01:56 12 know if it's Mr. Nash or someone else that's going to
01:56 13 argue this, but, you know, for example, here, you know,
01:56 14 if the wireless device or PSMS is acting in a certain
01:56 15 way, configured in a certain way and it functions in a
01:56 16 certain way with regard -- I think here it says to the
01:56 17 transmission mode, et cetera, every time -- for
01:56 18 example, here, it says sends an outgoing message as IP
01:56 19 packets in a way that is infringing, the fact that it
01:56 20 might at other times send or deliver in transmission
01:56 21 mode packages or whatever, its packets, whatever it's
01:56 22 sending, I don't understand how if they're not using --
01:56 23 if it's not infringing when it does that, it's not
01:56 24 infringing when it does that, but I don't understand an
01:57 25 argument how it would excuse infringement when it does

01:57 1 do what the patent claim says.

01:57 2 MR. DEVLIN: Then I think we're on the
01:57 3 same page. I'll just tease out this bullet on the
01:57 4 screen as an example, though, to be sure.

01:57 5 So there may be situations -- so for
01:57 6 example, if the recipient phone is a -- with this --
01:57 7 looking at the first bullet here, it's claim language
01:57 8 from the '127 patent. And it talks about sending the
01:57 9 transmission of first mode, a first transmission mode.
01:57 10 When the recipient is a subscriber to this messaging
01:57 11 service.

01:57 12 And there could be instances -- the
01:57 13 system could be configured so that it does not go
01:57 14 through that first transmission mode even if that
01:57 15 recipient is a subscriber. If the subscriber's phone
01:57 16 is offline, in airplane mode, not on WiFi, you know,
01:57 17 whatever. There could be configuration circumstances
01:58 18 under normal use where the claim is not met and, yet,
01:58 19 circumstances in normal use where the claim is met.

01:58 20 So again, as long as Your Honor is --
01:58 21 we're on the same page that when it's not met, there's
01:58 22 no infringement. When it is met, there's infringement.
01:58 23 As long as we're on the same page, I'm happy and the
01:58 24 word "whenever" doesn't bother me. I was worried that
01:58 25 the word "whenever" would be interpreted as always,

01:58 1 effectively. And so if something -- if there were an
01:58 2 exception to the always, then that would negate
01:58 3 infringement entirely, for the entire universe.

01:58 4 But if we're on the same page that that's
01:58 5 not the legal impact, we are fine. We're fine with the
01:58 6 Court's tentative construction and -- which is Apple's
01:58 7 construction.

01:58 8 THE COURT: Mr. Nash?

01:58 9 MR. NASH: Your Honor, I believe
01:58 10 Mr. Malloy in our LA office will be responding on this
01:58 11 position. Of course, I'm always happy to chat with
01:59 12 Your Honor.

01:59 13 MR. DEVLIN: I should have stopped
01:59 14 sharing my screen just in case.

01:59 15 MR. NASH: Thanks. I believe it's down,
01:59 16 Tim. Appreciate it.

01:59 17 MR. DEVLIN: Got it. Thank you.

01:59 18 MR. NASH: And if you'll wait one moment,
01:59 19 Your Honor, I believe we're going to pull up some
01:59 20 slides as well.

01:59 21 THE COURT: Sure.

01:59 22 MR. NASH: Go ahead, Mr. Malloy.

01:59 23 MR. MALLOY: Good afternoon, Your Honor.
01:59 24 My name's Brian Malloy. I'm from Morrison & Foerster
01:59 25 representing Apple.

01:59 1 Mr. Devlin talked a lot about
01:59 2 infringement issues, but I think that puts the cart
01:59 3 before the horse. He's assuming infringement and then
01:59 4 saying that we are trying to get out of infringement.
01:59 5 We're just trying to interpret these claims and figure
01:59 6 out what the claim scope is.

01:59 7 THE COURT: Well, let me just say, after
01:59 8 400 Markmans, just know I would be shocked to think
01:59 9 that any -- any patent lawyer representing a defendant
02:00 10 would ever be proposing a construction for the purpose
02:00 11 of getting out of infringement. That would never cross
02:00 12 my mind ever. I know that both sides are seeking only
02:00 13 the truth and justice and the American way.

02:00 14 So don't think for even a moment I
02:00 15 would -- it would cross my mind that Apple was trying
02:00 16 to get out of infringement by suggesting a
02:00 17 construction.

02:00 18 MR. MALLOY: I appreciate that, Your
02:00 19 Honor, and that's exactly right. We are applying the
02:00 20 plain and ordinary meaning of these terms. And we
02:00 21 think it's clear from the specification and the claim
02:00 22 language.

02:00 23 I think that the easiest way to address
02:00 24 much of what Mr. Devlin discussed is to go to Slide 16
02:00 25 of the power slides. And we have Nomin Jagdagdorj

02:00 1 who's helping with this.

02:01 2 And this slide is about claim
02:01 3 differentiation. But right now, I don't want to focus
02:01 4 on the claim differentiation issue. I want to talk
02:01 5 about what these wherein/when clauses are.

02:01 6 And, yes. They are part of the method
02:01 7 claims. And these method claims have steps that
02:01 8 read -- they have -- may read -ing, a lot of verbs.
02:01 9 Like Claim 1 of the '127 patent says receiving,
02:01 10 determining, selecting. And those are all steps of the
02:01 11 method.

02:01 12 But then we get to these wherein clauses.
02:01 13 And it doesn't make sense to read them as method steps.
02:01 14 It's really clear, this particular wherein clause that
02:01 15 we're looking at says that the wireless device is
02:01 16 capable of selecting the second transmission mode when
02:01 17 an indication does not correspond to a subscriber.

