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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE GOOGLE, INC. GMAIL) 5:13-MD-2430-LHK
LITIGATION)
) SAN JOSE, CALIFORNIA
)
) FEBRUARY 27, 2014
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) PAGES 1-78
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

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

FOR THE PLAINTIFF: WYLY-ROMMEL, PLLC
BY: SEAN ROMMEL
4004 TEXAS BLVD.
TEXARKANA, TX 75503

FOR GOOGLE: COOLEY, LLP
BY: MICHAEL RHODES
WHITTY SOMVICHIAN
KYLE WONG
101 CALIFORNIA STREET, 5TH FL
SAN FRANCISCO, CA 94111

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT
PRODUCED WITH COMPUTER.

APPEARANCES CONTINUED ON THE NEXT PAGE

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

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FOR THE PLAINTIFF: CORY WATSON CROWDER & DEGARIS
BY: JEROME TAPLEY
2131 MAGNOLIA AVENUE, STE 200
BIRMINGHAM, AL 35205

FOR THE PLAINTIFF: CARTER WOLDEN CURTIS, LLP
BY: KIRK WOLDEN
1111 EXPOSITION BLVD., STE 1
SACRAMENTO, CA 95815

1 SAN JOSE, CALIFORNIA

FEBRUARY 27, 2014

2 P R O C E E D I N G S

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

5 THE CLERK: CALLING CASE NUMBER C-13-02430-LHK.

6 IN RE GOOGLE INCORPORATED GMAIL LITIGATION.

7 MR. ROMMEL: GOOD AFTERNOON, YOUR HONOR.

8 THE COURT: GOOD AFTERNOON.

9 MR. ROMMEL: SEAN ROMMEL, JEROME TAPLEY AND KIRK
10 WOLDEN ON BEHALF OF PLAINTIFFS.

11 MR. RHODES: GOOD AFTERNOON, YOUR HONOR.

12 MICHAEL RHODES, WHITTY SOMVICHIAN AND KYLE WONG OF COOLEY
13 ON BEHALF OF GOOGLE.

14 THE COURT: OKAY. GOOD AFTERNOON. WELCOME. PLEASE
15 TAKE A SEAT.

16 SO I HAVE SOME QUESTIONS AS YOU MIGHT HAVE EXPECTED.
17 LET'S HANDLE OUR CMC PART OF THE CASE FIRST, BECAUSE THAT
18 SHOULD BE RELATIVELY EASY.

19 WAS THE DEPOSITION OF MR. HAN LEE, GOOGLE'S 30(B) (6)
20 WITNESS, THAT WAS TAKEN ON FEBRUARY 12TH. WAS THAT AT ALL
21 RELATED TO THE CLASS CERT MOTION OR WAS THAT A SEPARATE ISSUE?

22 MR. ROMMEL: YOUR HONOR, THAT WAS A 30(B) (6)
23 DEPOSITION ON THE TOPIC OF THE CONTENT ONE BOX. SO THAT
24 DEPOSITION, IT DID INVOLVE THE PROCESSES RELATED TO THE CONTENT
25 ONE BOX.

1 THE COURT: OKAY.

2 AND DID YOU NEED ANY OF THAT FOR YOUR CLASS CERT MOTION?

3 MR. ROMMEL: I DON'T BELIEVE SO, YOUR HONOR. WE
4 HAVEN'T REQUESTED THAT THE RECORD BE SUPPLEMENTED WITH THAT
5 INFORMATION.

6 OBVIOUSLY, IF THE COURT HAS ANY FURTHER QUESTIONS AFTER
7 TODAY'S PRESENTATION OF THE BRIEFING AND IF YOU HAVE ANY
8 QUESTIONS THAT WE MIGHT BE ABLE TO ADDRESS FROM THE DEPOSITION,
9 I WILL ALERT THE COURT, BUT WE ARE NOT SEEKING AT THIS TIME TO
10 SUPPLEMENT THE RECORD.

11 THE COURT: ALL RIGHT.

12 NOW WE HAVE A MEDIATION DEADLINE OF MARCH THE 15TH. AND
13 YOU HAVEN'T SELECTED A NEUTRAL YET. WHEN WOULD MAKE SENSE?

14 I HAVE SOME QUESTIONS FOR YOU TODAY, IF IT'S USEFUL I CAN
15 GIVE YOU A TENTATIVE RULING.

16 MR. RHODES: YOUR HONOR, WE HAVE ACTUALLY AGREED TO A
17 DATE AND MEDIATOR.

18 THE COURT: OH, YOU DID, GREAT.

19 MR. RHODES: I THINK WE WERE GOING TO ASK YOU FOR
20 LEAVE TO MOVE THE DEADLINE JUST BECAUSE OUR SCHEDULES ARE
21 CRAZY. APRIL 23RD BEFORE RANDY A. WULFF.

22 THE COURT: APRIL 23RD?

23 MR. RHODES: CORRECT, YOUR HONOR.

24 THE COURT: OKAY.

25 MR. RHODES: SO I APOLOGIZE IF THAT WASN'T CLEAR IN

1 THE PAPERS.

2 THE COURT: WELL, IT MAY HAVE BEEN. YOU MAY HAVE
3 COME TO AGREEMENT AFTER THIS DATE. SO THAT'S FINE. OKAY,
4 GREAT. THAT'S FINE. SO THERE'S NO ISSUE.

5 LET ME GO AHEAD THEN AND EXTEND YOUR MEDIATION DEADLINE
6 FROM MARCH 15TH TO -- WOULD APRIL 24TH BE TOO SOON?

7 MR. RHODES: I DON'T THINK SO. WE WILL KNOW WHAT THE
8 SCORE IS I THINK BY THE END OF THE 23RD. IF SOMETHING CHANGES,
9 WE CAN ALWAYS REPORT BACK TO THE COURT.

10 THE COURT: OKAY.

11 I WAS HOPING TO SCHEDULE A CMC SOONER RATHER THAN LATER.
12 OBVIOUSLY IT WILL BE MOOTED IF YOU RESOLVE YOUR CASE.

13 BUT, YOU KNOW, IF I GET THE CLASS CERT ORDER OUT, I DON'T
14 KNOW IF THAT WOULD NECESSITATE ANY DISCUSSION ABOUT THE
15 SCHEDULE.

16 SO I COULD SET IT FOR EARLY MAY, AND THEN YOU WOULD HAVE
17 YOUR MEDIATION AND ORDER.

18 MR. RHODES: I THINK THAT WOULD MAKE SENSE. THE ONLY
19 THING I WOULD SUGGEST, OF COURSE I WON'T BE ABLE TO ATTEND
20 BECAUSE MY DAUGHTER IS GETTING MARRIED THE FIRST WEEK OF MAY,
21 BUT I THINK MR. SOMVICHIAN CAN HANDLE THAT.

22 THE COURT: WELL, CONGRATULATIONS.

23 MR. RHODES: WELL, IT REMAINS TO BE SEEN, YOUR HONOR.

24 THE COURT: I HOPE THAT DIDN'T GO INTO THE PUBLIC
25 RECORD, FOR YOUR FUTURE IN LAW'S SAKE.

1 LET ME ASK, DOES MAY 1ST WORK FOR US?

2 THE CLERK: MAY 7TH ACTUALLY DOES LOOK ALL RIGHT.

3 THE COURT: OH, OKAY.

4 THE CLERK: WE HAVE FIVE SETTLEMENTS, BUT SOME ARE
5 SETTLED.

6 (OFF-THE-RECORD DISCUSSION.)

7 THE COURT: WE COULD DO APRIL 30TH, WOULD THAT BE
8 BETTER FOR YOU?

9 MR. RHODES: I COULD DO APRIL 30TH, YOUR HONOR.

10 THE CLERK: THAT'S FOR SOME REASON REALLY GOOD FOR
11 US.

12 THE COURT: WHY DON'T WE DO APRIL 30TH.

13 MR. ROMMEL: YOUR HONOR, IS THERE ANY WAY WE COULD DO
14 IT ON THE 24TH, THE DAY AFTER THE MEDIATION SINCE WE WILL ALL
15 BE OUT HERE?

16 THE ONLY CONCERN PLAINTIFFS HAVE IS REBUTTAL EXPERT
17 REPORTS DEADLINE IS THE 21ST, AND IF WE TRAVEL THE 29TH, 30TH
18 THEN BACK ON THE 1ST, THAT'S EFFECTIVELY THREE DAYS WHERE WE
19 KIND OF MISS FOR THAT ASPECT.

20 SO IF THERE'S ANY WAY WE COULD DO IT WHILE WE ARE OUT
21 HERE THE 24TH --

22 THE COURT: YES. LET ME SEE WHAT THE 24TH LOOKS
23 LIKE.

24 MR. RHODES: THAT'S OKAY WITH US, BY THE WAY
25 YOUR HONOR, AS WELL.

1 (OFF-THE-RECORD DISCUSSION.)

2 THE COURT: ALL RIGHT. WHY DON'T WE SET IT FOR
3 APRIL 24TH AT 1:30.

4 I THINK IT MAKES SENSE TO AVOID UNNECESSARY TRAVEL IF YOU
5 ARE ALREADY GOING TO BE OUT HERE. OKAY.

6 SO APRIL 24TH AT 1:30.

7 YOU'VE GOT YOUR MEDIATION. I DIDN'T THINK THERE WAS
8 ANYTHING ELSE FROM YOUR JOINT CASE MANAGEMENT STATEMENT THAT WE
9 NEEDED TO --

10 MR. ROMMEL: YOUR HONOR, ON THE CMC STATEMENT WITH
11 REGARDS TO DR. GREEN, I BELIEVE THAT GOOGLE HAS FILED A MOTION
12 TO SUPPLEMENT THE RECORD WITH THE DEPOSITION EXCERPTS.

