IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

APPLE, INC., PLAINTIFF, VS. SAMSUNG ELECTRONICS CO., LTD., ET AL, DEFENDANT.	CV-11-1846-LHK SAN JOSE, CALIFORNIA AUGUST 7, 2012 PAGES 1-46

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL S. GREWAL
UNITED STATES DISTRICT JUDGE

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

FOR THE PLAINTIFF: MORRISON FOERSTER
BY: ALISON TUCHER
JASON BARTLETT
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SAN FRANCISCO, CA 94105

FOR THE DEFENDANT: QUINN EMANUEL
BY: SUSAN ESTRICH
JOSEPH ASHBY
865 SOUTH FIGUEROA ST., 10TH FL
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(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

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SAN JOSE, CALIFORNIA AUGUST 7, 2012

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE COURT: MR. RIVERA, WOULD YOU CALL THE NEXT MATTER ON THE CALENDAR, PLEASE.

THE CLERK: YES, YOUR HONOR.

CALLING APPLE INC. V. SAMSUNG ELECTRONICS, ET AL. CASE NUMBER CV-11-1846.

MATTER ON FOR SAMSUNG'S MOTION FOR SPOLIATION ADVERSE INFRINGEMENT INSTRUCTION AND APPLE'S MOTION TO STRIKE SAMSUNG'S UNTIMELY MOTION FOR ADVERSE INFERENCE INSTRUCTION.

COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

MS. TUCHER: GOOD MORNING, YOUR HONOR.

ALISON TUCHER FROM MORRISON & FOERSTER WITH JASON BARTLETT AND NATHAN SABRI ON BEHALF OF APPLE.

MR. KOLOVOS: PETER KOLOVOS ALSO FOR APPLE FROM WILMER CUTLER PICKERING HALE.

THE COURT: COUNSEL, GOOD MORNING. WELCOME BACK.

MS. ESTRICH: GOOD MORNING, YOUR HONOR.

SUSAN ESTRICH FOR SAMSUNG. WITH ME IS MY

COLLEAGUE MR. JOSEPH ASHBY.

THE COURT: GOOD MORNING EACH OF YOU, PLEASE HAVE A SEAT.

ALL RIGHT, WELL THIS CASE IS A GIFT THAT KEEPS GIVING.

I UNDERSTAND FROM HER HONOR'S DIRECTIVE THAT I AM TO HEAR ARGUMENTS AND ISSUE AN OPINION ON TWO MOTIONS THIS MORNING.

ONE IS THE MOTION BROUGHT BY SAMSUNG FOR ADVERSE INSTRUCTION VIS A VI APPLE, AND THE SECOND IS APPLE'S MOTION TO STRIKE. OBVIOUSLY THESE ARE FAIRLY INTERTWINED SO I THINK WE CAN ADDRESS THEM TOGETHER.

I SEE THIS PRINCIPALLY AS A REQUEST BY SAMSUNG SO I WANT TO START WITH SAMSUNG'S COUNSEL.

WHY DON'T YOU GO AHEAD, COUNSEL.

MS. ESTRICH: THANK YOU, YOUR HONOR.

TO BRIEFLY ADDRESS THE TIMELINESS ISSUE, THE FEDERAL RULES OF CIVIL PROCEDURE RULE 51(A)(1) PROVIDES THAT REQUESTS FOR JURY INSTRUCTIONS, WHICH IS ESSENTIALLY WHAT THIS IS, ARE PROPERLY MADE ANY TIME BEFORE THE COURT'S DEADLINE -- BEFORE THE CLOSE OF THE CASE OR THE COURT'S DEADLINE.

AS THE COURT MAY WELL BE AWARE THE PARTIES CONTINUE TO NEGOTIATE ON THE SUBJECT OF

JURY INSTRUCTIONS. INDEED, THE DEADLINE FOR SUBMITTING AGREED UPON INSTRUCTIONS WAS EXTENDED ONLY YESTERDAY.

THE COURT: SO COUNSEL, WOULD YOU SUGGEST THEN THAT ON THE TIMELINESS ISSUE I AM TO LOOK AT THE NATURE OF THE REMEDY SOUGHT RATHER THAN THE HARM THAT'S ALLEGED?

MS. ESTRICH: YOUR HONOR, THIS IS NOT -- I WOULD SAY YOU SHOULD LOOK AT THE NATURE OF THE REMEDIES SOUGHT.

THIS IS NOT MY OPPOSING SISTER AND BROTHER'S DISCOVERY CASES WHERE YOU HAVE A CLOSE OF DISCOVERY, AND FOR INSTANCE THEY CITE THE APEX WITNESS ISSUE WHERE DISCOVERY IS ABOUT TO CLOSE AND SOMEBODY COMES RUNNING IN AND SAYS, YOU KNOW, DON'T CLOSE THE DOOR, WE WANT TO EXTEND THE PERIOD.

JUDGE KOH HAS YET TO DECIDE OUR APPEAL OF YOUR INITIAL ORDER. THERE HAVE BEEN NO FINAL DECISIONS ON JURY INSTRUCTIONS. THE GORDON -- I'M GONNA TO BLOW THE PRONUNCIATION HERE, BUT THE GORDON MAILLOUX ENTERPRISES CASE, GORDON V. FIREMEN'S INSURANCE COMPANY, 366 F.2D 740, THE NINTH CIRCUIT REJECTED AN ARGUMENT THAT A PARTY'S REQUEST FOR JURY INSTRUCTION WAS UNTIMELY WHERE IT WAS MADE FOUR DAYS BEFORE THE CLOSE OF EVIDENCE.

SO OUR ARGUMENT WOULD BE ON TIMELINESS, THIS IS A TIMELY MOTION. IT WAS MADE, I BELIEVE WITHIN 24 TO 36 HOURS AFTER THIS COURT RULED THAT THE AUGUST DATE TRIGGERED OUR OBLIGATION TO PRESERVE.

THE COURT: RIGHT.

BUT AGAIN, SO YOU'RE ASKING THAT I LOOK EITHER AT THE -- NOW YOU ARE ASKING TO LOOK EITHER AT THE NATURE OF THE REMEDY OR THE TIMING OF MY ORDER ON A MOTION BROUGHT BY APPLE.

WHERE IS IT UNDER MY INHERENT AUTHORITY UNDER RULE 37 DOES IT SUGGEST OR UNDER SOME OTHER SOURCE IS IT SUGGESTED THAT'S THE METRIC OR ONE OF THE TWO METRICS I HAVE TO APPLY?

MS. ESTRICH: I WOULD SUGGEST YOU COULD EITHER LOOK AT THE REQUEST FOR THE REMEDY WE'RE SEEKING WHICH IS JURY INSTRUCTIONS, OR IN THE INTEREST OF FAIRNESS AT THE TOTALITY OF THE CIRCUMSTANCES, THE SPEED WITH WHICH SAMSUNG HAS MOVED AND THE LACK OF PREJUDICE TO APPLE.

THE COURT: ON THE SPEED ISSUE, I APOLOGIZE FOR INTERRUPTING.

MS. ESTRICH: CERTAINLY, YOU'RE THE JUDGE.

THE COURT: SOMETIMES I WONDER.

MS. ESTRICH: IN MY BOOK YOU ARE.

THE COURT: IF TIMELINESS IS THE ISSUE AND APPLE'S COMPLIANCE WITH ITS OBLIGATIONS WAS WELL KNOWN TO SAMSUNG WELL OVER A YEAR AGO, MAYBE ALMOST TWO YEARS AGO, HOW IN ANYONE'S RIGHT MIND COULD WE NOW SAY THAT IN THE MIDDLE OF A TRIAL IT'S APPROPRIATE TO BRING A MOTION THAT'S CLEARLY PREDICATED ON A CLAIM OF DISCOVERY, WHETHER YOU ARE RIGHT ABOUT THAT OR NOT WE WILL DEBATE IN A MOMENT.

BUT THIS ISN'T A DISCOVERY MOTION, IS IT?

MS. ESTRICH: WELL NO BECAUSE WHAT IT'S SEEKING IS JURY INSTRUCTIONS.

THE COURT: WELL THEN BASICALLY YOU COULD COUCH ANY DISCOVERY MOTION THAT WOULD OTHERWISE BE BARRED UNDER THE SCHEDULE SET BY JUDGE KOH AS A JURY INSTRUCTION REQUEST AND THEREFORE AVOID THE OBLIGATION OF FILED IN AN UNTIMELY MANNER.

MS. ESTRICH: YOUR HONOR, UNTIL YOU ISSUED YOUR DECISION SAMSUNG HAD CONSISTENTLY TAKEN THE POSITION THAT NO OBLIGATION TO PRESERVE OF THE WAS TRIGGERED BY EITHER PARTY UNTIL APRIL.

THE ITC --

THE COURT: I'VE HEARD ALL ABOUT THE ITC AND WE'VE DEBATED THIS ISSUE MULTIPLE TIMES.

SO ON THIS ISSUE OF CONSISTENCY IT SEEMS

TO ME WHAT YOU ARE SAYING IS THAT TODAY SAMSUNG'S POSITION IS APPLE OUGHT TO GET WHACKED WITH AN ADVERSE INSTRUCTION TOO; IS THAT RIGHT?