02:01 18 The expressing capability of a wireless
02:02 19 device is clearly not a method step. What Apple
02:02 20 contends is that these wherein/when limitations,
02:02 21 specifically this one before us, '127 patent, Claim 1,
02:02 22 is it's expressing how this -- how this wireless device
02:02 23 is programmed or how it's configured.

02:02 24 And so there's no difference between our
02:02 25 original constructions and the constructions that

02:02 1 Mr. Devlin said were admitting something, admitting
02:02 2 that -- that these constructions are too narrow or --
02:02 3 we don't -- we don't think that at all because we think
02:02 4 our -- it's the same construction. That these claim
02:02 5 terms, the wherein/when limitations, should be read to
02:02 6 describe how this wireless device is configured.

02:02 7 And these method claims say that you
02:02 8 perform these steps of the method using this wireless
02:02 9 device that's programmed in a certain way.

02:02 10 This slide also makes a point that
02:03 11 Mr. Devlin didn't want to address. Because there's no,
02:03 12 in my mind, good rebuttal to our argument. And it's
02:03 13 that the applicants, when they wanted to express mere
02:03 14 capability of the wireless device, they wrote that
02:03 15 explicitly.

02:03 16 So we see here that they said that the
02:03 17 wireless device is capable of selecting the second
02:03 18 transmission mode when an indication doesn't correspond
02:03 19 to a subscriber.

02:03 20 And so we agree. Certainly the wireless
02:03 21 device doesn't have to be programmed to always select
02:03 22 the second transmission mode when the indication
02:03 23 doesn't correspond to a subscriber. When you have
02:03 24 language just requiring "is capable of."

02:03 25 But the applicants decided to use this

02:03 1 word "when" for the first transmission mode. And they
02:03 2 say: When the indication corresponds to a subscriber
02:04 3 of the service, then the wireless device is configured,
02:04 4 programmed to use the first transmission mode.

02:04 5 And you read the rest of this claim, it
02:04 6 makes clear that that first transmission mode is packet
02:04 7 switching versus the older SMS technology.

02:04 8 And it's clear here. It's if/then logic
02:04 9 that this device is programmed with. And so with that
02:04 10 in mind, I'd like to go to plaintiff's Slide 14. This
02:04 11 analogy that they made.

02:04 12 Mr. Devlin raised this hypothetical
02:04 13 claimed method of eating breakfast, eating lunch,
02:04 14 eating dinner wherein orange juice is consumed when
02:04 15 breakfast is eaten. And he said, well, gosh. That
02:04 16 would be really, really limiting because nobody would
02:04 17 always drink orange juice with breakfast like every
02:05 18 single day.

02:05 19 And that's not a really fair analogy to
02:05 20 the claims of the patents. Because the claims of the
02:05 21 patents are about a wireless device that has a chip and
02:05 22 a memory. It's programmed in a certain way. It's much
02:05 23 more reasonable that that wireless device is going to
02:05 24 be configured to do the same thing every time.

02:05 25 That's how computers are programmed. To

02:05 1 do the same thing every time and be reliable. As
02:05 2 opposed to a person who of course is -- can't be
02:05 3 expected to drink orange juice at every time he or she
02:05 4 eats breakfast.

02:05 5 And of course we don't have the spec
02:05 6 here, we don't have the prosecution history here, so we
02:05 7 don't know what the applicants intended. It could have
02:05 8 been that they intentionally wanted this narrow because
02:05 9 how else would they overcome validity challenges? We
02:05 10 don't know. There's not enough context here.

02:05 11 But in the context of the specification,
02:06 12 our construction is very well supported. It's actually
02:06 13 the construction that's set forth in the abstract of
02:06 14 the patent.

02:06 15 Nomin, could you actually pull up Slide
02:06 16 13 of our slides?

02:06 17 And here, we're reading the abstract's
02:06 18 description of this invention, and it says that the
02:06 19 sender's wireless device sends, if the destination
02:06 20 address corresponds to a subscriber of the service, the
02:06 21 outgoing message to the recipient's wireless device via
02:06 22 the packet switched base station in the first mode.

02:06 23 And this first mode is packet switching.

02:06 24 So again, we see if/then logic being
02:06 25 clearly expressed in the abstract. And that's what our

02:06 1 wherein/when limitations are meant to convey. That the
02:07 2 mobile device is programmed with this if/then logic
02:07 3 that, yeah. It will always be satisfied because that's
02:07 4 how it's programmed. And it's just like any kind of
02:07 5 computer's programmed to do the same things repeatedly.

02:07 6 If you have a mobile device that has some
02:07 7 different programming and that were used in conjunction
02:07 8 with these method claims, then that would be outside
02:07 9 the scope of the claims.

02:07 10 THE COURT: Were you done?

02:07 11 MR. MALLOY: I think it's a good point to
02:07 12 stop and see if you have any questions.

02:07 13 THE COURT: I don't.

02:07 14 MR. MALLOY: Okay. I'll briefly discuss
02:07 15 the IPR issue. It's not correct that we've taken any
02:07 16 inconsistent positions. We simply didn't articulate to
02:07 17 the PTAB that any particular terms required
02:08 18 construction, and that's because we're applying plain
02:08 19 and ordinary meanings there.

02:08 20 But there's no inconsistency between the
02:08 21 arguments that we've made in the PTAB and the
02:08 22 constructions that we're presenting to Your Honor. And
02:08 23 Mr. Devlin didn't point to any particular
02:08 24 inconsistency. There is none.