13 THE COURT: YES, THEY DID.

14 MR. ROMMEL: IN OUR MEET AND CONFER WE ORIGINALLY
15 REQUESTED THAT SOME ADDITIONAL EXCERPTS BE ADDED FOR
16 COMPLETENESS, BUT WE NO LONGER -- WE DON'T OPPOSE THE MOTION.

17 SO THE MOTION TO SUPPLEMENT THE RECORD WITH REGARDS TO
18 DR. GREEN'S EXCERPTS FROM HIS DEPOSITION TESTIMONY, PLAINTIFFS
19 DO NOT OPPOSE THAT.

20 THE COURT: ALL RIGHT. SO I WILL GRANT THAT MOTION.

21 MR. RHODES: THANK YOU, YOUR HONOR.

22 THE COURT: OKAY.

23 I THINK THAT WAS IT FOR THE CASE MANAGEMENT PART. DOES
24 THAT SOUND RIGHT?

25 MR. RHODES: YES.

1 MR. ROMMEL: YES, YOUR HONOR.

2 THE COURT: ALL RIGHT. SO LET'S PUT THAT AWAY.

3 SO LET'S GO TO -- ALL RIGHT. WELL, WHY DON'T WE -- LET'S
4 START OFF WITH THE MINORS.

5 I SAW THAT THERE'S A CALCULATION IN THE BRIEFING AS TO
6 HOW MANY ACCOUNTS WERE CREATED BASED ON SELF-REPORTED
7 BIRTHDAYS.

8 SO I GUESS THE QUESTION IS HOW WAS THAT NUMBER
9 CALCULATED? IS THERE SOME GOOGLE RECORD THAT COULD BE USED TO
10 DETERMINE WHICH ACCOUNT HOLDERS ARE MINORS OR NOT? THERE MUST
11 HAVE BEEN SOMETHING TO COME UP WITH THIS NUMBER.

12 MR. RHODES: I THINK THE RECORD WAS ACTUALLY THE
13 PLAINTIFFS CREATED THAT RECORD.

14 BUT I WANTED TO ASK THE COURT FOR AN INDULGENCE WHICH IS,
15 IT'S OBVIOUSLY A BIG RECORD, DOES THE COURT MIND IF
16 MR. SOMVICHIAN AND I PARE IT BACK AND FORTH DEPENDING WHAT
17 QUESTIONS YOU ASK?

18 THE COURT: NOT AT ALL. NOT AT ALL. ALL RIGHT.

19 THEN LET ME ASK, SO THAT WAS PLAINTIFF'S NUMBER?

20 MR. ROMMEL: YOUR HONOR, CERTAINLY.

21 EXHIBIT C IS GOOGLE'S OBJECTIONS AND RESPONSES TO
22 PLAINTIFF'S INTERROGATORIES NUMBER 7. IN RESPONSE TO
23 INTERROGATORY NUMBER 4, WHEREIN WE SPECIFICALLY ASKED FOR
24 GOOGLE ITSELF TO IDENTIFY ALL PERSONS UNDER THE AGE OF 18 YEARS
25 WHO HAD OPENED AND CLOSED @GMAIL.COM ACCOUNTS. K1 GOOGLE APPS

1 ACCOUNTS AND GOOGLE APPS EDU ACCOUNTS.

2 THE ANSWER TO THAT RESPONSE BEGINS ON PAGE 14 OF EXHIBIT
3 C, AND WHEREIN GOOGLE IDENTIFIED BY YEAR SINCE 2005 UP THROUGH
4 JULY 12, 2013, WHEN THE INTERROGATORY I BELIEVE WAS RESPONDED
5 TO, THE NUMBERS FOR THE MINOR GMAIL CLASS MEMBERS --

6 THE COURT: THAT'S A WORLDWIDE NUMBER, RIGHT?

7 MR. SOMVICHIAN: THAT'S THE WAY IT WAS CALCULATED.

8 MR. RHODES: FOR THE RECORD YOUR HONOR, I THINK HE
9 MEANT IT'S EXHIBIT C TO MR. ROMMEL'S DECLARATION.

10 MR. ROMMEL: YES, YOUR HONOR.

11 MR. RHODES: I DON'T THINK HE REFERENCED WHICH
12 DOCUMENT.

13 MR. ROMMEL: EXHIBIT C TO MY RESPONSE FOR
14 CERTIFICATION.

15 THE COURT: OKAY.

16 WELL, WHAT IN THE RECORD INDICATES THAT GOOGLE COULD
17 ACTUALLY DETERMINE WHICH GMAIL USERS ARE MINORS?

18 MR. ROMMEL: THE RECORD WOULD INDICATE THAT THE GMAIL
19 USER, WHOEVER SIGNS UP, PUTS THAT INFORMATION IN. THAT'S MY
20 UNDERSTANDING OF WHAT HAPPENS.

21 DURING THE CREATE-AN-ACCOUNT PAGE, THE INDIVIDUAL WOULD PUT
22 THAT INFORMATION IN THEMSELVES.

23 THE COURT: I UNDERSTAND.

24 BUT I THOUGHT THAT GOOGLE'S POSITION IS THAT THEY DON'T
25 STORE THAT INFORMATION. SO EVEN IF IT MIGHT BE SELF-REPORTED

1 AT THE CREATION OF THE ACCOUNT, THERE'S NO DATABASE WHERE THEY
2 COULD ACCESS WHAT BIRTH DATES WERE GIVEN BY THEIR USERS.

3 MR. ROMMEL: THAT'S NOT TRUE. IT'S MY UNDERSTANDING,
4 IN FACT IF YOU LOOK AT -- IF WE LOOK AT PAGE 30 OF EXHIBIT C,
5 SAME EXHIBIT C, THE USER MODEL CONTAINS INFORMATION WITH
6 REGARDS TO THE APPROXIMATION OF THE USER'S AGE BRACKET.

7 IT'S MY UNDERSTANDING, AGAIN IN THIS RECORD HERE, I'M NOT
8 SURE IF I COULD HONE THAT DOWN ANY FURTHER, BUT WE DO HAVE SOME
9 INDICATION THAT AGE HAS BECOME AND IS MAINTAINED WITHIN THE
10 USER MODEL ITSELF.

11 THE COURT: BY USER MODEL, ARE YOU REFERRING TO THE
12 USER PROFILES?

13 MR. ROMMEL: THE USER MODEL WHICH IS CREATED FOR THE
14 @GMAIL.COM PARTICIPANT FOR THE CONTENT ONEBOX, YES.

15 THE COURT: WHAT DID YOUR DISCOVERY SHOW WITH REGARD
16 TO THIS QUESTION? IS THIS IT? THIS IS WHAT YOU HAVE? WAS
17 THERE DEPOSITION TAKEN THAT WOULD HAVE CALLED FOR THE ANSWER TO
18 THIS QUESTION?

19 MR. ROMMEL: I DON'T HAVE AVAILABLE RIGHT NOW ANY
20 SPECIFIC INFORMATION AS TO HOW THAT INFORMATION IS ACQUIRED
21 OTHER THAN BY THE CREATE AN ACCOUNT PAGE FROM THE USER.

22 WE DO HAVE THIS INFORMATION HERE THAT WE DO BELIEVE IS
23 BEING MAINTAINED BUT NO, YOUR HONOR WE DON'T HAVE ANY SPECIFIC
24 QUESTIONS THAT WOULD SPECIFICALLY ADDRESS THE COURT'S QUESTION.
25 WE DON'T HAVE ANYTHING FOR YOU TODAY ON THAT.

1 THE COURT: OKAY.

2 NOW WHAT ABOUT ONE OF THE POINTS GOOGLE RAISES IN THAT
3 USERS MAY NOT BE ACCURATELY SELF REPORTING?

4 HOW ARE WE SUPPOSED TO DEAL WITH THAT? WOULD THAT BE AN
5 INDIVIDUAL INQUIRY?

6 MR. ROMMEL: THAT WOULD NOT BE AN INDIVIDUAL INQUIRY.
7 IT MAY AFFECT ASCERTAINABILITY. IT MAY AFFECT THE CLAIMANT'S
8 ABILITY TO PROVIDE PROOF TO RECOVER IN THIS CASE.

9 OBVIOUSLY, MUCH AS MANY CLASS ACTIONS ARE CERTIFIED AND
10 ASCERTAINABLE BY LOOKING AT RESIDENCY, THE PROOF OF AGE OF A
11 PARTICULAR CLASS MEMBER CAN BE READILY IDENTIFIED BY A NUMBER
12 OF SOURCES, WHETHER IT BE BIRTH CERTIFICATES, ANY TYPE OF
13 GOVERNMENT ID OR ENTITY THAT'S COMMONLY USED FOR THOSE TYPES OF
14 DETERMINATIONS OF AGENT AND RESIDENCY. THAT'S NOT SOMETHING
15 THAT'S PRESENTED WITH ASCERTAINABILITY.

16 IT MAY BE SOMETHING THE PERSON WHO SELF-REPORTED AND
17 MISINFORMED GOOGLE ABOUT WOULD NOT BE ABLE TO RECOVER
18 ULTIMATELY.

19 SO THE INDICATION WOULD BE, YOUR HONOR, THAT MUCH LIKE A
20 RESIDENCY, A PERSON'S RESIDENCY THEY WOULD HAVE TO PROVIDE THAT
21 INFORMATION BY WHICH THE COURT COULD THERE OBJECTIVELY
22 DETERMINE WHETHER OR NOT THAT PERSON FIRST FELL WITHIN THE
23 CLASS DEFINITION AND WAS BOUND BY ALL THE RULINGS OF THE COURT
24 AND ALSO WHETHER OR NOT THE PERSON WAS ELIGIBLE FOR RECOVERY.

