

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

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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
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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5 I, Kristie M. Davis, Official Court
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16 /s/ Kristie M. Davis
KRISTIE M. DAVIS
Official Court Reporter
17 PO Box 20994
Waco, Texas 76702
18 (254) 666-0904
kmdaviscsr@yahoo.com
19
20
21
22
23
24
25