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)

APPEARANCES:

For the Plaintiff: Timothy Devlin, Esq.
Neil A. Benchell, Esq.
Devlin Law Firm, LLC
1526 Gilpin Avenue
Wilmington, DE 19806

Michael W. Shore, Esq.
The Shore Firm
901 Main Street, Suite 3300
Dallas, TX 75202

For the Defendants: Brian Christopher Nash, Esq.
Morrison & Foerster LLP
701 Brazos Street, Suite 1100
Austin, TX 78701

Nima I. Kiaei, Esq.
Ryan J. Malloy, Esq.
Morrison & Foerster LLP
707 Wilshire Blvd., Suite 6000
Los Angeles, CA 90017-3543

Nomin-Erdene Jagdagdorj, Esq.
Morrison & Foerster LLP
2100 L Street, NW Suite 900
Washington, DC 20037

Court Reporter: Kristie M. Davis, CRR, RMR
PO Box 20994
Waco, Texas 76702-0994
(254) 666-0904

Proceedings recorded by mechanical stenography,

01:38 transcript produced by computer-aided transcription.

APPLE 1122
Apple Inc. v.
HBCU
IPR2026-00104

01:38 (Hearing begins.)

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

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

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

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

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

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

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

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

01:39 MR. DEVLIN: You as well.

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

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

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

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

THE COURT: I would rather be rounding up cows, for gosh sakes. I think you made the wrong decision.

(Laughter.)

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

MR. SHORE: It's warmer here.

THE COURT: Where are you at?

MR. SHORE: I'm about 65 miles southeast of Dallas.

THE COURT: Oh, okay.

Mr. Nash?

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

Jagdagdorj, Your Honor.

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

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

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

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

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

MR. NASH: Understood, Your Honor.

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

provided to the Court. Is that on the screen?

THE COURT: Yes, sir.

MR. DEVLIN: Okay. Thank you.

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

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

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

I'll note first, just very briefly, Your Honor, see if I can go through these slides. I'll skip all this.

I will note Apple submitted a series of IPRs. And each of the IPRs, Apple submitted to the PTAB that no formal constructions were necessary.

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

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

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

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

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

01:43 THE COURT: All good.

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

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

result X.

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

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

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

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

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

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

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

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

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

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

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

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

MR. DEVLIN: Thank you, Your Honor.

(Pause in proceedings.)

THE COURT: Okay. I'm back.

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

THE COURT: We are.

MR. DEVLIN: Thank you.

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

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

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

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

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

And there's other cases that say the same thing. Direct infringement of a method claim can be based on even one instance of the method being performed.

And so the fact that there might be instances where the method is not performed, where the claimed condition and event or condition and result is not met, those instances should not erase the times when it is met.

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

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

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

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

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

dinner. And now we have our "wherein/when" clause. Wherein orange juice is consumed when breakfast is eaten. So there's -- when is our condition, when breakfast is eaten. And the result is the Y, you consume orange juice.

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

But on those days where you have breakfast, lunch, and dinner and you have orange juice with breakfast, those days are instances of infringement. That's that simple application of the Federal Circuit law that we just looked at.

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

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

three meals and you have orange juice with breakfast.

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

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

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

So I think they sensed that the

01:53 construction that they proposed originally was
01:54 overreaching. Because even in cases of fault or error
01:54 in the system, a bug in the system where something
01:54 didn't happen would, again, if the claim is legally
01:54 interpreted -- or the claim construction is legally
01:54 interpreted in a way I'm worried about, then, you know,
01:54 a simple single instance of a message being directed
01:54 the wrong way would negate infringement for an entire
01:54 system or for the billions and billions of times when
01:54 the method claims are met.
01:54 And so --
01:54 THE COURT: Mr. Devlin, I don't
01:54 understand. I'm just too simple.
01:54 MR. DEVLIN: Sure.
01:54 THE COURT: I'm too simple minded. How a
01:54 construction could excuse -- or if instances infringe
01:55 the claim term on Monday through Saturday, to use your
01:55 vernacular, regardless of what the claim term is, the
01:55 fact that they don't -- if Apple were to take the
01:55 position under the construction they don't infringe on
01:55 Sunday, I don't see any scenario where Apple wouldn't
01:55 be liable for the infringement Monday through Saturday.
01:55 MR. DEVLIN: Thank you, Your Honor.
01:55 That's what we're worried about. It kind
01:55 of flows from -- I otherwise don't understand what this

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

But, Your Honor, I can stop here if the Court has enough. Because I'm in total agreement with what Your Honor just said, the Saturday through -- I'm sorry. Yeah.

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

01:57 do what the patent claim says.