MS. ESTRICH: NO.

TODAY OUR POSITION IS SIMPLY THAT IF JUDGE KOH SHOULD REVERSE YOUR ORDER THEN NEITHER SIDE SHOULD, TO PUT IT MILDLY, GET WHACKED WITH AN ADVERSE INSTRUCTION.

THE COURT: SO IF JUDGE KOH REVERSES MY EARLIER ORDER YOU ARE SAYING YOU ARE GOING TO WITHDRAW YOUR MOTION.

MS. ESTRICH: OUR MOTION WOULD BE MOOT.

THE COURT: IT WOULD BE MOOT OR YOU WOULD WITHDRAW IT?

MS. ESTRICH: I THINK IT WOULD BE MOOT AND WE WOULD WITHDRAWN IT BECAUSE OUR PREMISE FOR TODAY'S MOTION IS THAT BOTH SIDES SHOULD BE TREATED THE SAME. THAT IF WE WERE ON NOTICE IN AUGUST, EVEN THOUGH WE ARE THE DEFENDANT AND THEIR PRESENTATION IN AUGUST ONLY ADDRESSED UTILITY PATENTS, ONLY ADDRESSED ACTUALLY ONE PATENT THAT'S STILL AT ISSUE IN THIS CASE.

THE COURT: RIGHT. THERE'S NO MOTION FOR RECONSIDERATION.

MS. ESTRICH: NO, I'M NOT ARGUING FOR

RECONSIDERATION.

THE COURT: BUT YOU'RE SAYING THAT BASICALLY UNTIL JUDGE KOH RULES I CAN'T RULE ON YOUR MOTION.

MS. ESTRICH: YOU CERTAINLY COULD RULE.

THE COURT: HOW? BECAUSE YOU ARE SAYING IF JUDGE KOH REVERSES ME, THERE'S NO MOTION FOR ME TO DECIDE.

MS. ESTRICH: THAT WE SHOULD BE TREATED THE SAME. THAT ANY DISCOVERY OBLIGATION, ANY PRESERVATION OBLIGATION THAT IS IMPOSED ON APPLE, THAT IS IMPOSED ON SAMSUNG --

THE COURT: ALL RIGHT.

IF THE QUALITY OF TREATMENT IS THE ARGUMENT AS I'VE HEARD MADE IN MANY BRIEFINGS, LET'S GET TO THAT.

ARE YOU SAYING THAT YOUR ACTIONS AS OF AUGUST WERE COMPARABLE OR EQUIVALENT TO WHAT APPLE DID?

MS. ESTRICH: ACTUALLY, I THINK THE RECORD WOULD SHOW THAT WE DID A LITTLE BIT MORE AND KNEW A GREAT DEAL LESS.

THE COURT: REALLY.

SO YOU ARE SAYING YOU DID MORE BY LEAVING THE AUTO DELETE FUNCTIONALITY IN MYSINGLE ON. IS

THAT WHAT APPLE DID?

MS. ESTRICH: APPLE HAS NOT TOLD US THAT IT DID ANYTHING.

THE COURT: DO YOU HAVE ANY PROOF WHATSOEVER THAT THEY WERE REGULARLY DELETING E-MAIL?

MS. ESTRICH: THEIR OWN DECLARATION IN THIS CASE SAID THEY HAD A POLICY IN PLACE TO REMIND CUSTODIANS AND EMPLOYEES ON A REGULAR BASIS THAT THEY SHOULD KEEP THE NUMBER OF E-MAILS IN THEIR FILES BELOW A CERTAIN NUMBER.

THE COURT: IS THAT THE SAME THING AS LEAVING ON AN AUTO DELETE FUNCTIONALITY?

MS. ESTRICH: YOUR HONOR, THEY ARGUE, AND I WANT TO APOLOGIZE IN ADVANCE, WE RECEIVED THEIR OPPOSITION YESTERDAY SOMETIME IN THE AFTERNOON.

THE COURT: WELL I GOT YOUR REPLY AT 7:00 A.M. SO WE ARE ALL OPERATING UNDER --

MS. ESTRICH: SO WE STAYED UP ALL NIGHT AND I RESPECTFULLY ASK, I KNOW YOU HAVE A BUSY CALENDAR TODAY, I THINK WE ADDRESSED EVERY QUESTION AND EVERY POINT IN THEIR OPPOSITION, BUT YES, THEIR ARGUMENT BASED ON AN ARTICLE BY PROFESSOR SUNSTEIN NINE YEARS AGO IS THERE'S SOMETHING VERY DIFFERENT ABOUT OPT IN AND OPT OUT.

WE WOULD SUGGEST THAT THAT DIFFERENCE IS IMMATERIAL. AND WE OFFER FOR YOUR CONSIDERATION THE NUMBER OF E-MAILS THAT WERE ACTUALLY PRESERVED AND PRESENTED BY APPLE WHICH WAS --

THE COURT: OKAY. I WANT TO MAKE SURE I'M FOLLOWING SAMSUNG'S POSITION HERE. LET'S BE CLEAR.

YOU ARE SAYING THAT MAINTAINING A SYSTEM OF AUTOMATIC DESTRUCTION IS NO DIFFERENT, CONCEPTUALLY OR OTHERWISE, FROM AFFIRMATIVELY INSTRUCTING PEOPLE, REMINDING THEM THAT THEY SHOULD PRESERVE E-MAILS?

MS. ESTRICH: I'M SAYING, YOUR HONOR, THAT THE PRODUCTION OF 66 E-MAILS FROM A TOTAL OF 19 KEY CUSTODIANS IN THE PERIOD BETWEEN AUGUST 2010 AND APRIL 2011, SUGGESTS THAT WHATEVER SYSTEM APPLE WAS USING FAILED TO PRESERVE RELEVANT EVIDENCE.

AND IF THE TRIGGER DATE WAS AUGUST, AS I WOULD SUBMIT IT HAS TO BE FOR BOTH PARTIES, EITHER FOR BOTH OR FOR NEITHER BUT CERTAINLY NOT FOR THE DEFENDANT AND NOT THE PLAINTIFF, THEN A COMPARISON OF THE PRESERVATION AND THE PRODUCTIONS BETWEEN AUGUST AND APRIL FOR THE TWO SIDES MAKES CLEAR THAT APPLE'S PRODUCTION WAS PLAINLY INADEQUATE.

THEY MAKE NO ARGUMENT THAT THEY

INSTITUTED THE KIND OF LITIGATION HOLD MEASURES WHICH THEY TRUMPET IN THEIR BRIEF IN AUGUST. THEY HAVE NO ANSWER TO THE FACT THAT ONLY 66 E-MAILS WERE PRODUCED FROM KEY CUSTODIANS DURING THAT PERIOD.

THEY MAKE A GREAT POINT OF THE FACT THAT MANY OF THESE CUSTODIANS HAD RECEIVED LITIGATION HOLD NOTICES FROM OTHER CASES. AND AS YOU WILL SEE PERHAPS LATER IN THE DAY, WE RESPONDED IN OUR REPLY BRIEF BY LOOKING AT EACH OF THOSE PEOPLE AND SHOWING YOU THAT THEY PRODUCED IN SOME CASES ZERO E-MAILS DURING THIS CRITICAL PERIOD.

SO NOTHING APPLE POINTS TO IN THE AUGUST TO APRIL PERIOD ESTABLISHES THAT THEY DID ANY BETTER. AND IN FACT, WE WOULD SUBMIT THAT THEIR PRODUCTION WAS IN MANY CASES MUCH LEANER THAN OURS DURING THE RELEVANT PERIOD. THE PROOF IS IN THE PUDDING.

THE COURT: LET ME UNDERSTAND WHERE WE STAND TODAY.

AS WE SIT HERE TODAY, IS THE AUTO DISABLE -- THE AUTO DELETE FUNCTIONALITY STILL OPERATING WITHIN SAMSUNG?

MS. ESTRICH: YOUR HONOR, AS I UNDERSTAND IT THERE IS ON THE RECORD, THERE IS NO EVIDENCE

THAT SAMSUNG CURRENTLY HAS THE CAPACITY TO SIMPLY TURN THAT ON AND OFF.

THE COURT: THAT'S BEEN THE ARGUMENT FOR MONTHS IS THAT THE FUNCTIONALITY STILL OPERATING.

MS. ESTRICH: AS BEST AS I KNOW, IT IS.

AND NO COURT HAS EVER HELD THAT THAT SYSTEM, THE MYSINGLE SYSTEM WHICH HAS BEEN IN PLACE FOR 12 YEARS WITH ITS AUTO DELETE POLICY IS PER SE UNREASONABLE.

THE ONE CASE MY COLLEAGUES CONTINUE TO RELY ON THE MOSAID DECISION WHICH WAS 7, 8 YEARS AGO, WAS A CASE IN WHICH NO LITIGATION HOLD NOTICES WERE ACTUALLY ISSUED.