25 THE COURT: BUT ISN'T THAT TYPE OF VERIFICATION

1 DISFAVORED OF CLASS CERTIFICATION IF ONE WERE TO HAVE TO
2 START -- WE ARE NOT A GOVERNMENT AGENCY OF VERIFYING BIRTH
3 DATES AND VERIFYING GOVERNMENT ISSUED IDENTIFICATION DOCUMENTS,
4 ET CETERA.

5 MR. ROMMEL: NO, YOUR HONOR. IT HAPPENS ALL THE
6 TIME.

7 A CLAIMS ADMINISTRATOR WOULD BE APPOINTED BY THE COURT TO
8 DO THESE TYPES OF ACTIVITIES. IN THE IN RE HIGH-TECH AND OTHER
9 CASES THE COURT HAS DETERMINED THAT AN EXPERT WHO DETERMINED
10 THAT THE USE OF JOB TITLES WAS SUFFICIENT FOR THOSE PEOPLE TO
11 BE ABLE TO BE ASCERTAINED WITHIN THAT CLASS.

12 SO IN THAT PARTICULAR PROCESS, THIS COURT IDENTIFIED THAT
13 THERE WOULD HAVE TO BE SOME MATCHING OF JOB TITLES WITH THE
14 PARTICULAR, THE CLAIMANT WHO ULTIMATELY CAME FORWARD.

15 THE IDENTIFICATION PROCESS, THE ASCERTAINABILITY PROCESS
16 HERE IS AS SIMPLE AS ANY OTHER CLASS ACTION THAT REQUIRES AN
17 OBJECTIVE CRITERIA.

18 THERE'S ALSO GOING TO BE SOME TYPE OF A MATCHING PROCESS
19 IN THE CLAIMS ADMINISTRATION. FIRST TO DETERMINE WHETHER OR
20 NOT THE INDIVIDUAL FALLS WITHIN THE CLASS DEFINITION, WHICH IN
21 THIS PARTICULAR CASE GIVEN ANY OF THE CLASS DEFINITIONS, WOULD
22 REQUIRE THAT PERSON TO SHOW THAT THEY ARE A NON GMAIL USER OR
23 POTENTIALLY A GOOGLE APPS CABLE 1 USER, OR A GOOGLE APPS EDU
24 USER.

25 IT WOULD ALSO REQUIRE THEM TO SHOW IN RELATIONSHIP TO THE

1 PROPOSED CLASSES THAT THEY RECEIVED AN E-MAIL INTO THAT ACCOUNT
2 TO SHOW THAT RECEPTION OF THAT E-MAIL.

3 IF THEY HAVE TO SHOW --

4 THE COURT: I'M SORRY TO INTERRUPT YOU, MR. ROMMEL,
5 LET ME ASK A QUESTION OF GOOGLE'S COUNSEL.

6 DO YOU WANT TO MAKE A BRIEF COMMENT OF EITHER HOW UNDER
7 INCLUSIVE OR OVERINCLUSIVE THE MINOR CLASS MIGHT BE?

8 MR. RHODES: WE PROVIDED THE INFORMATION THAT WE WERE
9 ABLE TO GENERATE IS AN IMPERFECT MATCH.

10 SOMEBODY MAY SIGN UP FOR GOOGLE GENERALLY, THE E-MAIL
11 ACCOUNT MIGHT BE LATER. THERE IS A DISCONNECT. THERE'S AN
12 IMPERFECT SET OF DATA.

13 BUT I THINK THE COURT ASKED THE RIGHT QUESTION. I WON'T
14 BURDEN THE RECORD TODAY, BUT LOOK AT THE CARRERA DECISION OUT
15 OF THE THIRD CIRCUIT THAT JUDGE CONTI CITED TWO WEEKS AGO WITH
16 APPROVAL. IT TALKS ABOUT THE BURDEN OF DEVELOPING A MODEL,
17 FILLING IN THE VARIABLES AND DEMONSTRATING TO THE COURT AT SOME
18 LEVEL HOW IT WOULD ACTUALLY WORKS WHEN YOU ARE DEALING WITH
19 THESE SELF IDENTIFYING OR SELF REPORTING MECHANISMS FOR
20 INCLUSION OF CLASS MEMBERSHIP.

21 AND THAT'S THE PROBLEM HERE. WE HAVE GIVEN THEM THE
22 30(B)(6) DEPOSITIONS THEY WANTED, WE'VE ANSWERED THEIR
23 INTERROGATORIES, THERE'S BEEN MOTION PRACTICE. AND THE RECORD
24 TODAY IS ON THE CORE ISSUES OF ASCERTAINABILITY, THEY HAVE
25 NEVER SOME FORWARD WITH A MODEL THAT THEY HAVE DEMONSTRATED

1 WILL ACTUALLY WORK.

2 AND WORSE, THEY'VE NEVER SHOWN SOME STATISTICAL SAMPLING
3 OF THE DATA SET TO GIVE YOU MORE COMFORT THAT WE CAN TEST TO
4 SAY IT WILL NOT PRODUCE ENOUGH FALSE POSITIVES --

5 THE COURT: BUT DOES GOOGLE CONCEDE THAT THE USER
6 MODEL DOES INCLUDE AN AGE CATEGORY.

7 MR. RHODES: IT DOES INCLUDE THAT, YOUR HONOR.

8 THE COURT: OKAY.

9 SO IT SEEMS -- I DEFINITELY UNDERSTAND YOUR POINT OF
10 UNRELIABILITY OF SELF-REPORTING.

11 BUT IF GOOGLE HAS THE INFORMATION IN ITS USER PROFILES,
12 THEN WHY ISN'T THAT A CLASS THAT'S ASCERTAINABLE UNDERSTANDING
13 THAT SELF-REPORTING MAY NOT ALWAYS BE ACCURATE?

14 MR. SOMVICHIAN: YOUR HONOR, JUST TO CLARIFY ON THE
15 AGE INFORMATION, THAT'S INCLUDED IN THE USER MODEL SERVER,
16 THAT'S NOT -- THERE'S NOTHING IN THE RECORD INDICATING THAT'S
17 UNIVERSALLY MAINTAINED FOR EVERY USER. IN SOME INSTANCES THE
18 AGE INFORMATION MAY BE AVAILABLE WHEN IT IS SELF-REPORTED. IN
19 SOME INSTANCES IT MAY BE INFERRED FROM OTHER DATA. BUT THERE'S
20 NOTHING IN THE RECORD TO SUGGEST THAT THERE'S COMPREHENSIVE AGE
21 INFORMATION THAT'S PROVIDED AND MADE PART OF THE USER MODEL.

22 THE COURT: SO I'M SORRY TO INTERRUPT YOU.

23 SO TO CREATE AN ACCOUNT, A USER DOESN'T HAVE TO SELF REPORT
24 THEIR AGE? AND THEY OPT OUT OF PROVIDING THAT INFORMATION?

25 MR. SOMVICHIAN: TYPICALLY YOU DO HAVE TO INDICATE

1 YOUR AGE, YOUR HONOR. BUT THERE'S -- THE DIFFICULTY IN LOOKING
2 AFTER THE FACT AND TRYING TO DETERMINE EVERYBODY'S AGE WITH
3 RESPECT TO GMAIL USERS IS WHAT MR. RHODES MENTIONED, THAT
4 THERE'S A DIFFERENCE BETWEEN THE AGE WHEN -- THAT SOMEBODY SELF
5 REPORTS WHEN CREATING A GOOGLE ACCOUNT AND POTENTIALLY WHEN
6 THEY CREATE A GMAIL ACCOUNT. THAT MAY NOT BE THE SAME. THOSE
7 TWO DATES MAY NOT BE AVAILABLE.

8 WHAT WE HAVE INDICATED IN OUR INTERROGATORY RESPONSE,
9 THIS IS PAGE 14 OF THE SAME EXHIBIT THAT MR. ROMMEL NOTED, IS
10 "GOOGLE DOES NOT HAVE RELIABLE AGE INFORMATION FOR ALL OF ITS
11 USERS."

12 THE COURT: OKAY.

13 SO IF YOU CREATE ANY ACCOUNT ACROSS ANY OF GOOGLE'S
14 SERVICES, YOU DO HAVE TO REPORT, SELF-REPORT YOUR BIRTHDAY; IS
15 THAT CORRECT?

16 MR. SOMVICHIAN: YES.

17 THE COURT: OKAY.

18 BUT YOUR CONCERN IS THAT NUMBER ONE, AGES ARE CONSTANTLY
19 VARYING OR THEY ARE CHANGING OVER TIME. THAT'S ONE.

20 AND YOUR SECOND POINT IS WHAT? THAT PEOPLE MAY HAVE
21 CREATED ACCOUNTS AT DIFFERENT TIMES SO THAT THERE MIGHT BE A
22 NUMBER OF CONFLICTING AGES FOR THE SAME USER?

23 I'M JUST UNCLEAR ON WHAT THE POINT IS.

24 MR. SOMVICHIAN: YOU MAY HAVE THE DATE ONLY WHEN AN
25 ACCOUNT WAS CREATED AND YOU MAY NOT HAVE A DATE WHEN THE GMAIL

1 ACCOUNT WAS CREATED. AND YOU'RE ONLY IN THE CLASS IF YOU ARE A
2 MINOR GMAIL USER, NOT A MINOR WHO STARTED A GOOGLE ACCOUNT OR
3 SOME OTHER PERSON.

4 THE COURT: OH, I SEE.

5 SO IF YOU HAVE AN EXISTING GOOGLE ACCOUNT, YOU DON'T NEED
6 TO THEN RE SELF-REPORT YOUR AGE TO THEN LATER DEVELOP THE GMAIL
7 ACCOUNT.