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

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

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

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

01:58 effectively. And so if something -- if there were an
01:58 exception to the always, then that would negate
01:58 infringement entirely, for the entire universe.
01:58 But if we're on the same page that that's
01:58 not the legal impact, we are fine. We're fine with the
01:58 Court's tentative construction and -- which is Apple's
01:58 construction.
01:58 THE COURT: Mr. Nash?
01:58 MR. NASH: Your Honor, I believe
01:58 Mr. Malloy in our LA office will be responding on this
01:58 position. Of course, I'm always happy to chat with
01:59 Your Honor.
01:59 MR. DEVLIN: I should have stopped
01:59 sharing my screen just in case.
01:59 MR. NASH: Thanks. I believe it's down,
01:59 Tim. Appreciate it.
01:59 MR. DEVLIN: Got it. Thank you.
01:59 MR. NASH: And if you'll wait one moment,
01:59 Your Honor, I believe we're going to pull up some
01:59 slides as well.
01:59 THE COURT: Sure.
01:59 MR. NASH: Go ahead, Mr. Malloy.
01:59 MR. MALLOY: Good afternoon, Your Honor.
01:59 My name's Brian Malloy. I'm from Morrison & Foerster
01:59 representing Apple.

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

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

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

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

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

who's helping with this.

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

And, yes. They are part of the method claims. And these method claims have steps that read -- they have -- may read -ing, a lot of verbs. Like Claim 1 of the '127 patent says receiving, determining, selecting. And those are all steps of the method.

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

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

And so there's no difference between our original constructions and the constructions that

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

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

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

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

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

But the applicants decided to use this

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

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

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

Mr. Devlin raised this hypothetical claimed method of eating breakfast, eating lunch, eating dinner wherein orange juice is consumed when breakfast is eaten. And he said, well, gosh. That would be really, really limiting because nobody would always drink orange juice with breakfast like every single day.

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

That's how computers are programmed. To

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

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

But in the context of the specification, our construction is very well supported. It's actually the construction that's set forth in the abstract of the patent.

Nomin, could you actually pull up Slide 13 of our slides?

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

And this first mode is packet switching.

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

02:06 wherein/when limitations are meant to convey. That the
02:07 mobile device is programmed with this if/then logic
02:07 that, yeah. It will always be satisfied because that's
02:07 how it's programmed. And it's just like any kind of
02:07 computer's programmed to do the same things repeatedly.
02:07 If you have a mobile device that has some
02:07 different programming and that were used in conjunction
02:07 with these method claims, then that would be outside
02:07 the scope of the claims.
02:07 THE COURT: Were you done?
02:07 MR. MALLOY: I think it's a good point to
02:07 stop and see if you have any questions.
02:07 THE COURT: I don't.
02:07 MR. MALLOY: Okay. I'll briefly discuss
02:07 the IPR issue. It's not correct that we've taken any
02:07 inconsistent positions. We simply didn't articulate to
02:07 the PTAB that any particular terms required
02:08 construction, and that's because we're applying plain
02:08 and ordinary meanings there.
02:08 But there's no inconsistency between the
02:08 arguments that we've made in the PTAB and the
02:08 constructions that we're presenting to Your Honor. And
02:08 Mr. Devlin didn't point to any particular
02:08 inconsistency. There is none.
02:08 I also want to make one final point that

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

THE COURT: Did I -- I may have misunderstood you. So you -- Apple has challenged this patent at the PTAB?

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

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

MR. MALLOY: We didn't proffer any construction. We were applying the plain and ordinary meanings.

THE COURT: And what's the difference between the PTAB and my Court?

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

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

this case when you did not proffer one at the PTAB?

MR. MALLOY: Oh, I understand, Your Honor.

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

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

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

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

But that he's afraid that for other instances, Apple will say, no. Apple will say because

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

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

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

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

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

MR. MALLOY: Yes, Your Honor.

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

THE COURT: But you don't know what -- you don't know whether or not the plaintiff -- you don't know how they're going to take the plain and ordinary meaning and what -- how they're going to apply it to the Apple products.