IN THIS CASE, AND I DON'T WANT TO REARGUE BECAUSE I RESPECT YOUR HONOR'S TIME, BUT IN THIS CASE WE ACTUALLY DETAIL THE MEETINGS WE HELD, THE MEASURES WE TOOK, INTERESTINGLY ENOUGH, IN THE OPPOSITION WE RECEIVED YESTERDAY, APPLE CONTINUES TO SAY WHAT THEY WOULD HAVE DONE OR WHAT THEY GENERALLY DO. THEY DON'T EVEN GO AS FAR AS WE DO IN SAYING, HERE ARE THE MEETINGS WE HELD, HERE ARE THE PEOPLE WE TALKED TO, HERE ARE DECLARATIONS FROM THE LAWYERS WHO ACTUALLY FLEW TO KOREA OR HELD THESE MEETINGS.

THE COURT: THESE ARE ALL AFTER

AUGUST 2010, RIGHT?

MS. ESTRICH: IT IS ALL AFTER AUGUST.

SO I WOULD SUBMIT THAT OUR PRESERVATION EFFORTS AFTER APRIL WERE MORE THAN ADEQUATE.

I WOULD ARGUE THAT WE WERE UNDER NO DUTY IN AUGUST. BUT IF WE WERE UNDER A DUTY, SO WERE THEY. AND IF WE EXAMINE THE RELATIVE PRODUCTIONS OF THE TWO PARTIES BETWEEN AUGUST AND APRIL, WE ACTUALLY WILL FIND THAT ON KEY CUSTODIANS I THINK WE COMPARE BETTER THAN THEY DO.

FINALLY, IF I COULD MAKE ONE FINAL POINT, YOUR HONOR.

APPLE ARGUES THAT THEY COULDN'T HAVE KNOWN IN AUGUST THAT THEY SHOULD PRESERVE BECAUSE THEY WERE RELYING ON THE LONG STANDING BUSINESS RELATIONSHIP BETWEEN US. WELL, WE WERE CONTINUING TO MAKE PRODUCTS.

TWO POINTS. IF ONE SIDE IS ALLOWED TO RELY ON A LONG STANDING BUSINESS RELATIONSHIP TO ASSUME THAT THERE WILL BE AN AMICABLE RESOLUTION, THEN BOTH SIDES ARE.

THE COURT: BUT WHAT IF ONE SIDE IS KNOWINGLY KEEPING IN PLACE A SYSTEM WHICH WILL DESTROY RELEVANT INFORMATION AND THE OTHER ISN'T?

MS. ESTRICH: THERE IS NOTHING UNLAWFUL,

I WOULD SUGGEST, CERTAINLY NO PRECEDENT FOR SAYING THAT THERE IS ANYTHING UNLAWFUL PER SE ABOUT SAMSUNG'S SYSTEM IN THE ABSENCE OF AN OBLIGATION, A TRIGGER OBLIGATION TO PRESERVE EVIDENCE.

AS OF AUGUST --

THE COURT: WELL, I WOULD RESPECTFULLY DISAGREE.

I WOULD THINK IF THERE WERE REASONABLE NOTICE, NOTICE UPON WHICH A REASONABLE PARTY WOULD ANTICIPATE LITIGATION AND THERE IS A SYSTEM IN PLACE WHICH IS KNOWINGLY DESTROYING RELEVANT DATA, THAT PLACES YOU IN A SLIGHTLY DIFFERENT POSITION FROM AN OPPOSING PARTY WHICH DOES NOT HAVE ANY SIMILAR SYSTEM IN PLACE.

MS. ESTRICH: BUT APPLE HAD NO SYSTEM IN PLACE TO PRESERVE THAT EVIDENCE, AND THEY DIDN'T.

THE COURT: YOU ARE SAYING THERE'S NO MATERIAL DIFFERENCE BETWEEN PRESERVATION AND DESTRUCTION.

MS. ESTRICH: MY POINT IS ONCE THE OBLIGATION TO PRESERVE IS TRIGGERED, YOU MUST PRESERVE. BUT THERE IS NO GENERAL REQUIREMENT THAT SAMSUNG DISABLED ACROSS THE BOARD FOR HUNDREDS OF THOUSANDS OF EMPLOYEES AT A COST OF SOME $40 MILLION A YEAR, THAT IT DISABLED A SYSTEM WHICH

HAS BEEN IN PLACE ABSENT A TRIGGER.

AND THE IDEA THAT WE WERE TRIGGERED TO KNOW THAT IN THE FUTURE THEY WOULD ASSERT DESIGN PATENTS WHICH WEREN'T EVEN PART OF THE AUGUST PRESENTATION, THE AUGUST PRESENTATION DIDN'T INCLUDE DESIGN PATENTS.

THE COURT: DOES THE AUGUST PRESENTATION PRESERVE, STAND OR FALL OR IS IT OTHERWISE DEPENDENT UPON THIS PRECISE NATURE OF THE CLAIMS THAT ARE BEING ASSERTED?

MS. ESTRICH: I THINK IF YOU READ THE KITSAP CASE YOU WILL SEE THAT YOU MUST BE ON KNOWLEDGE, IF NOT OF EVERY DETAIL OF THE CLAIM, OF THE NATURE OF THE "SPECIFIC CLAIMS."

CERTAINLY, THE FACT THAT THEY WERE PRESENTING UTILITY PATENT CLAIMS, ONLY ONE OF WHICH I SHOULD ADD IS CURRENTLY AT ISSUE IN THIS TRIAL

THE COURT: BUT YOU WOULD ALSO AGREE WHAT IS CURRENTLY AT ISSUE UPSTAIRS IS A FUNCTION OF MORE THAN SIMPLY WHAT THE PARTIES HAVE CHOSEN TO ASSERT, RIGHT?

HER HONOR HAS PUT IN PLACE VERY STRICT CONTROL ON WHAT PATENTS MAY OR MAY NOT BE ASSERTED IN THIS PARTICULAR SUIT.

MS. ESTRICH: ABSOLUTELY, YOUR HONOR.

BUT THERE WERE NO DESIGN PATENTS, NO DESIGN PATENTS THAT WERE PRESENTED IN THAT AUGUST PRESENTATION.

THE COURT: SO LET'S SAY THEY UNVEILED A NUMBER OF DESIGN PATENTS, WOULD THAT HAVE CHANGED THE CALCULUS?

MS. ESTRICH: IT DEPENDS ON WHAT THEY UNVEILED, WHAT WE REASONABLY EXPECTED.

THE COURT: SO ONE DESIGN PATENT MIGHT HAVE BEEN ENOUGH.

MS. ESTRICH: WHATEVER WAS GOOD FOR THE GOES WAS GOOD FOR THE GANDER.

THE COURT: WOULD ONE BE ENOUGH.

MS. ESTRICH: IF ONE WOULD BE ENOUGH TO TRIGGER US THEN ONE WOULD BE ENOUGH TO TRIGGER THEM.

WE WERE NOT IN THE POSITION TO HAVE SUPERIOR KNOWLEDGE HERE. MICRON RECOGNIZES THAT IT'S THE PLAINTIFF WHO, IF ANYONE IS IN A POSITION TO HAVE SUPERIOR KNOWLEDGE.

SHOULD THIS COURT, WITH JUDGE KOH OBVIOUSLY MAKING HER OWN DECISIONS, SHOULD THIS COURT IMPOSE AN EARLIER TRIGGER DATE ON THE DEFENDANT IN A CASE, THEN ON THE PLAINTIFF WHO IS PURSUING THEIR CLAIM I'M JUST TALKING ABOUT A

TRIGGER DATE, THAT WOULD BE THE FIRST CASE, AT LEAST TO OUR KNOWLEDGE, THAT HAS EVER DONE SO.

THE COURT: WELL, WHY WOULD I EVER HAVE TO DO THAT IF I AM PRESENTED WITH A SITUATION WHERE ONE SIDE BRINGS A MOTION MONTHS AND MONTHS AGO WELL BEFORE THE TRIAL AND THE OTHER SIDE WAITS UNTIL THEY ARE HIT WITH AN ORDER TO THEN PRESENT A SIMILAR MOTION IN THE MIDDLE OF THE TRIAL.

MS. ESTRICH: YOUR HONOR, THE ARGUMENT WITH MY COLLEAGUE, MS. SULLIVAN, YOU SAID I THINK TWO OR THREE TIMES, YOU MAY HAVE A TERRIFIC MOTION.

THE COURT: I SAID YOU MAY, I DIDN'T SAY YOU DID. AND I READ HOW YOU CHARACTERIZE MY PAPERS.

MS. ESTRICH: I APOLOGIZE IF WE MISCHARACTERIZED IT, BUT YOU SAID YOU MAY, I AGREE.

AND SHE RESPONDED BY SAYING WE WILL CERTAINLY CONSIDER THAT AT A LATER TIME.

THE COURT: RIGHT.

SO SHE MADE HER RECORD AND PRESERVED HER POINT BUT SHE DOESN'T GET TO SET THE SCHEDULE, THE COURT SET THE SCHEDULE. NOT THIS COURT, IT WAS JUDGE KOH.

I'M STRUGGLING WHY SAMSUNG THOUGHT IT WAS IN THEIR INTEREST TO SIT AND LIE IN WAIT WITH THIS

MOTION FOR MONTHS AND ONLY POP UP WITH IT AFTER THEY GET AN ORDER ON A TOTALLY DIFFERENT MOTION THAT THEY DIDN'T LIKE.