02:08 25 I also want to make one final point that

02:08 1 in these slides that plaintiff has submitted and the
02:08 2 argument, there is discussion of certain claims that
02:08 3 haven't been asserted. And so we just want to state
02:08 4 for the record that if there appear to be a number of
02:08 5 claims being referenced in these proceedings that
02:08 6 aren't part of the infringement contentions aren't part
02:08 7 of the asserted claims.

02:08 8 THE COURT: Did I -- I may have
02:08 9 misunderstood you. So you -- Apple has challenged this
02:09 10 patent at the PTAB?

02:09 11 MR. MALLOY: Yes, Your Honor. We filed
02:09 12 IPR petitions on all seven --

02:09 13 THE COURT: I got it. I got it. And
02:09 14 so -- and with regard to this claim term, what
02:09 15 construction did you proffer at the PTAB?

02:09 16 MR. MALLOY: We didn't proffer any
02:09 17 construction. We were applying the plain and ordinary
02:09 18 meanings.

02:09 19 THE COURT: And what's the difference
02:09 20 between the PTAB and my Court?

02:09 21 MR. MALLOY: It's the same claim
02:09 22 construction standard is my understanding. And what
02:09 23 I'm trying to express is that we haven't taken any --

02:09 24 THE COURT: No. I -- maybe my question
02:09 25 wasn't clear. Why are you proffering a construction in

02:09 1 this case when you did not proffer one at the PTAB?

02:09 2 MR. MALLOY: Oh, I understand, Your
02:09 3 Honor.

02:09 4 During meet-and-confer conversations with
02:09 5 plaintiff's counsel, we determined that we weren't
02:09 6 seeing these terms eye-to-eye in terms of what they
02:10 7 meant because it appears that plaintiff's counsel
02:10 8 doesn't think that the wireless device needs to be
02:10 9 programmed the same way that we think it needs to be
02:10 10 programmed.

02:10 11 And we think that they would argue that
02:10 12 some kind of coincidental -- coincidental co-occurrence
02:10 13 would be enough to satisfy these claims. And so we
02:10 14 disagreed about that and thought it needed to be raised
02:10 15 as a claim construction.

02:10 16 THE COURT: Well -- I'm sorry to
02:10 17 interrupt you. So let me tell you the problem I have
02:10 18 now. From my perspective.

02:10 19 So what I hear Mr. Devlin saying is
02:10 20 essentially, I think, and he can correct me when we get
02:10 21 back, is that there is plenty of infringing going on,
02:10 22 tons of infringing going on by Apple. Under -- under
02:10 23 his orange juice theory.

02:11 24 But that he's afraid that for other
02:11 25 instances, Apple will say, no. Apple will say because

02:11 1 you didn't add the orange juice, because you didn't
02:11 2 have what you have here, it will eliminate all of
02:11 3 the -- all of the infringement being done by Apple and
02:11 4 that's a reason for me to reject the proffered claim
02:11 5 term.

02:11 6 What I hear you saying, if I understand
02:11 7 it, and again, I may not, but if I hear you saying is
02:11 8 your fear is that Apple could be on the hook for almost
02:11 9 no infringement other than random occasions when you
02:11 10 accidentally swerve into -- a tiny amount where you
02:11 11 swerve into what might be covered under the orange
02:11 12 juice rule here, as it were, and you're worried that
02:12 13 plaintiff is going to argue for infringement of
02:12 14 everything under this.

02:12 15 So help me out there. Again, I'm a
02:12 16 pretty simple person. When Mr. Devlin was speaking, I
02:12 17 said to the extent the expert can show that the Apple
02:12 18 product is complying really with the plain and ordinary
02:12 19 meaning of the claim term, then there is infringement.
02:12 20 And if there are times when the technology is acting in
02:12 21 a way that doesn't infringe, then there's not
02:12 22 infringement. And that the fact that sometimes the way
02:12 23 the product works is not infringing does not absolve
02:12 24 Apple of the times when it is.

02:12 25 You seem to be coming at it from a

02:12 1 completely opposite perspective, which tempts me to
02:13 2 want to give a plain and ordinary meaning construction,
02:13 3 which I do often, and tell Apple -- I'm not picking on
02:13 4 Apple -- this is not unique to this case and I'm not
02:13 5 picking on Apple, you just happen to be the defendant
02:13 6 here -- that I'm going to say plain and ordinary
02:13 7 meaning because I almost -- I'm sure Mr. Nash advised
02:13 8 you, I almost never, if ever, give prophylactic
02:13 9 constructions because the defendant is worried about
02:13 10 what the plaintiff might say about infringement.

02:13 11 And at some point, Mr. Devlin sends you
02:13 12 their expert infringement report and you look at it and
02:13 13 you either say, okay. We believe Mr. Devlin and team
02:13 14 stayed within the bounds of what plain and ordinary
02:13 15 means for this claim term, or we think he went beyond
02:14 16 it, which causes a problem for the Court then.

02:14 17 At which point you come back to the Court
02:14 18 and say, Judge, before we do our expert report, we want
02:14 19 to challenge whether or not the plaintiff's
02:14 20 technical -- the opinion proffered by the technical
02:14 21 expert falls within what the Court believes is the
02:14 22 ambit of the claim -- the plain and ordinary meaning of
02:14 23 the claim term and we go from there.

02:14 24 That's typically what I do -- I know I've
02:14 25 spoken for about ten minutes now -- but that is

02:14 1 typically what I do in a situation like the one I have
02:14 2 here. Tell me why that isn't the better course of
02:14 3 conduct here.

02:14 4 MR. MALLOY: Yes, Your Honor.