8 MR. SOMVICHIAN: I DON'T BELIEVE SO, YOUR HONOR.

9 THAT'S WHY WE INDICATED HERE, OF THE USERS WHO HAVE
10 PROVIDED GOOGLE WITH AGE INFORMATION AND FOR WHOM GOOGLE HAS A
11 DATE THE GMAIL WAS CREATED, THAT IS THE GROUP FOR WHICH WE
12 REPORTED THE NUMBERS THAT WERE HERE IN EXHIBIT C.

13 BUT IT'S WITH THOSE ASSUMPTIONS THAT BOTH OF THOSE
14 EXISTING DATA POINTS, AND IT MAY NOT BE THE CASE THAT THOSE
15 DATA POINTS ARE IN FACT AVAILABLE FOR EVERY USER --

16 THE COURT: DO YOU HAVE ANY SENSE OF WHAT PERCENTAGE
17 OF USERS HAVE NOT SUPPLIED THAT INFORMATION?

18 MR. SOMVICHIAN: WE DON'T HAVE THAT, YOUR HONOR.

19 THE COURT: IT JUST SEEMS THAT IF YOU ARE DOING A
20 USER PROFILE FOR THE PURPOSES OF ADVERTISING SOMEONE'S AGE,
21 WOULD BE A VERY KEY CHARACTERISTIC THAT WOULD HELP YOU IN MOST
22 SUCCESSFULLY TAILORING THE ADVERTISING.

23 SO YOU DO MAINTAIN IT AND YOU DO REQUIRE THE
24 SELF-REPORTING OF BIRTHDAYS WHEN THE ACCOUNT IS CREATED.

25 I GUESS I'M NOT SAYING WHERE THE HOLE IS. YOU REQUIRE IT

1 AT THE CREATION OF EVERY ACCOUNT FOR A GOOGLE SERVICE AND YOU
2 MAINTAIN INFORMATION OF USER PROFILES.

3 I'M STILL A LITTLE UNCLEAR ON WHERE IS THE HOLE?

4 MR. RHODES: GIVING YOU AN EXAMPLE, SUPPOSE SOMEBODY
5 SIGNS UP FOR GOOGLE+ AT THE AGE OF 17. THEY GO TO COLLEGE AND
6 THEY SIGN UP FOR THE EDU APP AT THE AGE OF 18. THAT MIGHT BE
7 AN INSTANCE WHERE THE 17-YEAR OLD DATA FIELD WITH RESPECT TO
8 GOOGLE+ DOESN'T INDICATE WHETHER OR NOT THE GMAIL ACCOUNT
9 HOLDER WHO IS THE SAME INDIVIDUAL, NECESSARILY APPLIES.

10 WE ARE NOT DISPUTING WITH YOUR CORE FUNDAMENTAL VIEW THAT
11 THERE'S A BODY OF AGE DATA THERE. WE AREN'T DISPUTING THAT.

12 WHAT WE SAID IN OUR INTERROGATORIES IS THAT THERE IS IN
13 FACT A GAP AND WE ARE MAKING SOME ASSUMPTIONS AND WE HAVE DONE
14 THE BEST WE CAN TO CALCULATE IT.

15 THE POINT I WOULD REITERATE FOR THE COURT IS IT'S THE
16 PLAINTIFF'S BURDEN TO DEMONSTRATE THAT THIS AND ALL THE OTHER
17 CRITERIA THAT COMPRISE THE ASCERTAINABILITY ARE THERE, ARE
18 KNOWN, THERE'S A BODY OF EVIDENCE THAT WE CAN ACTUALLY SORT OF
19 TEST TO SEE, OKAY, ARE WE COMFORTABLE THAT WE GOT IT.

20 AND WE GAVE THEM THIS INFORMATION, WE GAVE OUR WITNESSES
21 TO THEM AND THEY DON'T HAVE ANYTHING MORE IN THE RECORD THAN
22 THAT.

23 MR. ROMMEL: AND YOUR HONOR, WE DON'T NEED ANYTHING
24 MORE IN THE RECORD THAN THAT. AND LET ME GIVE YOU AN EXAMPLE.

25 LET'S LOOK AT THE CLASS DEFINITION WE ARE DEALING WITH

1 HERE.

2 THE INTERROGATORY WAS TO ADDRESS THE ISSUE OF NUMEROSITY
3 WHICH I WOULD CONTEND IS NOW NO LONGER CONTESTED BY GOOGLE. IT
4 WAS CONCEDED.

5 THE COURT: I THINK WE SHOULD FOCUS TODAY'S
6 DISCUSSION ON ASCERTAINABILITY AND PREDOMINANCE. THAT WOULD BE
7 THE MOST USEFUL FOR PURPOSES OF TRYING TO DRAFT AN ORDER AND
8 MAKE A DECISION.

9 MR. ROMMEL: SO LOOKING AT THE DEFINITION FOR THE
10 MINOR CLASS, THE MINOR CLASS IS ALL CHILDREN IN THE
11 UNITED STATES WHO DURING THE PERIOD OF THE CLASS PERIOD WHO
12 WERE 13 YEARS OF AGE AND UNDER THE LEGAL AGE --

13 THE COURT: ACTUALLY, I'M SORRY, MR. ROMMEL, CAN I
14 ASK YOU TO RESPOND TO MR. RHODES'S AND MR. SOMVICHIAN'S POINT.

15 MR. ROMMEL: YES.

16 THE COURT: IF THERE'S INCONSISTENCIES ACROSS THE
17 DIFFERENT DATA POINTS THAT GOOGLE HAS, HOW ARE WE SUPPOSED TO
18 MAKE A CLASS DETERMINATION ON THAT VERSUS AN INDIVIDUAL
19 ASSESSMENT OF, WELL, ARE YOU STILL A MINOR RIGHT NOW? WERE YOU
20 A MINOR OF THE CLASS PERIOD, DURING THE TIME OF THE CLASS
21 PERIOD?

22 MR. ROMMEL: I WOULD ASSERT, YOUR HONOR, THAT WE
23 DON'T NEED GOOGLE'S RECORDS WITH REGARDS TO THE PERSON'S AGE
24 TODAY OR AT ANY TIME TO MAKE THIS DETERMINATION. AND HERE'S
25 WHY:

1 WHEN LOOKING AT THE CLASS DEFINITION, WE NEED TO KNOW THE
2 DATE THEY SENT THE E-MAIL OR RECEIVED THE E-MAIL INTO THEIR
3 @GMAIL.COM ACCOUNT. SO THAT WOULD BE DONE WITH THE PERSON
4 PROVIDING, AND WE DON'T NEED A STATISTICAL MODEL HERE IN THIS
5 CASE AT ALL, THIS IS NO DIFFERENT THAN, I WOULD ASSERT A
6 SHAREHOLDER CASE WHERE SOMEBODY IS SAYING YES, I BOUGHT SHARES
7 WITHIN THE CLASS PERIOD AND HERE'S MY SHARE, AND YOU HAVE TO
8 COMPARE IT TO THE COMPANY RECORDS TO SEE THE DATE WHEN THEY
9 BOUGHT IT, TO SEE THAT THEY ARE ACTUALLY A SHAREHOLDER. THE
10 PERSON WOULD HAVE TO IDENTIFY THEY ARE A SHAREHOLDER, THE
11 PERSON WOULD HAVE TO IDENTIFY THEY ARE IN THE UNITED STATES --

12 THE COURT: I'M SORRY TO INTERRUPT YOU. BUT DON'T WE
13 STILL HAVE THE SAME PROBLEM THOUGH, YOU'VE GOT THE DATE OF THE
14 E-MAIL BUT THEN WE ARE GOING TO HAVE TO GO TO THE USER PROFILE
15 TO FIND THE SELF-REPORTED BIRTHDAY?

16 MR. ROMMEL: NO, YOUR HONOR.

17 THE COURT: WHY NOT?

18 MR. ROMMEL: WE HAVE THE E-MAIL WHICH WOULD SHOW THE
19 DATE THE E-MAIL WAS RECEIVED INTO THAT ACCOUNT.

20 AND ALL WE NEED THEN IS PROOF OF AGE ON THAT DAY WHICH
21 CAN BE DONE AGAIN THROUGH A BIRTH CERTIFICATE.

22 SO IF FOR EXAMPLE, IF IN NOVEMBER OF 2011 A MINOR HAD A
23 GMAIL ACCOUNT AND RECEIVED AN E-MAIL AND THAT MINOR BECAME A
24 CLAIMANT TODAY, WHATEVER, DOESN'T MATTER WHAT THE DATE IS THEY
25 ARE TODAY, CAME IN AND FILED A CLAIM AND SAID I WAS A MINOR

1 WHEN I RECEIVED THIS E-MAIL INTO MY @GMAIL.COM ACCOUNT. OKAY.
2 WELL, LET'S TAKE A LOOK THE HERE'S YOUR @GMAIL.COM ACCOUNT, WE
3 SEE THAT, YES, AND HOW OLD ARE YOU, WELL, MY BIRTHDAY IS THIS.

4 SO YOU CAN CONCLUSIVELY SHOW ON THAT DATE THEY WERE A
5 MINOR.

6 SO WE DON'T NEED THE USER PROFILE. I AGREE THAT
7 INFORMATION IS PROBABLY STILL THERE, BUT WE DON'T NEED THE USER
8 MODEL TO MAKE A DETERMINATION THAT THE PERSON WAS A MEMBER OF
9 THE CLASS BECAUSE AT THE TIME THEY RECEIVED THE E-MAIL PURSUANT
10 TO THE DEFINITION THEY WERE A MINOR.

11 THE COURT: I'M SORRY TO INTERRUPT YOU.

12 SO THE WAY WE WOULD FIND OUT IS THAT A CLAIMANT WOULD HAVE
13 TO SELF-REPORT OR SELF-IDENTIFY AS A MINOR ONCE A CLASS NOTICE
14 WENT OUT. SO WE WOULD NOT KNOW IN ADVANCE, WE WOULD JUST HAVE
15 TO DO EVERY POTENTIAL CLASS MEMBER AND SEE WHO REPORTS BACK.