MS. ESTRICH: I WOULD SUBMIT THAT IT WASN'T A TOTALLY DIFFERENT MOTION, YOUR HONOR.

I WOULD SUBMIT WE TOOK THE POSITION, THE CONSISTENT POSITION, AND I DON'T MEAN TO EMPHASIZE THE ITC AS BEING RIGHT AND YOU ARE WRONG, I SIMPLY MEAN TO UNDERSTAND OR HOPE TO EXPLAIN.

THE COURT: THE ITC DID NOT APPLY THE SAME STANDARD, DID IT?

MS. ESTRICH: THE ITC DECIDED THAT OUR OBLIGATION TO PRESERVE DOCUMENTS WAS NOT TRIGGERED BY THE AUGUST PRESENTATION.

THE COURT: THE ITC APPLIED A DIFFERENT STANDARD.

MS. ESTRICH: IN TERMS OF THE TRIGGER NO, I THINK THE ITC --

THE COURT: THE ITC LOOKED AT BAD FAITH, DIDN'T THEY?

MS. ESTRICH: THEY LOOKED AT BAD FAITH.

THE COURT: AND THAT WAS NOT THE STANDARD I APPLIED BECAUSE I'M NOT REQUIRED TO UNDER NINTH CIRCUIT LAW, RIGHT?

MS. ESTRICH: I UNDERSTAND, YOUR HONOR.

BUT IN TERMS OF -- THE FIRST ISSUE IS NOT CULPABILITY. THE FIRST ISSUE BEGINS, WHEN WAS THE OBLIGATION TRIGGER.

MS. ESTRICH: WOULD YOU AGREE, COUNSEL, THAT IN A PATENT CASE LIKE THIS OR FRANKLY ANY KIND OF CASE OF ANY NATURE, ONE PARTY MIGHT BE ON NOTICE IN A WAY THAT TRIGGERS THE DUTY ON THE DATE BEFORE ANOTHER PARTY, IS THAT CONCEPTUALLY CONCEIVABLE.

MS. ESTRICH: MICRON CERTAINLY SUGGESTS IT IS AND SUGGESTS IT WOULD BE THE PLAINTIFF BECAUSE THE PLAINTIFF --

THE COURT: ALWAYS? IS THAT A PER SE RULE MICRON IS SUGGESTING? IS THAT ARE HOW YOU READ MICRON?

MS. ESTRICH: YOUR HONOR, I HAVE NEVER SEEN A CASE IN WHICH A COURT HAS HELD THAT A DEFENDANT IN A SITUATION LIKE OURS --

THE COURT: IT MAY NOT BE OUT THERE. THERE MAY NOT HAVE EVER BEEN A CASE.

I'M ASKING YOU CONCEPTUALLY, IS IT PER SE ERROR TO CONCLUDE THAT A DEFENDANT MAY BE ON NOTICE BEFORE A PLAINTIFF?

MS. ESTRICH: YOUR HONOR, I'M A LAW PROFESSOR, I MAKE UP HYPOTHETICALS ALL THE TIME.

THE COURT: THAT'S WHY I'M ASKING.

MS. ESTRICH: IF YOU ARE ASKING ME IF I WERE TEACHING A CLASS COULD I COOK UP A HYPOTHETICAL IN WHICH I COULD CONVINCE ALL OF MY STUDENTS THAT IN THAT PARTICULAR HYPOTHETICAL CIRCUMSTANCE A DEFENDANT MIGHT HAVE BEEN ON NOTICE AND A PLAINTIFF MIGHT NOT, A DEFENDANT FOR INSTANCE MIGHT HAVE BEEN NEGOTIATING IN BAD FAITH, AND THE PLAINTIFF MIGHT HAVE BEEN NEGOTIATING IN GOOD FAITH, COULD I PLAY PROFESSOR ESTRICH AND COME UP WITH A HYPOTHETICAL? I'M SURE I COULD, AND I'M SURE YOU COULD.

BUT WE ARE NOT IN THE HYPOTHETICAL BUSINESS.

THE COURT: NO, I'M ABOUT AS FAR FROM THE HYPOTHETICAL -- I'M ON A DISCOVERY CALENDAR IN A FEDERAL DISTRICT COURT.

MS. ESTRICH: THAT'S WHY I AM SAYING, YOUR HONOR --

THE COURT: AND THERE'S NO ERROR IN REJECTING THE NOTION OF A PER SE RULE THAT SOMEHOW PLAINTIFFS ALWAYS KNOW BEFORE DEFENDANTS.

MS. ESTRICH: I'M SAYING THAT THE FACT THAT THERE IS NO CASE LAW THAT WE ARE AWARE OF AND CERTAINLY NONE THAT APPLE HAS CITED HOLDING THE DEFENDANT TO A HIGHER DUTY THAN A PLAINTIFF,

SUGGESTS THAT WHAT WE WOULD BE DISCUSSING HERE IN DOING SO REALLY IS A LAW SCHOOL HYPOTHETICAL AND NOT AN ISSUE THAT COMES UP IN THE REAL WORLD OF PATENT LAW.

THE COURT: ALL RIGHT.

LET ME ASK YOU ONE LAST QUESTION BEFORE I HEAR FROM APPLE.

MS. ESTRICH: CERTAINLY.

THE COURT: YOU SUGGESTED PREVIOUSLY IF JUDGE KOH WERE TO REVERSE MY EARLIER ORDER, SAMSUNG WOULD WITHDRAW ITS MOTION; AM I CORRECT ABOUT THAT?

MS. ESTRICH: IF JUDGE KOH WERE TO DENY A SPOLIATION, IT DEPENDS OBVIOUSLY ON WHICH PART SHE WOULD REVERSE, OBVIOUSLY.

IF JUDGE KOH WERE TO RULE THAT SAMSUNG, THAT THERE WAS NO ENTITLEMENT TO A SPOLIATION INSTRUCTION AGAINST SAMSUNG, IT WOULD BE OUR POSITION THAT THE PARTIES SHOULD THEN BE TREATED EQUALLY.

THE PROOF WE HAVE SUBMITTED IN OUR REPLY BRIEF WHICH I APOLOGIZE THAT 7:00 A.M. WAS THE BEST WE COULD DO STAYING UP ALL NIGHT. THE PROOF WHICH WE HAVE SUBMITTED EXACTLY MIRRORS THE PROOF THEY SUBMITTED.

SO IF THAT ISN'T ENOUGH TO SUPPORT AN

INSTRUCTION AGAINST US, I THINK IT WOULD LOGICALLY FOLLOW THAT NO INSTRUCTION SHOULD BE GIVEN AGAINST THEM.

OUR FUNDAMENTAL REASON FOR BEING HERE, AND I UNDERSTAND YOUR POINT, BUT THE REASON WE DID NOT FILE UNTIL AFTER YOUR DECISION THAT WAS WE BELIEVE THAT FUNDAMENTAL FAIRNESS IN A CIRCUMSTANCE LIKE THIS DEMANDS THAT TWO PARTIES BE TREATED THE SAME, AND IF THERE IS A DIFFERENCE IT SHOULD BE THE PARTY THAT FILED THE CLAIM AND NOT THE PARTY WHO IS DEFENDANT.

THE COURT: LET ME ASK YOU ONE FURTHER QUESTION THEN I WILL REALLY TURN TO APPLE.

MS. ESTRICH: ASK ME AS MANY AS YOU WANT.

THE COURT: I WILL. THANK YOU.

WHETHER WE ARE TALKING ABOUT SAMSUNG OR ANY OTHER KIND OF PARTY, IF THE PARTY ESSENTIALLY MAKES IT SO DIFFICULT AND SO EXPENSIVE TO DISABLE THE SHREDDER, IS THAT SOMETHING THE COURT SHOULD HOLD AGAINST THE OTHER PARTY?

I MEAN, IN THIS PARTICULAR INSTANCE YOU HAVE HIGHLIGHTED WITH PROFESSOR DEAN SULLIVAN, YOU HAD HIGHLIGHTED EARLIER THAT SAMSUNG WOULD HAVE TO SPEND SOMETHING LIKE $40 MILLION IN ORDER TO RIP OUT THIS FUNCTIONALITY.

I WANT TO ACCEPT THAT AS TRUE FOR THE MOMENT BECAUSE THE ONLY EVIDENCE I HAVE BEFORE ME WAS THE ONE DECLARATION. IS THAT SOMETHING THAT SHOULD WEIGH IN SAMSUNG'S FAVOR OR APPLE'S?

ESPECIALLY EIGHT YEARS AFTER OR SEVEN YEARS AFTER ANOTHER DISTRICT COURT HAS ALREADY ADDRESSED THE SAME FUNCTIONALITY.

MS. ESTRICH: THE OTHER DISTRICT COURT FOUND THAT SYSTEM IN THE ABSENCE OF A LITIGATION HOLD CREATED PREJUDICE FOR THE OPPOSING PARTY.

AND SAMSUNG HAS RESPONDED BY PUTTING INTO PLACE PROCEDURES THAT ENSURE THAT WHERE THERE IS A LITIGATION HOLD WE SEND OVER LAWYERS AND WE HOLD MEETINGS AND THE LIKE.