02:14 5 It's because we know right now that there
02:14 6 is a dispute about the plain and ordinary meaning of
02:14 7 what these terms mean and what "when" means. And we
02:14 8 know what that dispute is. It is --

02:14 9 THE COURT: But you don't know what --
02:14 10 you don't know whether or not the plaintiff -- you
02:15 11 don't know how they're going to take the plain and
02:15 12 ordinary meaning and what -- how they're going to apply
02:15 13 it to the Apple products.

02:15 14 And I would -- you know, I'm -- as
02:15 15 Mr. Nash will tell you, I would require them to be very
02:15 16 specific about why -- how and why the Apple product
02:15 17 meets the bounds of this claim term in this specific
02:15 18 claim language.

02:15 19 And again, if once you get the expert
02:15 20 report you believe that that can't -- as a matter of
02:15 21 law cannot be plain and ordinary meaning of the -- of
02:15 22 what that claim term is, then you come and tell me
02:15 23 that. And at that point, I'd rule with you or against
02:15 24 you.

02:15 25 MR. MALLOY: Your Honor, plaintiff's

02:15 1 counsel has already told us that they disagree with our
02:15 2 view of the plain and ordinary meaning. They do not
02:16 3 agree that this -- that what we're looking at on the
02:16 4 right of this slide, the wherein/when is a
02:16 5 cause-and-effect relationship.

02:16 6 Just like in American Calcar, where the
02:16 7 plaintiff didn't agree that this was -- that "when" was
02:16 8 connoting a cause-and-effect relationship, and the
02:16 9 Federal Circuit said, yes. It is a cause-and-effect
02:16 10 relationship. That's the plain and ordinary meaning.

02:16 11 And Apple's position is that the plain
02:16 12 and ordinary meaning of these wherein/when limitations
02:16 13 is a cause-and-effect relationship, and plaintiff's
02:16 14 counsel doesn't agree. They want to point to any time
02:16 15 where it just so happens that an indication comes back
02:16 16 that a recipient was a subscriber to packet switching.

02:16 17 Any time that happens -- that happens and
02:16 18 co-occurs with selection of packet switching, they want
02:16 19 to say that's infringement because it's not a
02:16 20 cause-and-effect relationship. That this condition
02:16 21 doesn't have to lead to this result in the plaintiff's
02:16 22 world.

02:17 23 We already know that. They've told us
02:17 24 that. They wouldn't agree to our configured to
02:17 25 constructions where we said, well, we can get rid of

02:17 1 these edge case concerns because all we're saying is
02:17 2 that the wireless device that's recited here, it has to
02:17 3 be configured to do this. It has to be configured to
02:17 4 select this first transmission mode packet switching
02:17 5 when a response comes back from a server that says the
02:17 6 subscriber has the ability to do packet switching.

02:17 7 THE COURT: But everything you're saying
02:17 8 there, what you just said is -- says a lot more than
02:17 9 what the claim construction is that I'm giving you.
02:17 10 And if -- and I'm concerned that -- that you are
02:17 11 taking -- that what you are arguing is just the
02:17 12 appropriate construction of a claim term and
02:17 13 essentially wanting me to do that so that you can make
02:18 14 the argument you just made about technically how it
02:18 15 works and whether or not there would be infringement.

02:18 16 And that's usually not the way I handle
02:18 17 claim constructions. I usually -- at this point. I
02:18 18 mean, I don't know -- I know you've probably spoken to
02:18 19 Mr. Devlin. Maybe even you have infringement
02:18 20 contentions. But I don't -- but I don't know, as we
02:18 21 sit here today in January, that what you are worried
02:18 22 about is going to come to pass with respect to what
02:18 23 Mr. Devlin and team say in their expert report.

02:18 24 Which is -- and I'm -- again, I'm -- I'll
02:18 25 give you one more shot, but I'm very reluctant usually

02:18 1 to provide a prophylactic claim construction. So one
02:18 2 more chance, please.

02:18 3 MR. MALLOY: Okay. Thank you, Your
02:18 4 Honor.

02:18 5 We don't consider it a prophylactic claim
02:19 6 construction. We just think it's a fundamental
02:19 7 question about what these wherein/when causes mean.

02:19 8 So I want -- I just want to go -- let's
02:19 9 go to Slide 12 again. I know we already looked at this
02:19 10 slide.

02:19 11 Excuse me one second. Let me make sure I
02:19 12 get the right slide.

02:19 13 I can step through this more
02:19 14 systematically too. Because I know we went briefly
02:19 15 into response to plaintiff's counsel. But I want to
02:19 16 make sure that the issue's fully keyed up and that you
02:19 17 understand what our position is and I think what the
02:19 18 dispute is.

02:19 19 I think Slide 16, let's start with that.

02:19 20 Okay. The fundamental question that's
02:19 21 before us, and which we know right now that there's a
02:19 22 dispute about, is whether this word "when" is the same
02:20 23 thing as "is capable of." And Mr. Devlin wants to read
02:20 24 "when" to mean "is capable of." Even though the next
02:20 25 limitation uses is capable of.

02:20 1 And Mr. Devlin doesn't agree with us that
02:20 2 this wherein/when limitation is reciting a
02:20 3 cause-and-effect relationship. He wants when to be --
02:20 4 to co-occur. So -- if the wireless device is even
02:20 5 capable of selecting packet switching when a indication
02:20 6 corresponds to a subscriber, he wants to say that's
02:20 7 within the scope of the claims.

02:20 8 We are -- we know that's the dispute
02:20 9 already. We don't have to get to expert reports to get
02:20 10 there.

02:20 11 And our position is this is a pure claim
02:20 12 construction issue. It's a Markman issue. It's
02:20 13 pure -- it's clear claim differentiation when we have
02:20 14 this "is capable" of language versus "when" as recited
02:21 15 in the wherein/when terms.