16 MR. ROMMEL: YOUR HONOR, ASCERTAINABILITY DOES NOT
17 REQUIRE IDENTIFICATION OF THE CLASS PRIOR TO THE NOTICE OR
18 PRIOR TO THE -- IT REQUIRES AN ABILITY, IF ARE THIS COURT, IT
19 REQUIRES AN ABILITY FOR THE COURT TO MAKE A DETERMINATION BY
20 OBJECTIVE CRITERIA THAT THE PERSON FALLS WITHIN THE CLASS. WE
21 DON'T HAVE TO IDENTIFY THE CLASS MEMBERS.

22 SO AGAIN, THIS COURT, IN LOOKING AT THE ISSUE WITH
23 REGARDS TO THE IN RE HIGH-TECH, THE PROPOSED TECHNICAL CLASS
24 CONSISTS OF JOB TITLES.

25 SO THIS COURT --

1 THE COURT: I THINK THAT'S -- I APPRECIATE YOU CITING
2 IT IN MY ORDER, BUT I THINK THAT'S A LITTLE BIT OF A SITUATION
3 BECAUSE THOSE WERE EMPLOYERS SO THEY KNEW WHO THEIR EMPLOYEES
4 WERE.

5 THIS IS NOT QUITE THE SAME SITUATION. THESE EMPLOYERS
6 HIRED, PAID, EMPLOYED THOSE FOLKS. SO IT'S A LITTLE BIT OF A
7 DIFFERENT SITUATION THAN US JUST DOING A BILLION PERSON BLAST
8 AND WAITING TO SEE WHO COMES BACK TO SELF-REPORT AS A MINOR.

9 MR. ROMMEL: I AGREE, YOUR HONOR.

10 THERE'S ALWAYS GOING TO BE A CLAIMS PROCESS IN THIS CASE.
11 THERE WILL HAVE TO BE. AND THAT'S NOT UNHEARD OF IN CLASS
12 ACTIONS. PEOPLE WILL HAVE TO COME AND FILE A CLAIM AFTER THEY
13 HAVE RECEIVED NOTICE.

14 AND THE QUESTION FOR TODAY FOR ASCERTAINABILITY IS CAN
15 THE PERSON DEMONSTRATE THAT THEY ARE A MEMBER OF THE CLASS
16 USING OBJECTIVE EVIDENCE THAT THIS COURT CAN BE SATISFIED, YES,
17 YOU ARE A MEMBER OF THIS CLASS, OR NO, YOU ARE NOT A MEMBER OF
18 THIS CLASS BASED UPON INDICIA THAT THE COURT APPROVES IS, CAN
19 SATISFY THAT.

20 SO WHEN WE GO TO THE AGE OF THE PERSON ON THE DATE THEY
21 SENT THE E-MAIL, THERE ARE A NUMBER OF WAYS THAT THE COURT
22 COULD SAY THAT A CLAIMS ADMINISTRATOR -- AND LET'S REMEMBER, WE
23 ARE AT THE CLAIMS PROCESS. THIS COMPANY HAS BEEN FOUND LIABLE
24 OF MASSIVE VIOLATIONS OF FEDERAL STATE LAW.

25 SO IF WE ARE AT THAT PROCESS, THE BURDENS THAT WE TALK

1 ABOUT TODAY AND THE CLAIMS ADMINISTRATION WILL HAVE TO LOOK AT
2 IS THE ISSUE OF, IS THE PERSON A MINOR. AND WE CAN DO THAT
3 WITH THE SUBMISSION OF BIRTH CERTIFICATES. THAT'S NOT
4 SELF-REPORTING, THAT'S INDICIA OF RELIABLE INFORMATION THAT'S
5 CUSTOMARILY USED BY GOVERNMENTS AND AGENCIES AND SCHOOLS AND
6 INSTITUTIONS ACROSS THE UNITED STATES AND HAVE BEEN RECOGNIZED
7 IN CASE LAW AS WELL.

8 SO THIS ISSUE OF RESIDENCY, YES, THEY MAY HAVE TO PROVE
9 THEY ARE MEMBERS, CITIZENS OF OR CHILDREN IN THE UNITED STATES.
10 THEY HAVE TO PROVE THEIR AGE. THAT WOULD BE THE ONLY
11 SELF-REPORTING THAT THE PERSON WOULD HAVE TO DO, BECAUSE AFTER
12 THAT, THEN ALL THEY HAVE TO DO IS SUBMIT THE APPLICABLE
13 E-MAILS, WHICH I CONTEND, MAKE THEM FALL INTO THE CLASS.

14 THE COURT: I WOULD LIKE TO MOVE ON TO ANOTHER ISSUE.

15 MR. RHODES: I JUST WANT TO MAKE A VERY BRIEF
16 OBSERVATION, YOUR HONOR.

17 THEY ARE ACTUALLY PROPOSING IN THIS CASE, AND I APOLOGIZE
18 FOR THIS DIGRESSION SINCE THE COURT WANTS TO MOVE ON, THEY HAVE
19 A FRONT END PROCESS WHERE THEY ENVISION SENDING OUT A BLAST
20 NOTICE AND GETTING INFORMATION BACK FROM CLASS MEMBERS, RIGHT?

21 THE INFORMATION HAS FOUR COMPONENTS: AGE. THE SECOND
22 ONE IS RESIDENCY BECAUSE THERE ARE THREE CLASSES WHERE YOU NEED
23 TO KNOW WHERE SOMEONE LIVES.

24 THE THIRD ONE IS WHETHER SOMEONE IS A NATURAL PERSON AS
25 DISTINCT FROM A CORPORATE ACTOR.

1 AND THE FOURTH ONE IS AN EXAMPLE OF AN E-MAIL THAT THEY
2 SAY WAS SCANNED.

3 AND I'M NOT GOING TO ARGUE THE CASE AT THIS MOMENT, BUT I
4 WANT THE COURT TO FOCUS ON THE FACT THAT THERE ARE FOUR
5 SEPARATE VARIABLES THAT THEY HAVE IDENTIFIED AT THE VERY FRONT
6 END IN ORDER TO DETERMINE WHO IS EVEN IN THE CLASS.

7 AND I GO BACK TO THAT CARRERA CASE, AUGUST OF LAST YEAR
8 FROM THE THIRD CIRCUIT, WHICH TALKS ABOUT IMPORTING INTO THE
9 ASCERTAINABILITY ANALYSIS, THE RIGOROUS ANALYSIS TEST OF DUES,
10 WHICH WAS BEFORE THAT VIEWED AS A (B) (3) PROPOSITION.

11 THAT COURT IS SAYING THAT'S ACTUALLY THE FRONT END. AND
12 WHEN YOU HAVE FOUR INTERRELATED VARIABLES HERE, EACH ONE OF
13 WHICH REQUIRES THE SUBMISSION OF SOME INFORMATION FROM THE
14 CLASS MEMBER, EACH ONE OF WHICH REQUIRES SOME LEVEL OF
15 VERIFICATION, THAT'S WHERE THE ARGUMENT STARTS TO FALL APART
16 AND YOU GET THIS FOUR-WAY APPLES TO ORANGES COMPARISON.

17 AND THEY WERE SUPPOSED TO COME FORWARD WITH A MODEL TO
18 SHOW YOU HOW THAT WOULD WORK, AND THAT'S WHAT'S MISSING HERE.

19 THE COURT: CAN WE MOVE ON TO RESIDENCE.

20 ACTUALLY, THAT WAS A QUESTION I WANTED TO ASK. WHAT CAN
21 THE COURT LOOK TO IN THE RECORD THAT WOULD INDICATE THAT IP
22 ADDRESS WOULD INDICATE A USER'S RESIDENCE?

23 MR. ROMMEL: YOUR HONOR, I DO NOT BELIEVE -- AND IF
24 WE HAVE, I DON'T BELIEVE WE OFFERED THAT AN IP ADDRESS WOULD BE
25 USED TO SHOW THE ADDRESS.

1 THE ADDRESS OF WHETHER A PERSON WAS WITHIN A STATE WOULD
2 BE SHOWN AS IT WOULD BE IN ANY CLASS ACTION, WHERE IF YOU WERE
3 A CITIZEN OF THE STATE OF CALIFORNIA AND YOU WERE, RECEIVED
4 NOTICE TO FILE A CLAIM, THAT YOU WOULD BRING YOUR INFORMATION
5 TO BE ABLE TO SHOW THAT YOU WERE INDEED A RESIDENT IN THE STATE
6 OF CALIFORNIA, WHETHER IT BE A DRIVER'S LICENSE OR SOMETHING
7 ELSE.

8 THE ISSUE OF THE IP ADDRESS I THINK MAY HAVE COME UP WHEN
9 WE WERE FOCUSING ON THE CAT II MIXER AND THOSE ASPECTS THERE.
10 AND GOOGLE'S INDICATION OF HOW WE WOULD SHOW THAT THE CAT II
11 MIXER WAS ACTUALLY APPLIED.

12 SO TO THE EXTENT THAT THERE IS SOMETHING IN THE RECORD
13 THAT THE COURT HAS CONCERNS ABOUT THAT PLAINTIFF'S MODEL WOULD
14 REQUIRE THE IP ADDRESS TO SHOW RESIDENCY, THAT WOULD NOT BE OUR
15 SUBMISSION AT THIS TIME.

16 WE WOULD ASSERT THAT FOR PURPOSES OF A NATURAL PERSON WHO
17 RESIDES IN THE UNITED STATES OR A NATURAL PERSON WHO RESIDES
18 WITHIN THE STATE OF CALIFORNIA OR A NATURAL PERSON WHO RESIDES
19 WITHIN THE STATE OF MARYLAND OR A CHILD OR MINOR WHO RESIDES IN
20 THE UNITED STATES, THAT AGAIN, THAT WOULD BE DONE AS IS
21 CUSTOMARILY DONE WITH ANY PROVISION FOR RESIDENCY IN A STATE
22 CLASS ACTION OR ANY KIND THROUGH THOSE IDENTIFIED MEANS.