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

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

MR. MALLOY: Your Honor, plaintiff's

02:15 counsel has already told us that they disagree with our
02:15 view of the plain and ordinary meaning. They do not
02:16 agree that this -- that what we're looking at on the
02:16 right of this slide, the wherein/when is a
02:16 cause-and-effect relationship.
02:16 Just like in American Calcar, where the
02:16 plaintiff didn't agree that this was -- that "when" was
02:16 connoting a cause-and-effect relationship, and the
02:16 Federal Circuit said, yes. It is a cause-and-effect
02:16 relationship. That's the plain and ordinary meaning.
02:16 And Apple's position is that the plain
02:16 and ordinary meaning of these wherein/when limitations
02:16 is a cause-and-effect relationship, and plaintiff's
02:16 counsel doesn't agree. They want to point to any time
02:16 where it just so happens that an indication comes back
02:16 that a recipient was a subscriber to packet switching.
02:16 Any time that happens -- that happens and
02:16 co-occurs with selection of packet switching, they want
02:16 to say that's infringement because it's not a
02:16 cause-and-effect relationship. That this condition
02:16 doesn't have to lead to this result in the plaintiff's
02:16 world.
02:17 We already know that. They've told us
02:17 that. They wouldn't agree to our configured to
02:17 constructions where we said, well, we can get rid of

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

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

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

Which is -- and I'm -- again, I'm -- I'll give you one more shot, but I'm very reluctant usually

to provide a prophylactic claim construction. So one more chance, please.

MR. MALLOY: Okay. Thank you, Your Honor.

We don't consider it a prophylactic claim construction. We just think it's a fundamental question about what these wherein/when causes mean.

So I want -- I just want to go -- let's go to Slide 12 again. I know we already looked at this slide.

Excuse me one second. Let me make sure I get the right slide.

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

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

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

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

We are -- we know that's the dispute already. We don't have to get to expert reports to get there.

And our position is this is a pure claim construction issue. It's a Markman issue. It's pure -- it's clear claim differentiation when we have this "is capable" of language versus "when" as recited in the wherein/when terms.

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

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

cause-and-effect relationship like the Federal Circuit held when to require in America Calcar.

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

MR. MALLOY: Unless Your Honor has more questions, then nothing else.

THE COURT: Okay. I'll be back in just a second.

(Pause in proceedings.)

THE COURT: The Court is going to change its preliminary construction and go with plain and ordinary meaning.

The next claim term up is "bearer."

MR. DEVLIN: Thank you, Your Honor.

THE COURT: Yes, sir.

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

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

THE COURT: Mr. Devlin, I apologize.

MR. DEVLIN: Yeah.

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

02:27 MR. DEVLIN: One moment, Your Honor.

02:27 We have a sample claim here. And if I need to, I can pull up a full claim.

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

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

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

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

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

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

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

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

02:29 be fine with that. We don't need protocol running on a
02:29 channel because -- I mean, in the same way that "or
02:29 channel" is too broad because channel's always there,
02:29 protocol running on a channel is sort of, you know,
02:30 it's unnecessary at some level to say the second part
02:30 because a channel is always there. There's always
02:30 going to be some communication channel.
02:30 So really the focus for us is on the fact
02:30 that it relates to the language, the protocol that's
02:30 being spoken. And there are various examples, some of
02:30 which the jury will be familiar with and some, you
02:30 know, not. And I don't think we really need all those,
02:30 by the way. I don't think we need that list in there.
02:30 We want it to be helpful. But if that's considered
02:30 unhelpful, then we could exclude that list.
02:30 THE COURT: Okay. Anything else,
02:30 Mr. Devlin?
02:30 MR. DEVLIN: That's all, Your Honor.
02:30 Thank you.
02:30 THE COURT: Okay. And for Apple?
02:30 MR. KIAEI: Good afternoon, Your Honor.
02:30 Nima Kiaei, counsel of Morrison & Foerster on behalf of
02:30 Apple. I believe we might have just one slide here
02:30 that might help the Court.
02:30 Of course we agree with Your Honor's

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

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

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

THE COURT: And what does Apple say to that?

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

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

of protocols.

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

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

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

And again, in contrast to that later, saying it may also be a data transfer protocol and it gives some examples with that.

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

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

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

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

With that, Your Honor, happy to answer any questions that you may have.

THE COURT: Mr. Devlin.

MR. DEVLIN: Yeah. Very brief. And keep this slide on the screen.

So what's happening here is not just a

02:34 channel. In each one of these, there's a protocol
02:34 pointed to. So there's -- here's there's SM -- there's
02:34 two different categories of bearers that are discussed
02:34 in the patent. There's SMS bearers, which go through
02:34 that cellular traditional SMS system but they do so
02:34 using SMS protocol language.
02:34 SS7 and SMS themselves are such
02:34 protocols. So SS7 is a protocol running on this
02:34 channel. So it's not just saying channel.
02:34 And the second part of the sentence when
02:34 it talks about packet switched data bearer, it's not
02:34 just channel. It's a channel that combines multiple
02:34 time slots in a GSM TDMA frame. TDMA is Time Division
02:35 Multiple Access. That's a protocol.
02:35 So it's talking about protocols in each
02:35 of the examples in this very sentence. And then it
02:35 goes on in the next sentence to say it may also be --
02:35 this is the data switched bearer may also be. And the
02:35 "also" there is above and beyond the TDMA frame. The
02:35 GSM TDMA protocol. It could also be, instead,
02:35 Bluetooth, WiFi, et cetera. All those protocols.
02:35 So here, it's -- even in this sentence,
02:35 there's never an instance where channel by itself is
02:35 the bearer. The bearer refers to the language that's
02:35 used to exchange information. And in -- you know, in a

more technical sense, that's the word "protocol." So that's where we are on this.