02:21 16 And if you go through these patents,
02:21 17 you'll see that the applicants routinely in many claims
02:21 18 recite "is capable of" when that's what they mean. But
02:21 19 here, they didn't say that they used very different
02:21 20 language expressing a cause/effect relationship which
02:21 21 is the plain and ordinary meaning according to Apple
02:21 22 and not according to plaintiffs.

02:21 23 In fact, they refuse to say what the
02:21 24 plain and ordinary meaning is. But they're -- as I
02:21 25 understand it, they will not agree to a

02:21 1 cause-and-effect relationship like the Federal Circuit
02:21 2 held when to require in America Calcar.

02:21 3 THE COURT: I wasn't sure if you were
02:21 4 finished. Anything else?

02:21 5 MR. MALLOY: Unless Your Honor has more
02:21 6 questions, then nothing else.

02:21 7 THE COURT: Okay. I'll be back in just a
02:21 8 second.

02:21 9 (Pause in proceedings.)

02:26 10 THE COURT: The Court is going to change
02:26 11 its preliminary construction and go with plain and
02:26 12 ordinary meaning.

02:26 13 The next claim term up is "bearer."

02:26 14 MR. DEVLIN: Thank you, Your Honor.

02:26 15 THE COURT: Yes, sir.

02:26 16 MR. DEVLIN: Yes. This is Tim Devlin.
02:26 17 This one will be very short. I'm not even going to go
02:26 18 to the slides.

02:26 19 So the issue with the tentative
02:27 20 construction in our view and Apple's proposal is that
02:27 21 it's too broad in one very simple sense. There's
02:27 22 always a channel. This is -- we're talking about
02:27 23 communications. There has to be --

02:27 24 THE COURT: Mr. Devlin, I apologize.

02:27 25 MR. DEVLIN: Yeah.

02:27 1 THE COURT: You would have been well
02:27 2 served to be at the CLE I did this week where I
02:27 3 complained, not about you, but just as a general
02:27 4 statement that a lot of times, you know, my clerks give
02:27 5 me a very good bench memo. When all I have is the word
02:27 6 for -- like for example here, bearer, it would help me
02:27 7 a lot if someone could show me the entire claim and let
02:27 8 me see the context "bearer" is used in.

02:27 9 MR. DEVLIN: One moment, Your Honor.
02:27 10 We have a sample claim here. And if I
02:27 11 need to, I can pull up a full claim.

02:27 12 So here's an example. In the '127
02:27 13 patent, Claim 1. And there are different types of
02:27 14 bearers that are discussed in the patent and in the
02:28 15 claims. There's packet switch bearers. And --

02:28 16 THE COURT: I'm not -- you know, I've
02:28 17 done this for a while and I'm certainly not an
02:28 18 engineer. I don't remember confronting the term
02:28 19 "bearer" before. Is it something that's used often? I
02:28 20 mean, why -- do you have any idea why the -- either the
02:28 21 inventor or the lawyer prosecuting this chose -- does
02:28 22 "bearer" have some meaning I'm unaware of because I'm
02:28 23 not an engineer?

02:28 24 MR. DEVLIN: Your Honor, we perhaps
02:28 25 should have put in some extrinsic evidence here. It is

02:28 1 a term of art. And it really just means the protocol
02:28 2 that's being used. Those protocols have to run on
02:28 3 channels.

02:28 4 So bearer could sound like -- this is why
02:28 5 we actually suggested this term, because bearer could
02:28 6 sound like it means the medium. Is it a wire? Is it
02:28 7 the air? You know, if it's wireless, what does the
02:28 8 "bearer" mean? You know, is it the -- for lack of a
02:28 9 better way to say it, the physical thing that's going
02:28 10 on? Or is it something more logical?

02:29 11 It turns out it's the logical side. If
02:29 12 you look up "bearer," you know, if you just kind of
02:29 13 Google it and look at various technical sources,
02:29 14 they'll indicate that it really relates to the standard
02:29 15 or protocol, the language by which the information is
02:29 16 being transmitted across anything, you know, within a
02:29 17 computer system.

02:29 18 And so for us, protocol or channel, the
02:29 19 or there is overly broad because it could just mean a
02:29 20 channel. It could mean a wire. Literally a wire on
02:29 21 the floor is a bearer. Or anything that's carrying
02:29 22 bits as a bearer. Regardless of whether they're
02:29 23 formatted at all in any communication sense.

02:29 24 And so to -- for us really the focus is
02:29 25 on protocol. And if "bearer" just meant protocol, we'd

02:29 1 be fine with that. We don't need protocol running on a
02:29 2 channel because -- I mean, in the same way that "or
02:29 3 channel" is too broad because channel's always there,
02:29 4 protocol running on a channel is sort of, you know,
02:30 5 it's unnecessary at some level to say the second part
02:30 6 because a channel is always there. There's always
02:30 7 going to be some communication channel.

02:30 8 So really the focus for us is on the fact
02:30 9 that it relates to the language, the protocol that's
02:30 10 being spoken. And there are various examples, some of
02:30 11 which the jury will be familiar with and some, you
02:30 12 know, not. And I don't think we really need all those,
02:30 13 by the way. I don't think we need that list in there.
02:30 14 We want it to be helpful. But if that's considered
02:30 15 unhelpful, then we could exclude that list.

02:30 16 THE COURT: Okay. Anything else,
02:30 17 Mr. Devlin?

02:30 18 MR. DEVLIN: That's all, Your Honor.
02:30 19 Thank you.

02:30 20 THE COURT: Okay. And for Apple?

02:30 21 MR. KIAEI: Good afternoon, Your Honor.
02:30 22 Nima Kiaei, counsel of Morrison & Foerster on behalf of
02:30 23 Apple. I believe we might have just one slide here
02:30 24 that might help the Court.