IF YOUR QUESTION IS SHOULD SAMSUNG, IN EFFECT, AUTOMATICALLY LOSE AND BE SANCTIONED IN EVERY CASE BECAUSE PRIOR TO PUTTING ON A LITIGATION HOLD IT CONTINUES TO USE THE SYSTEM WHICH OUR EXPERT, MR. DALY, FROM THE LAST SET OF MOTIONS OPINED WAS REASONABLE. OUR EXPERT, AND I WON'T EVEN TRY THE NAME, A KOREAN ATTORNEY AND PROFESSOR OPINED IN THE LAST CASE, IS CONSISTENT WITH CERTAIN SPECIALIZED EMPHASIS IN KOREAN LAW AS TO PRIVACY.

IF YOU WERE TO HOLD THAT THAT SYSTEM ALONE EVEN IN THE ABSENCE OF A TRIGGER DATE AND

EVEN IN THE ABSENCE OF LITIGATION HOLDS ISSUED AT THAT TRIGGER DATE THAT THAT SYSTEM ALONE MEANS THAT SAMSUNG IS FOREVER VULNERABLE TO SANCTIONS WHENEVER IT GETS SUED, I WOULD SAY THAT THAT WOULD BE PER SE UNREASONABLE.

THE COURT: SO IN A CASE WHERE THERE'S A DAMAGE DEMAND OF TWO AND A HALF BILLION POTENTIAL TROUBLING UNTOLD FEES ACCRUED ON BOTH SIDES, WHAT'S THE LINE A LITTLE MAGISTRATE JUDGE LIKE ME OUGHT TO APPLY? $5 MILLION, 10, 20? 40 IS OBVIOUSLY TOO MUCH. HOW MUCH IS ENOUGH?

MS. ESTRICH: YOUR HONOR, FIRST OF ALL I WOULD DISAGREE WITH YOUR CHARACTERIZATION OF YOURSELF AS A LITTLE MAGISTRATE JUDGE.

THE COURT: I FEEL PRETTY LITTLE IN THIS ROOM.

SO TELL ME, HOW SHOULD I THINK ABOUT THIS PROBLEM?

MS. ESTRICH: I THINK YOU HAVE TO ASK TWO QUESTIONS.

I DON'T THINK YOU'RE YOUR HOLDING, AT LEAST AS I READ IT WAS PREMISED ON THE NOTION THAT APPLE -- THAT SAMSUNG'S SYSTEM WAS PER SE UNREASONABLE.

I READ IT TO HOLD THAT SAMSUNG WAS UNDER

TRIGGER OBLIGATION IN AUGUST AND THAT WE HAD NOT TAKEN THE ADDITIONAL STEPS WE TOOK IN APRIL LITIGATION HOLDS, MEETINGS, ET CETERA, WHICH WOULD BE NECESSARY AND INDEED CRITICAL.

THE COURT: BUT NOT SUFFICIENT BECAUSE YOU NEVER WENT BACK AND AUDITED. AS I UNDERSTAND, STILL NOT AUDITED TO SEE WHETHER POST-APRIL MEASURES HAVE IN FACT SUFFICIENTLY PRESERVED DOCUMENTS.

MS. ESTRICH: YOUR HONOR, I WOULD POINT YOU TO THE KELLERMAN DECLARATION IN WHICH SHE DOES NOT SAY --

THE COURT: THEY MAY HAVE THEIR OWN PROBLEM BUT I WILL GET TO THAT, I'M JUST FOCUSSING ON THE ISSUE AT HAND.

MS. ESTRICH: I WOULD SAY WE DID EVERYTHING THAT SHOULD REASONABLY BE EXPECTED TO ENSURE THAT WE PRODUCED ADEQUATE DOCUMENTS AND THAT THE PROOF THAT WE DID AT LEAST AS MUCH AS APPLE DID, IS THAT OUR FIGURES ARE IN EVERY RESPECT COMPARABLE TO THEIRS.

AND THEREFORE SHORT OF HOLDING, THAT OUR SYSTEM IS PER SE UNREASONABLE, ABSENT AN AUGUST TRIGGER DATE, THERE WOULD BE NO BASIS FOR FINDING US TO HAVE SPOLIATED.

AND IF THE AUGUST TRIGGER DATE APPLIES TO US, IT ALSO SHOULD APPLY TO THEM. AND IN THEIR DECLARATIONS THEY MAKE NO CLAIM THAT THESE PROCEDURES WHICH THEY GENERALLY RELY ON AND SAY THEY WOULD HAVE RELIED ON, THAT THEY RELIED ON THEM AT ALL FROM AUGUST TO APRIL.

AND WITHOUT BELABORING THE POINT, OUR RELY FILED THIS MORNING GOES THROUGH THE KEY CUSTODIANS, HOW MANY DOCUMENTS WERE PRODUCED, GOES THROUGH EACH OF THEIR ARGUMENTS.

WELL, MANY OF THESE PEOPLE RECEIVED LIT HOLDS BEFORE BUT AS A MATTER OF FACT THEY STILL DIDN'T PRODUCE ANY DOCUMENTS DURING THIS PERIOD OR LOOK AT HOW MANY PRE-AUGUST 2010 DOCUMENTS WE PRODUCED.

SO WE TOOK THAT AND WE COMPARED THOSE NUMBERS AND FOUND THAT THEIR PRODUCTION ACTUALLY DECREASED FROM AUGUST TO APRIL, OR WE DIDN'T KNOW THERE WOULD BE ANY INFRINGING PRODUCTS AND WE AGAIN, ACTUALLY SAID THEY WERE INFRINGING PRODUCTS IN AUGUST AND WENT THROUGH THE LIST OF ACCUSED PRODUCTS AND THEY WERE, IN FACT AT LEAST 8 OR 9 OF THEM, RELEASED BEFORE APRIL.

SO I THINK ON EACH OF THOSE SPECIFIC POINTS, I WON'T TAKE EVERYONE'S TIME, WE ACTUALLY

ANSWERED THE ARGUMENT. AND THE BASIC QUESTION COMES DOWN TO THE TRIGGER DATE.

THE COURT: ALL RIGHT.

THANK YOU VERY MUCH.

MS. ESTRICH: THANK YOU VERY MUCH FOR YOUR COURTESY AND TIME, YOUR HONOR.

THE COURT: MS. TUCHER.

MS. TUCHER: THANK YOU, YOUR HONOR.

ON THE THRESHOLD QUESTION OF THE TIMELINESS OF THEIR MOTION I JUST WANT TO MAKE ONE QUICK POINT.

APPLE'S WITNESSES, THE APPLE EMPLOYEES WHO WERE CALLED TO TESTIFY IN THIS TRIAL ARE ALREADY ON AND OFF THE STAND. AND SAMSUNG HAS YET TO SERVE OR TO DRAFT ADVERSE INFRINGEMENT INSTRUCTION.

SO IT DOES SEEM TO ME THAT IT IS TO LATE FOR THEM TO BE RAISING THIS POINT, AND IT SEEMS TO ME UNFAIR TO HOLD THEM TO THE STRATEGIC POINT THEY MADE TO ARGUE FOR A CERTAIN TRIGGER DATE MONTHS AGO WHEN WE FIRST FILED THE MOTION.

BUT IF YOUR HONOR INTENDS TO ADDRESS THE MOTION ON ITS MERITS --

THE COURT: I DO WANT TO HEAR YOUR ARGUMENTS ON THAT, BUT LET ME EXPLORE A COUPLE

ISSUES ON TIMELINESS WITH YOU.

SHE KIND OF HAS A POINT, SHE'S ASKING FOR AN ADVERSE INSTRUCTION. AREN'T THE RULES FAIRLY CLEAR THAT JURY INSTRUCTIONS ARE ALL OPEN, FAIR GAME, UNTIL BASICALLY THE JURY IS CHARGED? HOW DO I AVOID THAT PROBLEM?

MS. TUCHER: THE PARTIES RENDER AN ORDER FROM JUDGE KOH TO SERVE ON EACH OTHER TO NEGOTIATE AND THEN TO FILE WITH THE COURT OUR INSTRUCTIONS.

WE DID THAT SEVERAL WEEKS AGO. WE ARE NOW DOING IT AGAIN BECAUSE, AS YOU CAN IMAGINE, THERE ARE STILL DISPUTES TO BE WORKED OUT, A LOT OF MOVING PARTIES.

SO MS. ESTRICH IS CORRECT THAT WE ARE STILL GOING TO BE SERVING AND FILING ADDITIONAL INSTRUCTIONS ON EACH OTHER. BUT THE FIRST DATE FOR THAT TO HAPPEN HAS ALREADY PASSED. AND THAT WAS BEFORE SAMSUNG DECIDED THAT THEY WANTED TO SEEK AN ADVERSE INSTRUCTION AGAINST APPLE.

THE COURT: ALL RIGHT.

LET'S TURN TO THE MERITS HERE.

IT DOES SEEM SOMEWHAT SURPRISING THAT SAMSUNG COULD BE REASONABLY APPRISED OF THE POSSIBILITY OF LITIGATION AND APPLE COULD NOT.