THE COURT: Anything else from Apple?

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

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

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

THE COURT: Mr. Devlin.

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

THE COURT: So the fight's over channel?

The inclusion of channel?

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

THE COURT: Right.

MR. DEVLIN: And that's what "bearer" means. That's all.

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

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

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

But it needs to be a protocol. It can't just be a channel. So it's the "or channel" that is

02:38 the troublesome part for us. And that I view and we
02:38 view as inconsistent with that -- what's actually on
02:38 the screen right now that Apple is advocating. Because
02:38 every one of these involves a protocol.
02:38 THE COURT: Anything else from Apple?
02:38 MR. KIAEI: No, Your Honor. I think
02:38 we've already hit on these key points. We just want to
02:38 reiterate that, again, this Column 7, it says while a
02:38 packet switched data bearer may be a shared
02:38 transmission channel, we do think that it discloses
02:38 channel-only embodiments and that excluding that would
02:38 exclude some of the embodiments in the specification.
02:38 So we do think that's important. We also
02:38 think that it is consistent with the plain meaning.
02:38 THE COURT: Okay. I'll be back in a few
02:38 seconds.
02:38 (Pause in proceedings.)
02:49 THE COURT: We can go back on the record.
02:49 You know, seven and a half years in,
02:49 there's always a first. And why not have it happen
02:49 when I'm surrounded by such good friends and good
02:49 lawyers?
02:49 I don't really -- as I understand both
02:49 sides' arguments, I don't like either of your proposed
02:49 constructions. So I understand, Mr. Devlin, the effort

you made to alter yours.

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

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

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

Because I certainly understand why -- if I get this wrong, I can -- and I was joking earlier about constructions and infringement and all that and I really was joking because I did it for a long time. But I really do want to get this right and not accidental either permit or prohibit claim -- if I get this wrong.

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

02:51 just copy the other side. Y'all are welcome after
02:51 the -- you know, obviously to talk about it and see if
02:51 you can come jointly up with something. I'm not
02:51 ordering you to -- either to talk or to come up with
02:51 something. Just a suggestion. And if you all want to
02:51 exchange what you're proposing in advance to see if it
02:51 moves one side or the other, that's fine as well.
02:51 I really do want -- based on what you
02:51 argued, I understand the importance of getting this
02:51 construction right if I can. And so I think that's the
02:51 best solution.
02:51 Mr. Devlin, you're in my screen. Is
02:51 there anything else that we need to take up today?
02:51 MR. DEVLIN: Nothing further, Your Honor.
02:51 Just a quick clarification.
02:51 So before Tuesday, I'm understanding and
02:52 I'm just confirming so no one's, you know -- no
02:52 argument. You just want a proposed construction but
02:52 no -- if you want argument later, you'll tell us. But
02:52 no argument before Tuesday.
02:52 THE COURT: Correct.
02:52 MR. DEVLIN: Got it. Thank you, Your
02:52 Honor.
02:52 THE COURT: And if you -- I mean, you
02:52 know, when someone's as brilliant as Michael Shore, if

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

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

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

So, Mr. Nash and team?

MR. NASH: Just one clarifying question, Your Honor.

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

needed a construction. I think in Apple's perspective -- and not sure that -- that might have been lost on the argument today and perhaps even in the briefing.

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

But like I didn't want to then come back to the Court and propose plain and ordinary meaning because --

THE COURT: No, no, no. By the way, plain and ordinary meaning might be the right construction.

MR. NASH: Understood, Your Honor.

Okay. I didn't want to keep something to that effect and then you think that I didn't take the Court's instruction.

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

get better educated about how that word is used as well.

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

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

So the fact that I'm unfamiliar with the word "bearer" doesn't mean that it's that fancy a word either.

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

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

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

So whatever it is Apple wants to suggest, whatever the plaintiff wants to suggest, I'm -- it's your case. And so I'm totally open to it.

MR. DEVLIN: Thank you, Your Honor.

MR. NASH: Thank you, Your Honor.

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

(Hearing adjourned.)

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 26th day of January 2026.

/s/ Kristie M. Davis
KRISTIE M. DAVIS
Official Court Reporter
PO Box 20994
Waco, Texas 76702
(254) 666-0904
kmdaviscsr@yahoo.com