02:30 25 Of course we agree with Your Honor's

02:30 1 preliminary construction, and so I don't want to
02:30 2 belabor. We did just want to respond to a few --

02:31 3 THE COURT: Well -- I'm sorry. Could
02:31 4 you -- what would help me is if you would start by --
02:31 5 Mr. Devlin, if you would repeat what you'd be
02:31 6 willing -- what you would like to see removed and ask
02:31 7 Apple if they -- if they would be okay with that.

02:31 8 MR. DEVLIN: Sure. If we just used the
02:31 9 word "protocol" or if we wanted to be a little more
02:31 10 jury friendly, you know, a communication protocol,
02:31 11 something like that, we'd be fine.

02:31 12 THE COURT: And what does Apple say to
02:31 13 that?

02:31 14 MR. KIAEI: We're almost in agreement,
02:31 15 Your Honor. Our concern is that we're going to be
02:31 16 excluding some of the embodiments that are explicitly
02:31 17 disclosed in the specification. Namely, there are
02:31 18 channel-only embodiments, if we go to the next slide.

02:31 19 We see that in Column 7 of the
02:31 20 specification with the '127 patent, for example, where
02:31 21 the specification says that an SMS bearer may be a
02:31 22 channel. A packet switch data bearer may also be a
02:31 23 different shared transmission channel. And then later
02:31 24 on in that same passage, it says that it may also be a
02:32 25 protocol. And it gives some examples of certain types

02:32 1 of protocols.

02:32 2 But ultimately our issue, Your Honor, is
02:32 3 that we're concerned that we're collapsing channel and
02:32 4 protocol together with HBCU Messaging's language of a
02:32 5 protocol running on a channel. That specific language
02:32 6 does not appear in the patent.

02:32 7 We think that this is a and/or dispute of
02:32 8 does it mean the two things together or is it a channel
02:32 9 or a protocol? And we think it's the latter really
02:32 10 because of these embodiments disclosed in the
02:32 11 specification in Column 7.

02:32 12 HBCU Messaging did bring up in their
02:32 13 brief that they think that SMS is just an adjective
02:32 14 that's describing the protocol type that's used on the
02:32 15 channel. We think that ignores the rest of the
02:32 16 sentence where the patent doubles down and says that it
02:32 17 may also be a shared transmission channel for a packet
02:32 18 switch data bearer.

02:32 19 And again, in contrast to that later,
02:32 20 saying it may also be a data transfer protocol and it
02:33 21 gives some examples with that.

02:33 22 And I think the way that we reconcile
02:33 23 this, Your Honor, why there's channel-only embodiments
02:33 24 and protocol-only embodiments is that we're talking
02:33 25 about a cellular messaging situation here. We have

02:33 1 SMS. We have certain cellular protocols that are being
02:33 2 used. And when we're talking about that cellular
02:33 3 context, the patent is using channel. It may be a
02:33 4 signalling channel.

02:33 5 But then when we get to these packet
02:33 6 switch communication methods, the patent gives examples
02:33 7 of packet switch protocols. And it uses the term
02:33 8 "protocol." So Bluetooth, WiFi, WiMax. So we think
02:33 9 it's an issue of cellular versus packet switch and the
02:33 10 patent is using these terms disjunctively.

02:33 11 And that's ultimately how we see this
02:33 12 issue, Your Honor, that it's more of a functional
02:33 13 consequence in terms of what bearer does. What does
02:33 14 bearer functionally do and that's how we're getting the
02:33 15 message to the recipient. And in this cellular
02:33 16 example, it says we're using this particular
02:34 17 communication channel. And then with these packet
02:34 18 switch examples, like Bluetooth, WiFi, WiMax, the
02:34 19 protocol is what's been being used to deliver it.

02:34 20 With that, Your Honor, happy to answer
02:34 21 any questions that you may have.

02:34 22 THE COURT: Mr. Devlin.

02:34 23 MR. DEVLIN: Yeah. Very brief. And keep
02:34 24 this slide on the screen.

02:34 25 So what's happening here is not just a

02:34 1 channel. In each one of these, there's a protocol
02:34 2 pointed to. So there's -- here's there's SM -- there's
02:34 3 two different categories of bearers that are discussed
02:34 4 in the patent. There's SMS bearers, which go through
02:34 5 that cellular traditional SMS system but they do so
02:34 6 using SMS protocol language.

02:34 7 SS7 and SMS themselves are such
02:34 8 protocols. So SS7 is a protocol running on this
02:34 9 channel. So it's not just saying channel.

02:34 10 And the second part of the sentence when
02:34 11 it talks about packet switched data bearer, it's not
02:34 12 just channel. It's a channel that combines multiple
02:34 13 time slots in a GSM TDMA frame. TDMA is Time Division
02:35 14 Multiple Access. That's a protocol.

02:35 15 So it's talking about protocols in each
02:35 16 of the examples in this very sentence. And then it
02:35 17 goes on in the next sentence to say it may also be --
02:35 18 this is the data switched bearer may also be. And the
02:35 19 "also" there is above and beyond the TDMA frame. The
02:35 20 GSM TDMA protocol. It could also be, instead,
02:35 21 Bluetooth, WiFi, et cetera. All those protocols.

02:35 22 So here, it's -- even in this sentence,
02:35 23 there's never an instance where channel by itself is
02:35 24 the bearer. The bearer refers to the language that's
02:35 25 used to exchange information. And in -- you know, in a

02:35 1 more technical sense, that's the word "protocol." So
02:35 2 that's where we are on this.

02:35 3 THE COURT: Anything else from Apple?