23 THE COURT: ALL RIGHT.

24 SO YOUR ANSWER ON AGE AND RESIDENCE IS BASICALLY THE SAME.
25 YOU SEND OUT THE BLAST E-MAIL, YOU WAIT, THE CLAIMS

1 ADMINISTRATOR WAITS AND SEES WHO SELF-IDENTIFIES AS A
2 CALIFORNIA RESIDENT OR MARYLAND RESIDENT OR WHAT NOT.

3 MR. ROMMEL: YES.

4 AND NONE OF THAT IS NECESSARY FOR PRESENTATION OF THE
5 MATTERS TO THE JURY ON THE COMMON ISSUES THAT THIS JURY WOULD
6 FIND THE DEFENDANT LIABLE, WHICH WOULD HAVE BEEN, TAKE US TO
7 THE CLAIMS PROCESS FOR DOING THAT.

8 SO THIS IS NOT A FRONT LOADED BLAST TO INDIVIDUALS TO GET
9 THEM TO SELF-REPORT. THE COURT HAS THE CRITERIA OF THE CLASS
10 TO SEND OUT THE SUBMISSION SO INDIVIDUALS CAN OPT OUT. THEY
11 COULD SAY, I DON'T WANT TO BE PART OF THE CABLE ONE CLASS OR I
12 DON'T WANT TO BE PART OF THE GMAIL CLASS.

13 EVERYBODY COULD LOOK AT THIS AND MAKE A DETERMINATION,
14 YOU KNOW WHAT, I'M USING A GOOGLE APPS EDUCATION ACCOUNT AND I
15 HAVE RECEIVED AN E-MAIL INTO THAT ADDRESS AND I DO WANT TO STAY
16 IN THE CLASS.

17 OR SOMEBODY COULD LOOK AT THE DEFINITION AND SAY, I DON'T
18 WANT MY CHILD WHO IS A MINOR BEING PART OF ANY CLASS.

19 THE COURT: ALL RIGHT. THANK YOU.

20 I'M SORRY TO INTERRUPT YOU. LET ME ASK GOOGLE'S COUNSEL,
21 WHAT IS THE BEST ARGUMENT THAT YOU HAVE THAT DOING THE BLAST
22 MAIL TO EVERYONE AND WAITING TO SEE WHO THEN SELF-IDENTIFIES AS
23 ONE OF THESE VARIOUS CATEGORIES, MINOR, CALIFORNIA RESIDENT,
24 CANADA RESIDENT, WHAT NOT, THAT THAT IS IMPROPER FOR ASSESSING
25 WHETHER THE CLASS IS ASCERTAINABLE OR NOT?

1 MR. RHODES: WE HAVE TO GO BACK TO FIRST PRINCIPLES.
2 AND I WOULD ENTREAT THE COURT TO LOOK AT JUDGE CONTI'S DECISION
3 CITING THE CARRERA DECISION AS THE APPROPRIATE MODEL, THE
4 STANDARD OF REVIEW FOR DETERMINING ASCERTAINABILITY.

5 AND THE CARRERA DECISION AT THE END OF THAT OPINION, THE
6 THIRD CIRCUIT EXPLICITLY WARNS DISTRICT COURTS OF APPROVING A
7 CLASS BASED UPON, THIS IS THEIR WORDS, THE PLAINTIFF'S SAY SO.

8 SO LET'S TAKE RESIDENCY, LET'S TAKE THAT ONE FOR A
9 SECOND, YOUR HONOR.

10 THIS IS THEIR EXPERT. THEY JUST STIPULATED THAT
11 MR. GREEN CAN NOW BE CONSIDERED. THIS IS THE EXPERT THAT WE
12 SAW FOR THE FIRST TIME IN THE REPLY PAPERS. THIS IS WHAT HE
13 SAYS AT PAGE 32, LINE 4 THROUGH 5:

14 "I DID NOT PROVIDE ANY METHODOLOGY FOR DETERMINING
15 SOMEBODY'S STATE OF RESIDENCE."

16 WE ASKED HIM, WELL, HOW ARE YOU GOING TO PROPOSE TO
17 VERIFY AT ANY LEVEL, WHAT SOMEBODY SAYS IS TRUE THAT I'M A
18 RESIDENT OF MARYLAND, FLORIDA OR FOR THE CIPA CLASS IF I'M NOT
19 A RESIDENT OF CALIFORNIA?

20 NOW WE ACTUALLY HAVE AN INTERESTING CASE IN POINT WITH
21 THE NAMED REPRESENTED PLAINTIFFS THEMSELVES.

22 THE COURT WILL RECALL AT ONE TIME THERE WAS A
23 PENNSYLVANIA CLASS IN THIS CASE. THE ADVOCATE FOR THAT CLASS
24 OF WAS A WOMAN NAMED KAREN BRINKMAN. MS. BRINKMAN STOPPED
25 COMMUNICATING WITH COUNSEL. SHE DROPS BY THE WAYSIDE. THEY

1 SUBSTITUTED A MAN NAMED KOVLAR, K-O-V-L-A-R. MY PARTNER TOOK
2 HIS DEPOSITION. HE WAS PURPORTING TO REPRESENT A CLASS OF
3 PENNSYLVANIA RESIDENTS. HE DIDN'T LIVE IN PENNSYLVANIA. HE
4 SAID, WELL, THE COMPLAINT IS JUST WRONG, I'M NOT A RESIDENT OF
5 PENNSYLVANIA.

6 SO THERE'S A PERFECT EXAMPLE OF THE PROBLEM. SOMEBODY
7 MAY BE SELF-REPORTING AS A RESIDENT. THEY HAVE SPECIFICALLY
8 DISCLAIMED IN MR. GREEN'S DEPOSITION THAT WE NOW HAVE IN THE
9 RECORD, THE USE OF IP ADDRESSES.

10 THE REASON IS OBVIOUS. IF YOU ARE CONNECTING TO GMAIL
11 WITH A MOBILE DEVICE AND YOU ARE USING VERIZON OR AT&T, THE
12 GATE MAY BE IN IDAHO WHILE YOU MAY BE IN CALIFORNIA WHILE YOU
13 ARE A RESIDENT OF MARYLAND.

14 IF YOU LOOK AT BRAD SCOTT IN THE RECORD, PARAGRAPHS 94
15 AND 95 TO MR. SOMVICHIAN'S DECLARATION, MR. SCOTT TESTIFIED
16 THAT HE IS A RESIDENT OF MARYLAND. ALL OF THE E-MAILS HE SENT
17 TO ARE TO VIRGINIA AND SO FORTH.

18 THE INFORMATION THAT WE ARE GOING TO GET FROM THESE
19 PEOPLE IS GOING TO REQUIRE SOME LEVEL OF VERIFICATION.

20 THE COURT: BUT ISN'T THAT TRUE WITH ALL CLAIM FORMS?

21 MR. RHODES: NO.

22 THE COURT: THERE IS SOME, AND IT JUST DEPENDS ON THE
23 SETTLEMENT AGREEMENT, IN MOST INSTANCES, HOW MUCH VERIFICATION
24 IS REQUIRED.

25 MR. RHODES: I DISAGREE, YOUR HONOR, FOR THIS REASON.

1 AND YOU'VE SEEN ME BEFORE, THIS IS WHAT I DO FOR A LIVING.
2 WHEN YOU SETTLE CASES, YOU START THE PROCESS KNOWING WHO IS IN
3 THE CLASS, RIGHT.

4 NOW THE QUESTION IS, HOW DO I GET NOTICE TO THOSE PEOPLE
5 THAT BINDS THEM? HOW DO I GET NOTICE TO THEM?

6 AND WHAT CARRERA TALKS ABOUT IS VERY IMPORTANT. WHAT
7 THEY SAY IS THE DUE PROCESS REQUIREMENT THAT THE PLAINTIFFS
8 ADDUCED A MODEL THAT CAN BE TESTED BY THE DISTRICT COURT SERVES
9 TWO SIGNIFICANT BUT SOMEWHAT COMPETING INTERESTS.

10 ON THE ONE HAND, IT TELLS US WE KNOW WHO IS IN THE CLASS
11 BECAUSE WHEN YOUR HONOR MAKES YOUR DISPOSITION, THOSE FOLKS ARE
12 BOUND.

13 BUT SECONDARILY, WHAT THE CASE SAYS IS, THE DEFENDANT HAS
14 A CONSTITUTIONAL DUE PROCESS RIGHT TO CHALLENGE THE MEMBERSHIP
15 OF AN INDIVIDUAL INTO THE CLASS.

16 IT'S NOT ENOUGH TO SAY I HAVE A RIGHT TO MOUNT A
17 STATUTORY DEFENSE OF IMPLIED CONSENT WHEN WE GET TO (B) (3), BUT
18 WE ARE TALKING ABOUT CLASS ASCERTAINABILITY. WE HAVE A RIGHT
19 TO SAY THE PEOPLE THAT ARE PURPORTED TO BE IN THE CLASS DON'T
20 BELONG THERE.

21 MAZDA TEACHES THAT IN THE NINTH CIRCUIT. AND THE MOST
22 RECENT CASE, BERGER V. HOME DEPOT SAYS THE SAME THING. YOU GOT
23 TO GET PEOPLE OUT OF THE CLASS WHO DON'T BELONG THERE.