IS THERE BASIC RESPONSE TO THAT CONCERN

THAT YOU OUGHT TO HAVE UNDERSTOOD OR HAD A REASONABLE BASIS TO BELIEVE THAT THEY WERE GOING TO MAKE CERTAIN CHANGES TO AVOID THIS LITIGATION ENTIRELY; IS THAT BASICALLY THE POINT YOU ARE MAKING?

MS. TUCHER: THAT IS OUR BASIC POINT. NOT THAT WE NECESSARILY UNDERSTOOD THAT THEY WOULD BUT THAT WE WERE IN NEGOTIATIONS WITH THEM. WE WERE THEIR LARGEST -- WE ARE THEIR CUSTOMER AT THAT TIME. WE BOUGHT BILLIONS OF DOLLARS OF MATERIAL FROM THEM, COMPONENTS FOR THE PRODUCTS.

AND THE PARTIES MET MONTHLY, JULY, AUGUST, SEPTEMBER, OCTOBER, NOVEMBER -- THROUGH NOVEMBER. THEY WERE MEETING MONTHLY TO TALK ABOUT OUR ALLEGATIONS OF THEIR INFRINGEMENT.

THERE'S A REASON THAT WE BELIEVE IT'S APPROPRIATE FOR APPLE TO RELY ON THAT AND NOT FOR SAMSUNG TO.

AND I WANT TO BE CLEAR, WE ARE NOT ASKING FOR A DIFFERENT STANDARD. APPLE IS PREPARED FOR YOU TO JUDGE APPLE'S CONDUCT BY EXACTLY THE SAME STANDARD THAT YOU JUDGED SAMSUNG'S CONDUCT. IT'S THAT THE FACTS ARE SO PROFOUNDLY DIFFERENT THAT YOU REACH A DIFFERENT RESULT.

SO ON THE SPECIFIC QUESTION OF THE

TRIGGER DATE, I HAVE A DOCUMENT I WANTED TO SHARE WITH YOU. THIS IS A TRIAL EXHIBIT, IT'S EXHIBIT NUMBER 195. ALTHOUGH IT IS MARKED AS CONFIDENTIAL, IT IS ONE THAT SAMSUNG HAS TOLD JUDGE KOH IN A FILING THAT IT WILL NOT BE MOVING SO I DON'T BELIEVE IT NEEDS TO BE TREATED AS CONFIDENTIAL.

IF WE START ON THE SECOND PAGE, SINCE THIS IS AN E-MAIL STRING, YOU SEE A SAMSUNG CUSTODIAN E-MAILING IN OCTOBER OF 2010 WITH REGARD TO BOUNCING. THIS IS THE '381 PATENT THAT WAS IN THE AUGUST PRESENTATION.

THE SAMSUNG CUSTODIAN SAYS, "COMPARED TO OUR COMPETITOR'S PRODUCT, YOU KNOW WELL WHICH ONE" AND THEN THERE'S AN EMOTICON FOR CRYING. "IT IS STILL NOT SATISFACTORY."

THE TABLET THAT SAMSUNG WAS DEVELOPING IN OCTOBER 2010 WAS STILL NOT SATISFACTORY BECAUSE IT'S BOUNCE FEATURE WASN'T AS GOOD AS APPLE.

AND YOU SEE ON THE FRONT PAGE THE RESPONSE TO THIS CONCERN AT SAMSUNG, "WITH REGARDS TO BOUNCE, WE USE THE MASS SPRING DAMPER MODEL WHICH WAS MODELLED AFTER THE ACTUAL PHYSICAL EFFECT AND OBTAINED THE BOUNCE EFFECT THAT IS SIMILAR TO THE IPAD."

THIS IS WHAT SAMSUNG WAS DOING IN

OCTOBER 2010. SO APPLE WAS NEGOTIATING WITH SAMSUNG, APPLE THOUGHT THAT IT'S STATUS AS THE LARGEST CUSTOMER MIGHT VERY WELL RESULT IN SAMSUNG CHANGING ITS PRODUCTS AND IT DIDN'T.

BUT IT'S BECAUSE OF THE DIFFERENT FACTUAL CIRCUMSTANCES THAT WE THINK THE SAME LEGAL STANDARD PRODUCES A DIFFERENT RESULT.

I ALSO WANT TO BE CLEAR HOWEVER THAT I DON'T THINK ANYTHING RIDES IN THIS CASE ON THE DIFFERENCE BETWEEN AN AUGUST AND AN APRIL TRIGGER DATE BECAUSE SAMSUNG HAS PROVEN ABSOLUTELY NO DESTRUCTION OF DOCUMENTS. THAT'S THE BIG DIFFERENCE.

THEY'RE A SERIAL SPOLIATOR. EVERY TWO WEEKS, TO THIS DAY, WE LEARN THIS MORNING THEY CONTINUE TO DESTROY E-MAILS. APPLE DOES NOT. APPLE HAS A CULTURE OF RETENTION. THEIR SERVERS AND SYSTEMS ALLOW AND SUPPORT RETAINING E-MAIL INDEFINITELY.

THEY ALSO HAVE AN ACTIVE DOCUMENT COLLECTION AND RETENTION PROGRAM RUN BY APPLE'S IN-HOUSE LEGAL DEPARTMENT. THEY USE THAT IN THIS CASE AND THEY USE IT IN OTHERS.

WHY ARE OTHER CASES RELEVANT? WELL, BECAUSE WHEN APPLE GOES AND DOES A COLLECTION IN

OTHER CASES, IT USUALLY COLLECTS ALL WORK RELATED E-MAILS FROM THE KEY CUSTODIANS.

SO WHEN WE LISTEN TO WHICH CUSTODIAN SAMSUNG CLAIMS TO BE MOST CONCERNED ABOUT THEY CITED STEVE JOBS. APPLE HAS STEVE JOB'S E-MAILS AND THEY HAD THEM BEFORE AUGUST 2010.

SO THE NUMBER OF E-MAILS PRODUCED IN THIS CASE FROM STEVE JOBS IS NOT BECAUSE OF SPOLIATION, IT'S BECAUSE OF THE SEARCH TERMS THAT THE PARTIES AGREED WERE APPROPRIATE. THAT'S ALL DISCLOSED IN OUR -- WAY BACK LAST FALL WHAT SEARCH TERMS WE WERE GOING TO USE, WHAT DATE CUTOFFS WE WERE GOING TO USE. AND IF THIS IS NOT A DISCOVERY MOTION, THIS IS NOT THE TIME TO BE REVISITING THAT.

SO THERE'S ABSOLUTELY NO EVIDENCE THAT THERE ARE ANY STEVE JOBS E-MAILS DESTROYED. SCOTT FOERSTAL, HE WAS A WITNESS IN THE CASE LAST WEEK. HE RUNS THE IOS SIDE AT APPLE. HE WAS UNDER MULTIPLE DOCUMENT RETENTION NOTICES FROM, LITERALLY, DOZENS OF CASES. HIS FILES FROM HIS OWN COMPUTER HAD BEEN COLLECTED HAD BEEN PRESERVED AND SAMSUNG HAS ABSOLUTELY NO EVIDENCE OF ANY DESTRUCTION OF MR. FOERSTAL'S E-MAILS.

THE COURT: ARE ANY OF THE APPLE E-MAIL CUSTODIANS SUBJECT TO THE CAPACITY CONSTRAINTS OR

OTHER CONSTRAINTS THAT WOULD EFFECTIVELY REQUIRE THEM TO DELETE OR DESTROY E-MAIL IN ORDER TO MAINTAIN AN INBOX OR SET OF FILE FOLDERS?

MS. TUCHER: NO, YOUR HONOR.

WHAT WE SHOWED WITH THE KELLERMAN DECLARATION IS THAT APPLE CUSTODIAN, APPLE EMPLOYEES RECEIVE A NOTICE SAYING IF THEIR E-MAIL INBOX IS TOO LARGE, THEY NEED TO MOVE E-MAILS OFF THE SERVER. THEY DON'T HAVE TO DESTROY THEM, THEY CAN PUT THEM ON THE HARD DRIVES.

BUT WE ALSO IN THE KELLERMAN DECLARATION EXPLAINED THAT AS SOON AS AN EMPLOYEE IS SUBJECT TO A DOCUMENT RETENTION OBLIGATION FOR ANY CASE, THEY NO LONGER RECEIVE THOSE NOTICES.

AND WE ALSO EXPLAINED IN OUR OPPOSITION PAPERS, AND I'M PREPARED TO TALK ABOUT ANY OTHER CUSTODIANS TODAY IF YOU WANT TO, THAT THE CUSTODIANS SAMSUNG HAS RAISED WERE UNDER DOCUMENT RETENTION NOTICE OBLIGATIONS FOR VARIOUS OTHER CASES.

SO THEY DIDN'T RECEIVE THAT E-MAIL BEFORE AUGUST 2010.

THE COURT: ALL RIGHT.

MS. TUCHER: THERE WAS AN ATTACK ON MS. KELLERMAN IN THE REPLY PAPERS I WANTED TO ADDRESS.

SHE WAS OUR 30(B)(6) WITNESS ON DOCUMENT RETENTION.