02:35 4 MR. KIAEI: Thanks, Your Honor. I'll
02:35 5 just briefly touch on this.

02:35 6 I think that ignores the second -- the
02:36 7 last sentence in Column 7. There's no channels being
02:36 8 discussed there. It just says the packet switched data
02:36 9 bearer may also be a protocol, and it gives examples of
02:36 10 certain protocols that could be used for packet
02:36 11 switching, Bluetooth, WiFi, WiMax.

02:36 12 And then the column that we have at the
02:36 13 very top of the slide here from Column 2, HBCU
02:36 14 Messaging's contention is that this is not just a
02:36 15 channel. We think what's being discussed here, Your
02:36 16 Honor, is, again, a cellular network situation where a
02:36 17 cellular device is sending SMS messages and that's
02:36 18 being done with a channel, particular channel.

02:36 19 THE COURT: Mr. Devlin.

02:36 20 MR. DEVLIN: It's right there in the
02:36 21 sentence, it says GSM SS7 channel. There's the
02:36 22 protocol. So each of these involves a protocol.
02:36 23 That's where we are. We agree -- there's always a
02:36 24 protocol, we agree with that.

02:36 25 THE COURT: So the fight's over channel?

02:36 1 The inclusion of channel?

02:36 2 MR. DEVLIN: It's just the or. So you
02:36 3 need a protocol. You can't exchange --

02:36 4 THE COURT: Right.

02:37 5 MR. DEVLIN: And that's what "bearer"
02:37 6 means. That's all.

02:37 7 THE COURT: So your -- the Devlin
02:37 8 position is that where channel is used, it's still part
02:37 9 of a protocol. Therefore, you don't need a channel --
02:37 10 a protocol or a channel?

02:37 11 MR. DEVLIN: Right. There's always going
02:37 12 to be a channel. There is -- I mean, that's just true.
02:37 13 There's always going to be a mechanism for bits of data
02:37 14 to move. That's always going to be there.

02:37 15 And to say "or channel," and so that
02:37 16 bearer could merely mean channel without any protocol
02:37 17 running on it, that's what's wrong. There needs to be
02:37 18 a protocol. And if "bearer" just is defined as
02:37 19 protocol because it's easier for the jury to
02:37 20 understand, we're totally fine with that. We don't
02:37 21 need to use our language, protocol running on a
02:37 22 channel. We don't need the examples that we have
02:37 23 provided.

02:37 24 But it needs to be a protocol. It can't
02:38 25 just be a channel. So it's the "or channel" that is

02:38 1 the troublesome part for us. And that I view and we
02:38 2 view as inconsistent with that -- what's actually on
02:38 3 the screen right now that Apple is advocating. Because
02:38 4 every one of these involves a protocol.

02:38 5 THE COURT: Anything else from Apple?

02:38 6 MR. KIAEI: No, Your Honor. I think
02:38 7 we've already hit on these key points. We just want to
02:38 8 reiterate that, again, this Column 7, it says while a
02:38 9 packet switched data bearer may be a shared
02:38 10 transmission channel, we do think that it discloses
02:38 11 channel-only embodiments and that excluding that would
02:38 12 exclude some of the embodiments in the specification.

02:38 13 So we do think that's important. We also
02:38 14 think that it is consistent with the plain meaning.

02:38 15 THE COURT: Okay. I'll be back in a few
02:38 16 seconds.

02:38 17 (Pause in proceedings.)

02:49 18 THE COURT: We can go back on the record.

02:49 19 You know, seven and a half years in,
02:49 20 there's always a first. And why not have it happen
02:49 21 when I'm surrounded by such good friends and good
02:49 22 lawyers?

02:49 23 I don't really -- as I understand both
02:49 24 sides' arguments, I don't like either of your proposed
02:49 25 constructions. So I understand, Mr. Devlin, the effort

02:49 1 you made to alter yours.

02:49 2 So I'm going to give the parties until
02:49 3 close of business Tuesday. You can do it sooner
02:49 4 obviously. Submit a new -- if you want to. Let me
02:50 5 start over.

02:50 6 I'm not ordering you to submit something.
02:50 7 I'm going to give you the opportunity to submit
02:50 8 something by the end of the day Tuesday. And if you
02:50 9 don't, you don't, and I'll go from there. If you do,
02:50 10 I'll look at what I get and hopefully it will help me.

02:50 11 Because I don't -- I don't think either
02:50 12 one of them, as framed, I'm comfortable with as I
02:50 13 understand the arguments. And if I -- once I get them,
02:50 14 if I feel like additional arguments would help me with
02:50 15 that, then we'll get back together as well.

02:50 16 Because I certainly understand why -- if
02:50 17 I get this wrong, I can -- and I was joking earlier
02:50 18 about constructions and infringement and all that and I
02:50 19 really was joking because I did it for a long time.
02:50 20 But I really do want to get this right and not
02:50 21 accidental either permit or prohibit claim -- if I get
02:51 22 this wrong.

02:51 23 So if you all will get -- as soon as you
02:51 24 can by -- by the end of Tuesday, if not sooner, I
02:51 25 believe it's Anna's case, if you'll get them to her and

02:51 1 just copy the other side. Y'all are welcome after
02:51 2 the -- you know, obviously to talk about it and see if
02:51 3 you can come jointly up with something. I'm not
02:51 4 ordering you to -- either to talk or to come up with
02:51 5 something. Just a suggestion. And if you all want to
02:51 6 exchange what you're proposing in advance to see if it
02:51 7 moves one side or the other, that's fine as well.

02:51 8 I really do want -- based on what you
02:51 9 argued, I understand the importance of getting this
02:51 10 construction right if I can. And so I think that's the
02:51 11 best solution.