24 THAT MEANS IF YOU ARE GOING TO RELY ON A SELF-REPORTING
25 READING, WHERE CLASS MEMBERS SUBMIT A TON OF INFORMATION THAT,

1 BY THE WAY, WE DON'T KNOW EXACTLY WHAT INFORMATION THAT IS,
2 WHETHER IT'S ELECTRONIC OR PAPER, I ASSUME IT WILL BE DONE ON A
3 WEBSITE. WE HAVE NO IDEA HOW MANY CLAIMS THAT WE'VE MADE, WE
4 DON'T HAVE ANY IDEA WHERE THAT DATA WILL BE STORED, WHO PAYS
5 FOR THE SERVERS, HOW MUCH COURT TIME IT'S GOING TO TAKE, HOW
6 MUCH VERIFICATION WE GET TO DO, WHO IS GOING TO DO IT, HOW LONG
7 IS IT GOING TO TAKE TO DO IT.

8 BUT ASSUMING YOU COULD FIGURE ALL OF THAT OUT, WE HAVE A
9 CONSTITUTIONAL DUE PROCESS RIGHT TO CHALLENGE INCLUSION IN THE
10 CLASS. AND THE WAY WE DO THAT IS AT THIS HEARING TODAY,
11 YOUR HONOR AND I ARE ARGUING ABOUT A MODEL THAT WE UNDERSTAND.

12 OKAY. WE UNDERSTAND THE MODEL HAS THESE VARIABLES, THIS
13 IS THE SAMPLING THAT THEY HAVE DONE. WE ASKED THEIR EXPERT,
14 DID YOU JUST TRY TO DO ANY OF THIS? AND HE SAID NO, I WAS
15 NEVER ASKED TO DEVELOP THAT METHODOLOGY, IT'S WHAT THE COURT IS
16 GOING TO TELL ME.

17 SO WE ARE SITTING HERE TODAY POSTULATING IN THE ABSTRACT
18 THAT IT CAN BE DONE, BUT THERE IS NO MODEL IN THE RECORD THAT
19 SHOWS IT WILL BE DONE, IT WILL BE DONE RELIABLY AND VERIFIABLY.

20 AND I'M NOT ADVOCATING FOR PERFECTION, YOUR HONOR, BUT WE
21 HAVE TO THINK WHAT THE PROPOSAL WILL DO WILL ACTUALLY INCLUDE
22 ONLY THE PEOPLE WHOSE E-MAILS WERE ACTUALLY SCANNED OR A
23 NATURAL PERSON WHERE WE KNOW THEIR RESIDENCY AND OBVIOUSLY WE
24 KNOW WHAT THEIR AGE IS, AND THAT'S NOT IN THE RECORD.

25 MR. ROMMEL: YOUR HONOR, DR. GREEN WASN'T OFFERED AS

1 A NOTICE FOR ADMINISTRATIVE EXPERT, HE WAS OFFERED AS A
2 COMPUTER SCIENTIST EXPERT WHEREIN HE OPINED THE INFORMATION
3 THAT GOOGLE HAS OBTAINED AND IS AVAILABLE FOR OTHER ASPECTS OF
4 THE PROOF OF CLAIM.

5 WITH REGARDS TO --

6 THE COURT: I'M SORRY, CAN I ASK YOU ANOTHER
7 QUESTION.

8 MR. ROMMEL: SURE.

9 THE COURT: HOW MANY CLASS MEMBERS ARE THERE IN THE
10 NON GMAIL CLASS?

11 IS THERE ANYTHING IN THE RECORD, I SEE YOU HAVE A FOOTNOTE
12 THAT KIND OF LAYS OUT WHAT WE THINK THE NUMBERS ARE FOR CABLE
13 ONE AND THE EDUCATION OF THE MINORS. BUT IS THERE ANY SENSE OF
14 HOW MANY?

15 MR. ROMMEL: NO, YOUR HONOR. I HAVE NO NUMBER FOR
16 YOU TODAY.

17 THE COURT: HOW CAN THAT BE ASCERTAINABLE?

18 MR. ROMMEL: IT'S ASCERTAINABLE BECAUSE THE
19 DESCRIPTION IS DEFINITE ENOUGH SO THAT IT IS ADMINISTRATIVELY
20 FEASIBLE FOR THE COURT TO ASCERTAIN WHETHER AN INDIVIDUAL IS A
21 CLASS MEMBER.

22 AGAIN, IDENTIFYING THE PARTICULAR CLASS MEMBER AT THIS
23 STAGE IS NOT REQUIRED. HAVING AN EXACT NUMBER OF THE CLASS
24 MEMBERS AT THIS STAGE IS NOT REQUIRED.

25 THE ASCERTAINABILITY REQUIREMENT AS IDENTIFIED BY THE

1 SUPREME COURT IS WHETHER OR NOT IT IS ADMINISTRATIVELY FEASIBLE
2 FOR THE COURT TO ASCERTAIN WHETHER THE PERSON IS OR IS NOT A
3 CLASS MEMBER.

4 AND AGAIN, FOR ADMINISTRATIVE PURPOSES, IF WE ARE AT THAT
5 STAGE THEN THIS DEFENDANT HAS BEEN FOUND LIABLE OF VIOLATIONS
6 OF FEDERAL STATE LAW ON A MASSIVE SCALE.

7 SO WHAT WOULD HAPPEN, TO ANSWER THE QUESTION OF COUNSEL,
8 IS THAT THIS COURT WOULD APPOINT A CLAIMS ADMINISTRATOR. AND
9 THIS COURT WOULD GIVE THAT CLAIMS ADMINISTRATOR VERY PARTICULAR
10 GUIDANCE AS TO WHAT THE CLAIMS ADMINISTRATOR WOULD HAVE TO LOOK
11 AT TO ENSURE THAT A PERSON FALLS WITHIN THE CLASS DEFINITION.
12 AS IS DONE IN EVERY CLASS THAT GETS TO THAT STAGE, WHETHER IN
13 SETTLEMENT OR AFTER VERDICT NOTICE.

14 SO THE BLAST WE ARE TALKING ABOUT HERE IS A VERDICT
15 NOTICE. AND IT WOULD TELL THOSE INDIVIDUALS IF YOU WERE A
16 MINOR AT THE TIME THAT YOU RECEIVED AN E-MAIL INTO YOUR GMAIL
17 ACCOUNT, YOU HAVE A CLAIM, FILE YOUR PROOF.

18 SO LET'S TALK FIRST ABOUT THE ASCERTAINABILITY OF THAT.

19 THE COURT: ACTUALLY, CAN I ASK YOU ANOTHER QUESTION.

20 MR. ROMMEL: CERTAINLY.

21 THE COURT: ALL RIGHT.

22 GOOGLE'S POSITION IS THAT OF THE VERY MANY, MANY, MANY NON
23 GMAIL USERS, THAT THESE USERS HAD MULTIPLE ACCOUNTS, AND THEY
24 ALSO HAVE GMAIL ACCOUNTS AS WELL. AND THE NUMBERS ARE
25 GIGANTIC.

1 MR. ROMMEL: YES, YOUR HONOR.

2 THE COURT: SO HOW ARE WE SUPPOSED TO, AS A COURT,
3 LOOK AT THAT QUESTION THAT THERE ARE A BILLION FOLKS WHO MAY
4 HAVE BOTH A GMAIL ACCOUNT AND A NON GMAIL ACCOUNT, AND HOW ARE
5 WE SUPPOSED TO MAKE SURE THAT OUR CLASSES AREN'T OVERINCLUSIVE
6 UNDER INCLUSIVE, ET CETERA?

7 MR. ROMMEL: CERTAINLY, YOUR HONOR.

8 IF WE ARE LOOKING AT A PARTICULAR PERSON WHO MAY OR MAY
9 NOT HAVE A GMAIL ACCOUNT ASSOCIATION WITH A NON GMAIL ACCOUNT,
10 AND WE ARE AT THE PROCESS WHERE THIS PERSON IS FILING A CLAIM,
11 THEN GOOGLE HAS ALREADY BEEN FOUND THAT THROUGH ITS GMAIL
12 ACCOUNTS NO CONSENT MAY BE PROVIDED.

13 SO IT DOESN'T MATTER THAT THE PERSON HAS A GMAIL ACCOUNT,
14 BUT CHOOSES TO FILE A CLAIM BECAUSE THEY FALL WITHIN THE CLASS
15 OF NON GMAIL MEMBERS WHO ALSO SEND AN E-MAIL TO A GMAIL PERSON.

16 SO THE ISSUE THERE DOESN'T MATTER. MY ARGUMENT WOULD BE
17 THAT IT DOESN'T MATTER IF THEY HAVE A GMAIL ACCOUNT. AND THE
18 E-MAIL THEY ARE SAYING WAS VIOLATED BY GOOGLE, BY GOOGLE
19 VIOLATING THE LAW, IT DOESN'T MATTER. BECAUSE GOOGLE AT THAT
20 STAGE WILL HAVE ALREADY BEEN FOUND LIABLE FOR THE INTERCEPTION
21 OF THAT VERY TYPE OF E-MAIL.

22 SO THE ISSUE IS WHETHER OR NOT IT WOULD PRECLUDE THAT
23 PERSON FROM FILING SUCH A CLAIM.

24 AND THE ANSWER IS NO, IT WOULDN'T. THERE'S NOTHING IN
25 THE STATUTE THAT SAYS YOU WOULD NOT BE ABLE TO FILE THAT TYPE

1 OF CLAIM.

2 AND THE REASON FOR THAT IS, BECAUSE YOU AND THE JURY
3 WOULD HAVE ALREADY MADE THE DECISION THAT IT DOESN'T MATTER
4 THAT YOU HAVE A GMAIL ACCOUNT BECAUSE YOU DON'T GET CONSENT FOR
5 DOING THAT.