AND IN THE REPLY PAPERS SAMSUNG TELLS US WELL, YOU KNOW, SHE SAID IN HER TESTIMONY SHE CAN'T SPEAK SPECIFICALLY TO WHAT SHE DID IN THIS CASE.

THAT IS UNFORTUNATELY SUCH A MISCHARACTERIZATION OF THE EVIDENCE THAT I WANT YOU TO SEE THE DEPOSITION THAT THEY QUOTED BUT DIDN'T PROVIDE YOU A COPY OF.

SO IMMEDIATELY AFTER MS. KELLERMAN SAID I CAN'T SPEAK SPECIFICALLY TO WHAT WE DID IN THIS CASE SHE SAYS, I CAN TELL YOU IN GENERAL WHAT WE DO WHICH IS A PRACTICE THAT WOULD HAVE BEEN APPLIED TO THIS CASE.

AND SAMSUNG FOLLOWED UP WITH THE QUESTION, TO CLARIFY, DO YOU KNOW FOR SURE THAT THESE STEPS TOOK PLACE IN THIS CASE? HER ANSWER WAS AN UNEQUIVOCAL, YES.

SAMSUNG SHOULD HAVE TOLD YOU THAT WHEN THEY FILED THEIR REPLY BRIEF AT 7:00 THIS MORNING.

SAMSUNG ALSO IN THEIR REPLY BRIEF, AND AGAIN IN THEIR STATEMENT TODAY, SAID MS. KELLERMAN'S DECLARATION IN SUPPORT OF OUR OPPOSITION SAYS THERE IS NO FOLLOW-UP TO THE DOCUMENT RETENTION.

THAT'S SIMPLY WRONG. IF YOU LOOK AT

PARAGRAPH 4 OF MS. KELLERMAN'S DECLARATION SHE SAYS THAT AFTER SERVING DOCUMENT RETENTION NOTICES, COUNSEL GOES AND INTERVIEWS THE EMPLOYEES IN ORDER TO DO A COLLECTION, THAT COUNSEL CONFIRMS THE INDIVIDUAL RECEIVED THE DOCUMENT RETENTION NOTICE AND CONFIRMS THAT THE INDIVIDUAL UNDERSTANDS HIS OR HER DOCUMENT RETENTION OBLIGATIONS.

THERE'S ALSO EVIDENCE ALONG WITH THE PAPERS THAT SAMSUNG FILED ORIGINALLY THAT MANY OF THESE CUSTODIANS RECEIVED NOT ONE BUT MULTIPLE REPETITIVE DOCUMENT RETENTION NOTICES IN THIS CASE.

THE COURT: I WANT TO GO BACK TO THE POINT YOU RAISED IN YOUR PAPERS WHICH YOU CITED PROFESSOR SUNSTEIN'S ARTICLE.

I SHOULD NOT ADMIT PUBLICLY TO NOT COMPLETELY UNDERSTANDING EVERYTHING PROFESSOR SUNSTEIN SAID, BUT CAN YOU EXPLAIN TO ME AS BEST YOU CAN THE OMISSION, COMISSION, THE DICHOTOMY THAT PROFESSOR SUNSTEIN SUGGESTS IN THAT ARTICLE THAT YOU POINT TO IN ORDER TO DIFFERENTIATE THE RESPECTIVE POSITIONS OF THE PARTIES.

MS. TUCHER: I'M NOT A LAW PROFESSOR SO I'M GOING TO JUST DO IT IN MY OWN WORDS.

WE ARE CREATURES OF HABIT. IT'S A QUESTION OF WHAT YOU HAVE TO TAKE INITIATIVE TO DO.

AT SAMSUNG, EMPLOYEES HAVE TO TAKE INITIATIVE IN ORDER TO PRESERVE E-MAILS. IF SAMSUNG EMPLOYEES DON'T SOMETHING AFFIRMATIVE TO SAVE THOSE E-MAILS, THOSE E-MAILS ARE DESTROYED.

SO THEY PROBABLY DON'T GET AROUND TO IT FOR WHATEVER, COLLECTIONS REASONS. THE EVIDENCE WE DISCUSSED MONTHS AGO SHOW THAT VERY IMPORTANT CUSTODIANS DIDN'T PRESERVE E-MAILS OR TAKE THOSE AFFIRMATIVE STEPS.

THAT'S THE REQUIREMENT THAT THE SAMSUNG EMPLOYEES OPT-IN TO DOCUMENT PRESERVATION. IF THEY DON'T DO ANYTHING THERE WILL BE NO DOCUMENT PRESERVATION.

AT APPLE IF AN EMPLOYEE DOESN'T DO ANYTHING, DOCUMENTS ARE PRESERVED BECAUSE APPLE DOESN'T ELIMINATE E-MAILS EVERY TWO WEEKS OR TWO MONTHS.

SO ONLY WHEN AN EMPLOYEE AFFIRMATIVELY AND PERSONALLY DELETES THE E-MAIL DOES IT JUST DISAPPEAR.

THE COURT: SO I TAKE IT THOUGH THAT YOU WOULD NOT REST ON THE OR RELY UPON THE DICHOTOMY OR THAT DIFFERENCE STRUCTURALLY IN ORDER TO DISTINGUISH YOUR POSITION FROM SAMSUNG.

THE FACT OF THE MATTER IS EMPLOYEES,

PEOPLE DO ALL OTHER SORTS OF THINGS WITH THEIR E-MAIL AFFIRMATIVELY, RIGHT?

MS. TUCHER: THAT'S RIGHT, YOUR HONOR.

SO RIGHT IN THE SENSE THAT WE ARE NOT RELYING SOLELY ON THAT. WE DO THINK IT'S AN IMPORTANT DIFFERENCE. WE THINK THE FACT THAT THEY AUTOMATICALLY DESTROY RELEVANT E-MAIL UNLESS SOMEBODY DOES SOMETHING MATTERS. AND THE FACT THAT WE DON'T DESTROY ANYTHING UNLESS AN EMPLOYEE DOES SOMETHING. THE REASON THAT MATTERS IS BECAUSE THEY DON'T SHOW A SINGLE EMPLOYEE DESTROYING.

YOU ASKED WHEN I WAS HERE SEVERAL -- A COUPLE MONTHS AGO ON THE MIRROR IMAGE MOTION, WHAT DOES THE DEPOSITION TESTIMONY SHOW? AND THE DEPOSITION TESTIMONY IN SAMSUNG'S CASE SHOWED THAT EMPLOYEES DIDN'T KNOW ABOUT SOME OF THE PROVISIONS. IN FACT, THEIR 30(B)(6) DEPONENT DIDN'T KNOW ABOUT SOME OF THE PROVISIONS OF HOW TO SAVE THE E-MAIL THAT THEY CAME INTO THIS COURT THEN AND BRAGGED ABOUT.

I LOOKED FOR DEPOSITION TESTIMONY, WE LOOKED FOR DEPOSITION TESTIMONY ON THE CUSTODIANS THAT THEY COMPLAIN MOST LOUDLY ABOUT. THEY WEREN'T ASKED ABOUT THAT FOR THE MOST PART.

THE ONE CUSTODIAN WHERE I DID FIND

DEPOSITION TESTIMONY IS MR. LEMAY, AND THAT'S BECAUSE I WAS LOOKING FOR SOME EVIDENCE EVEN THOUGH THEY HADN'T PRODUCED ANY OF E-MAILS ACTUALLY BEING DESTROYED.

AND MR. LEMAY THEIR ONE PERSON WHERE I COULD FIND SOME -- AND THIS IS NOT IN THE RECORD, SO I CAN THE SHARE IT WITH YOU IF YOU WOULD LIKE OR I CAN JUST TELL YOU, THAT WHEN HE WAS ASKED HE SAID APPLE'S DOCUMENT COLLECTION AGENCY, HE WAS ASKED, DID SOMEBODY -- SORRY. SOMEBODY IN THIS CASE IS APPLE'S DOCUMENT COLLECTION AGENCY. AND HE WAS ASKED DID SOMEBODY COME FOR THIS LITIGATION AND COLLECT EVERYTHING FROM YOUR COMPUTER? AND HIS ANSWER WAS, I COULDN'T TELL YOU WHAT SPECIFIC LITIGATION, IT'S HAPPENED MANY TIMES.

SO WHEN WE LOOK FOR ANY SPECIFIC EVIDENCE FROM ANY SPECIFIC CUSTODIAN, WE COME UP WITH THINGS LIKE ALL OF MR. JOB'S E-MAILS ARE SAVED, MR. LEMAY'S E-MAILS ARE COLLECTED BY THE AGENCY, WE COME UP WITH THE FACT THAT THESE OTHER CUSTODIANS, IVAN STRINGER AND FOERSTAL, THEIR DOCUMENTS HAVE BEEN COLLECTED. WE HAVE ABSOLUTELY NO EVIDENCE OF ANY DOCUMENT BEING DESTROYED.

SO WHEN WE WERE HERE ARGUING FOR SPOLIATION SANCTION AGAINST THEM, WE WERE ABLE TO

SAY, ZERO E-MAILS FROM W.P. HONG. HE SHOULD HAVE PRODUCED THE APRIL 17TH E-MAIL SPECIFICALLY ON THIS SUBJECT. HE SHOULD HAVE PRODUCED RESPONSES TO THE APRIL 17TH E-MAIL BECAUSE IT HAD TO DO WITH COMPARING SAMSUNG PRODUCTS UNDER DEVELOPMENT TO APPLE PRODUCTS. CLEARLY RELEVANT.