02:51 12 Mr. Devlin, you're in my screen. Is
02:51 13 there anything else that we need to take up today?

02:51 14 MR. DEVLIN: Nothing further, Your Honor.
02:51 15 Just a quick clarification.

02:51 16 So before Tuesday, I'm understanding and
02:52 17 I'm just confirming so no one's, you know -- no
02:52 18 argument. You just want a proposed construction but
02:52 19 no -- if you want argument later, you'll tell us. But
02:52 20 no argument before Tuesday.

02:52 21 THE COURT: Correct.

02:52 22 MR. DEVLIN: Got it. Thank you, Your
02:52 23 Honor.

02:52 24 THE COURT: And if you -- I mean, you
02:52 25 know, when someone's as brilliant as Michael Shore, if

02:52 1 you have this done by -- you know, before he has to go
02:52 2 out and herd cows and you want to send it in today, you
02:52 3 can send it in today. Or you can send it to Mr. Nash
02:52 4 today and say, here's our new proposal. What do you
02:52 5 think?

02:52 6 And again, if it's 4:59 on Tuesday and
02:52 7 you haven't gotten it done, you'll have till Wednesday.
02:52 8 I mean, it's really not time critical. I just want to
02:52 9 get it done -- I just want to have a deadline so that
02:52 10 we know when -- and when we get it in Tuesday or
02:52 11 earlier, Anna and I and the other clerks and I'll talk
02:52 12 about it. If we need more argument, we'll ask you for
02:52 13 it. If we don't, once we have everyone's -- we may
02:52 14 come up with our own. And so -- construction, which is
02:53 15 probably the worst thing that can happen for the
02:53 16 parties.

02:53 17 And so and -- if that happens. So but I
02:53 18 can't -- I don't really feel like I can get it right
02:53 19 with either of these two constructions.

02:53 20 So, Mr. Nash and team?

02:53 21 MR. NASH: Just one clarifying question,
02:53 22 Your Honor.

02:53 23 I think on this term, Apple did provide a
02:53 24 proposed construction to the extent it was helpful to
02:53 25 the Court. But this was not a term that we had thought

02:53 1 needed a construction. I think in Apple's
02:53 2 perspective -- and not sure that -- that might have
02:53 3 been lost on the argument today and perhaps even in the
02:53 4 briefing.

02:53 5 But it's been our position that one of
02:53 6 skill in the art would understand this, have a plain
02:53 7 and ordinary meaning to it. It's a bearer. It just
02:53 8 simply is that if it's one, it's this. If it's that,
02:53 9 it's just two different ways of looking at it.

02:53 10 But like I didn't want to then come back
02:53 11 to the Court and propose plain and ordinary meaning
02:53 12 because --

02:53 13 THE COURT: No, no, no. By the way,
02:54 14 plain and ordinary meaning might be the right
02:54 15 construction.

02:54 16 MR. NASH: Understood, Your Honor.

02:54 17 Okay. I didn't want to keep something to
02:54 18 that effect and then you think that I didn't take the
02:54 19 Court's instruction.

02:54 20 THE COURT: That was a great question
02:54 21 because, you know, again, I was taken a little off
02:54 22 guard by bearer. It's rare at this point after so many
02:54 23 Markmans I'm taken off guard. But -- and, you know,
02:54 24 having practiced. I really was taken a little off
02:54 25 guard by bearer. And so it might do us good for me to

02:54 1 get better educated about how that word is used as
2 well.

02:54 3 And that might -- that might -- having
02:54 4 heard Mr. Devlin's arguments about protocols and
02:54 5 channels and your arguments as well and -- and, you
02:54 6 know, a lot of this, as you've heard me say, everyone
02:54 7 on here's heard me say, you know, I don't think when
02:54 8 whoever was writing this patent, they spent more than
02:54 9 about two seconds writing the word "bearer" in there,
02:54 10 not thinking that I would ever spend an hour of trying
02:55 11 to figure out what they meant by it.

02:55 12 I bet you there are other things in the
02:55 13 patent when they were drafting it they spent a lot more
02:55 14 time worrying about. And probably just used the word
02:55 15 "bearer" because that's what they thought worked in
02:55 16 that sentence. And so I'm aware of the realities of
02:55 17 the patent prosecution world too.

02:55 18 So the fact that I'm unfamiliar with the
02:55 19 word "bearer" doesn't mean that it's that fancy a word
02:55 20 either.

02:55 21 So basically by the end -- as soon as you
02:55 22 can, hopefully by the end of the day Tuesday, get me
02:55 23 your proposals, whatever they are, you know, I'll take
02:55 24 them up. And for example, in your case, I'm not saying
02:55 25 it is or isn't, but I might like plain and ordinary

02:55 1 meaning for Apple better because -- and don't take this
02:55 2 word wrong, I might see that there could be less
02:55 3 mischief done with it than the phrase you gave, even
02:55 4 though I don't think the phrase you gave was intended
02:56 5 for the purposes of mischief.

02:56 6 It's just when I heard how much fight
02:56 7 there was over protocol and channel, I can see why the
02:56 8 other side might be concerned if that's what you
02:56 9 suggested.

02:56 10 So whatever it is Apple wants to suggest,
02:56 11 whatever the plaintiff wants to suggest, I'm -- it's
02:56 12 your case. And so I'm totally open to it.

02:56 13 MR. DEVLIN: Thank you, Your Honor.

02:56 14 MR. NASH: Thank you, Your Honor.

02:56 15 THE COURT: Have a good day. And
02:56 16 everyone out there be safe. Take care.

02:56 17 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

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I, Kristie M. Davis, Official Court
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