WE KNEW FROM OTHER CUSTODIANS THAT THE E-MAIL HAD BEEN ISSUED APRIL 17TH. WE KNEW HE DIDN'T PRODUCE IT BECAUSE HE PRODUCED NOTHING. WE KNEW HE PRODUCED NO RESPONSES TO THAT E-MAIL.

WE COULD SAY THESE ARE THE SPECIFIC DOCUMENTS HE SHOULD HAVE HAD THAT HE DIDN'T HAVE THAT HE DIDN'T PRODUCE.

THAT'S THE KIND OF SHOWING THAT THEY HAVE NOT MADE IN THIS CASE AND THAT WE DON'T THINK THEY COULD MAKE IN THIS CASE.

WE'VE DONE EVERYTHING WE CAN TO SHOW THAT THEY WON'T BE ABLE TO MAKE IT BECAUSE OF OUR SYSTEMS. BUT FRANKLY, IT'S THEIR BURDEN OF PROOF.

THEY LIKE TO CITE MICRON. IN MICRON THERE WERE SHREDDING PARTIES AND THE QUESTION WAS, DOES IT MATTER WHETHER THE SHREDDING -- WHEN THE SHREDDING PARTY HAPPENED? THERE WERE NO SHREDDING PARTIES AT APPLE. THERE'S NOTHING LIKE THAT IN THEIR ARGUMENT, THAT'S THE DIFFERENCE.

THE COURT: I HAVE TO CUT YOU OFF THERE.

I THINK I UNDERSTAND YOUR POSITIONS, UNLESS YOU HAVE A FINAL POINT TO MAKE.

MS. TUCHER: LOTS OF POINTS, LOT OF CUSTODIANS, BUT I THINK YOU UNDERSTAND.

THANK YOU, YOUR HONOR.

THE COURT: MS. ESTRICH, I WILL GIVE YOU THE FINAL WORD.

MS. ESTRICH: AND I WILL BE VERY BRIEF, YOUR HONOR.

FIRST AS TO MS. KELLERMAN. THE QUOTE WE GAVE YOU WAS ACCURATE. I CAN'T SPEAK TO SPECIFICALLY WHAT WE DID IN THIS CASE, BUT IF YOU LOOK AGAIN AT HER DECLARATION, AT NO POINT DOES SHE ADDRESS SPECIFICALLY WHAT WAS DONE IN THIS CASE.

THE COMMENT MS. TUCHER REFERRED TO SHE SAID, AFTER A LEGAL HOLD ISSUES COUNSEL MAY CONDUCT INDIVIDUAL DOCUMENT INTERVIEWS. TYPICALLY SUCH A COLLECTION WOULD INCLUDE.

MS. KELLERMAN IS VERY CAREFUL, IT'S NOT SIMPLY HER DEPOSITION, IN HER DECLARATION TO MAKE NO REPRESENTATIONS ABOUT PARTICULAR MEETINGS THAT WERE HELD, PARTICULAR CUSTODIANS THAT WERE INTERVIEWED AND THE LIKE.

SO I WOULD SIMPLY SAY THAT WE FAIRLY

REPRESENTED WHAT SHE SAID.

SECOND, THESE WERE LICENSING NEGOTIATIONS, YOUR HONOR. A GREAT DEAL IS MADE OF THE POINT THAT WHILE THERE WERE MEETINGS GOING ON WE WERE DEVELOPING PRODUCTS. WE WERE. THEY WERE A BIG CUSTOMER OF OURS. I THINK THERE WAS CERTAINLY, I DON'T WANT TO GET INTO THE DETAILS OF DISCUSSIONS, BUT THERE WAS CERTAINLY HOPE ON BOTH SIDES THAT THESE LICENSING NEGOTIATIONS WOULD REACH A SOLUTION IN WHICH BOTH PARTIES WOULD GO ABOUT CONTINUING TO MAKE THEIR PRODUCTS.

SO THE FACT THAT IN OCTOBER A SAMSUNG ENGINEER WAS LOOKING AT AN APPLE PATENT DOESN'T MEAN THAT SAMSUNG KNEW IT WAS GOING TO BE INFRINGING.

THIS IS IN THE MIDST OF NEGOTIATIONS. HAD THE NEGOTIATIONS SUCCEEDED IN SOME KIND OF LICENSING AGREEMENT THAT COVERED THAT PATENT, YOU AND I AND MS. TUCHER AND JUDGE KOH WOULD NOT BE HERE TODAY. SO THAT'S HARDLY PROOF.

APPLE CLAIMS THEY HAD A CULTURE OF RETENTION WHERE WE HAD A CULTURE OF DELETION.

I WOULD SUBMIT, YOUR HONOR, THAT THEY SENT OUT PERIODIC NOTICES THAT CREATED, IF WE WANT TO PLAY THIS GAME, A CULTURE OF ELIMINATION.

AND PROFESSOR SUNSTEIN IS A FRIEND OF MINE, AND I THINK I UNDERSTAND HIS ARGUMENT ABOUT LIBERTARIAN PATERNALISM. BUT THERE IS NO CASE AUTHORITY SAYING THAT AS A MATTER OF LAW THERE IS A DIFFERENCE BETWEEN TURNING SOMETHING ON AND TURNING SOMETHING OFF.

FINALLY, AS TO THE PROOF THAT DOCUMENTS WERE ACTUALLY DESTROYED, MS. TUCHER OFFERS THEIR PROOF WAS THAT THEY COULD SAY, WELL, WE GOT THIS FROM THIS PRODUCTION SO WE KNOW YOU WERE ON THE E-MAIL, AND YOU DIDN'T PRODUCE IT.

AGAIN, AND RESPECTFULLY GIVEN THE HOUR THIS MORNING, WE REPRODUCED OUR CHARTS. WE ACCEPTED THAT EVERY ERROR THEY SAID WE MADE WITHOUT ARGUING ABOUT IT, WE MADE.

SO ON CERTAIN PEOPLE THEY SAID WELL, THERE WAS A GOOD REASON THAT YOU DIDN'T GET DOCUMENTS FROM HIM. FINE, WE TOOK THEM OUT. ON CERTAIN PEOPLE THEY SAID, YOU KNOW, YOUR NONCUSTODIAL NUMBERS ARE OFF, YOURS ARE TOO HIGH. FINE, WE REDUCED THEM.

AS YOU WILL SEE IN OUR REPLY BRIEF, EVEN TAKING EVERY ONE OF THEIR CORRECTIONS, THE NUMBERS CONTINUE TO PROVE EXACTLY WHAT THEIR NUMBERS PROVE. THAT IS THE CUSTODIAL PRODUCTIONS FROM KEY

INDIVIDUALS WERE DRAMATICALLY LOWER THAN NONCUSTODIAL PRODUCTIONS.

REACHING THE CONCLUSION THAT THEY'VE ARGUED YOU MUST HAVE DESTROYED, ELIMINATED RELEVANT E-MAILS.

AGAIN, THEY SAID HERE ARE PEOPLE IN OUR CASE WHO HAVEN'T PRODUCED MANY AND SHOULD. SO WE MADE A LIST OF 19 PEOPLE WHO HADN'T PRODUCED MANY AND SHOULD HAVE.

THEY SAID SIX INNOCENT EXPLANATIONS OR FIVE INNOCENT EXPLANATIONS. WE TOOK THEM OUT, REDID THE LIST, AND ONCE AGAIN YOU WILL SEE MIRROR PROOF FROM BOTH SIDES AS TO POTENTIAL INADEQUACIES OF PRODUCTION.

NOW AT THE END OF THE DAY BOTH SIDES HAVE PRODUCED MILLIONS AND MILLIONS OF DOCUMENTS. AND I THINK IT WOULD BE ENTIRELY FAIR TO CONCLUDE THAT NEITHER SIDE, WHATEVER ELSE WE MAY BE SUFFERING FROM, IS SUFFERING FROM A LACK OF EVIDENCE TO USE.

BUT IF THEY CAN CLAIM, ON THE BASIS OF THOSE COMPARISONS, PROOF THAT WE DELETED EVIDENCE, THEN WE I THINK ARE ENTITLED TO USE THE SAME SORT OF EVIDENCE TO MAKE THE SAME SORT OF CLAIMS.

AND I THANK YOU YOUR HONOR FOR YOUR PATIENCE. AND AGAIN, I APOLOGIZE FOR THE 7:00 A.M.

SUBMISSION BUT IT WAS A 12:30 OPPOSITION AND WE ARE GRATEFUL FOR THE ATTENTION YOU'VE GIVEN.

THE COURT: ALL RIGHT.

WE WILL HAVE TO LEAVE IT THERE.

THANK YOU VERY MUCH. YOU WILL HAVE AN ORDER FROM ME SHORTLY.

HAVE A GOOD MORNING.

MS. ESTRICH: THANK YOU, YOUR HONOR, YOU TOO.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.

/S/

_____
SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185 DATED: 8/7/12