6 MR. RHODES: YOUR HONOR, MAY I RESPOND?

7 THE COURT: YES.

8 I MEAN, I THINK THERE'S A COUPLE OF ISSUES HERE.

9 ONE IS THE CONSENT ISSUE. BUT THERE'S THE SEPARATE ISSUE
10 OF TRYING TO ASCERTAIN THE CLASS IF WE HAVE THESE OVERLAPPING
11 CATEGORIES AND HOW WE FARE OUT WHO IS IN WHICH CATEGORY.

12 I ASSUME YOUR ANSWER WOULD BE AS ITS BEEN WITH THE
13 RESIDENCE AND THE AGE THAT WE RELY ON SELF-REPORTING FOR PEOPLE
14 TO IDENTIFY WHAT ACCOUNTS THEY MAY HAVE, GOOGLE OR OTHERWISE.

15 MR. ROMMEL: IN EVERY CLASS, MOST OF THE TIMES
16 THERE'S SOME SELF-REPORTING.

17 SO YES, IN THIS PARTICULAR INSTANCE, HERE'S HOW THAT WOULD
18 BE DONE.

19 THE PERSON WOULD BE ABLE TO LOOK AT THE VERDICT NOTICE AND
20 SEE THAT THEY HAVE A NON GMAIL ACCOUNT BY WHICH THEY SUBMITTED
21 OR SENT AN E-MAIL TO A GMAIL ACCOUNT.

22 SO THEY SAY I'M A RESIDENT OF THE UNITED STATES, MARYLAND
23 OR FLORIDA, I HAVE A NON GMAIL ACCOUNT, I HAVE SENT AN E-MAIL
24 TO A GMAIL, AN @GMAIL.COM ACCOUNT, AND I FALL WITHIN THE CLASS
25 PERIOD.

1 THE CLASS ADMINISTRATOR WOULD LOOK AT THAT AND SAY, YOU
2 ARE A NATURAL PERSON, YOU ARE A RESIDENT BY YOUR DRIVER'S
3 LICENSE, BIRTH CERTIFICATE, AND YES, I NOW HAVE RECEIVED YOUR
4 INFORMATION ABOUT THE E-MAIL WHICH WE HAVE SAID WOULD BE THE
5 FORM OF THE E-MAIL, THE HEADERS, THE VERY UNIQUE MESSAGE ID
6 WHICH IS GENERATED AND GUARANTEED BY THE HOST. A NUMBER OF
7 WAYS TO PROVE THE CLAIM.

8 SO WHEN YOU LOOK AT ASCERTAINABILITY, HOW THE PERSON CAN
9 ULTIMATELY GET PAID, THE ELEMENTS ARE THE SAME. BUT JUST
10 BECAUSE THE PERSON FALLS WITHIN THE CLASS DOESN'T MEAN THEY ARE
11 ULTIMATELY GOING TO GET PAID IF THEY CAN'T BRING IN THE PROOF,
12 THE COURT IS GOING TO REQUIRE THEM TO DO THAT.

13 SO IN LOOKING AT ASCERTAINABILITY WE NEED TO LOOK AT THE
14 DEFINITION ALONE AND DETERMINE IS THAT SOMETHING THE COURT CAN
15 LOOK AT OR HAVE THE CLAIMS ADMINISTRATOR AND THE COURT'S ORDER
16 AND AUTHORITY TO LOOK AT DOWN THE ROAD AND SAY, YES, YOU ARE IN
17 THE CLASS, NO, YOU ARE NOT IN THE CLASS.

18 AND WE WOULD ASSERT THAT THE DEFINITIONS HERE ARE ALL
19 OBJECTIVELY VERIFIABLE THROUGH EITHER RECORDS WHICH ARE
20 COMMONLY ASSERTED AND BROUGHT FORTH FOR PURPOSES OF CLASS
21 ACTION FOR AGE AND RESIDENCY, AND THEN THE REMAINDER OF IT
22 WOULD BE ALSO THE RECORDS THAT THE PERSON WOULD BRING TO SHOW
23 THAT THEY ARE EITHER A NON GMAIL PERSON OR THAT THEY ARE A
24 GOOGLE APPS USER OR THAT THEY ARE A MINOR GMAIL PERSON, AND
25 THAT IS THEN VERIFIED WITH GOOGLE'S OWN RECORDS.

1 SO THIS ISSUE OF DUE PROCESS AND ALL OF THAT, GOOGLE WILL
2 HAVE ALL OF THE RECORDS THAT IT WILL BE ABLE TO VERIFY IN A
3 RAPID BASIS TO SAY YES, MR. KEITH DUNBAR IS OR IS NOT A GOOGLE
4 APPS CABLE ONE USER. YES, MR. CARRILO IS, AT ONE POINT IN
5 TIME, DID HAVE A GOOGLE APPS, EDU ACCOUNT WITH THE UNIVERSITY
6 OF PACIFIC. MR. FREE, WE CAN LOOK AT OUR BOOKS AND SAY HE DOES
7 HAVE A GOOGLE APPS ACCOUNT WITH THE UNIVERSITY OF HAWAII.

8 SO THAT TYPE OF DETERMINATION TO DETERMINE WHETHER OR NOT
9 THEY FALL WITHIN THE CLASS, GOOGLE HOLDS THAT KNOWLEDGE.

10 THE COURT: OKAY. THANK YOU.

11 I HAVE A COUPLE MORE TOPICS I NEED TO TOUCH UPON. SO
12 JUST VERY BRIEFLY.

13 MR. RHODES: VERY BRIEFLY, YOUR HONOR.

14 I WOULD REFER THE COURT BACK TO JUDGE DUNBAR'S DECISION
15 ALMOST TWO YEARS AGO TO THE DATE.

16 THE COURT: JUDGE DUNBAR?

17 MR. RHODES: YES. HE DENIED CLASS CERT.

18 I'M SORRY, JUDGE FOLSOM IN THE DUNBAR CASE. SORRY, I GOT
19 MY NAMES WRONG.

20 AND WHAT HE SAID WAS PRETTY INTERESTING. THEY CAME TO
21 COURT WITH A DECLARATION OF A CLAIMS ADMINISTRATOR, ALL RIGHT.
22 AND SAID, WE CAN DO THIS. THIS PERSON DOES THIS FOR A LIVING.
23 THE SAME THING HAPPENED TO CARRERA, BY THE WAY, THE CONSULTING
24 THERE.

25 AND WHAT JUDGE FOLSOM TOLD THEM WAS ALL YOU'VE GIVEN ME

1 IS A FIGURE IT OUT AS YOU GO ALONG, HIS WORDS NOT MINE,
2 APPROACH. HAVING ENVISIONED A PROCESS IS NOT THE SAME AS
3 HAVING SUBMITTED A PLAN.

4 SO TWO YEARS AGO THEY GOT TOLD THAT. THEY WENT BACK TO
5 IT MONTHS LATER. DIFFERENT JUDGE. JUDGE SNYDER ON THE WAY THE
6 CASE WAS COMING TO YOUR HONOR.

7 JUDGE SNYDER SAID, YOU WANT ME IT RE OPEN CLASS
8 CERTIFICATION BECAUSE YOU WANT A NEW WAY OF DOING IT. AND
9 JUDGE SNYDER IN HIS JULY 2012 RULING SAID, YOU HAVEN'T GIVEN ME
10 ANYTHING.

11 THEN WE LANDED HERE, AND WE BRIEFED IT ALL UP. AND
12 UNLIKE THIS TIME, THE LAST MOTION THEY ATTACHED AN EXCERPT TO
13 THE MOVING PAPERS. HERE THEY SANDBAG US, THEY SHOW IT ON THE
14 REPLY. THEY SAID NO, WE WANT A NEW -- WE ARE GOING TO DO IT
15 AGAIN.

16 SO NOW WE ARE HERE. SAME ISSUE HAS BEEN BRIEFED UP IN
17 MARIN COUNTY. SO WHAT YOU HAVE IS LAWYERS WHO KEEP PROMISING
18 AND PROMISING THAT WE HAVE A WAY TO DO IT AND IT CAN BE DONE,
19 BUT THEY HAVE NEVER GOTTEN THE RECORD TOGETHER TO SAY THIS IS
20 EXACTLY HOW WE ARE GOING TO DO IT, HERE'S THE MODEL, HERE'S THE
21 VARIABLES AND HERE'S THE PROOF THAT WE HAVE DONE SOME
22 STATISTICAL SAMPLING.

23 I WILL LEAVE THE COURT WITH THIS. THIS IS THEIR EXPERT.
24 CONTRARY TO WHAT COUNSEL SAYS, AND I WILL LEAVE IT FOR THE
25 COURT STAFF TO READ THE DEPOSITION ITSELF, HE SAYS WHAT HE'S

1 THERE TO BE AN EXPERT ON, WHICH IS HOW TO FIGURE OUT WHO GOES
2 INTO THE CLASS. HIS TESTIMONY, NOT MINE.

3 ON PAGE 85 HE SAYS, LINE 3, "I HAVEN'T SPECIFICALLY
4 WORKED OUT THE DETAILS OF HOW THE PROCESS MIGHT WORK."

5 MY POINT, YOUR HONOR, IS THAT'S EXACTLY WHY WE ARE HERE
6 TODAY. AND THE BURDEN IS ON THEM TO SHOW THAT THEY HAVE A
7 PROCESS, HOW IT WOULD WORK, WHAT THE VARIABLE SET IS AND HOW
8 THEY HAVE STATISTICALLY SAMPLED IT SUFFICIENTLY TO DEMONSTRATE
9 THAT IT WON'T INCLUDE FALSE POSITIVE, BECAUSE IN THE WORDS OF
10 MAZDA YOU CAN'T HAVE A CLASS WITH UNINJURED CLASS MEMBERS.

11 BY THE WAY, MR. GREEN, HE'S A NON GMAIL ACCOUNT HOLDERS
12 AND A GMAIL ACCOUNT HOLDER AND WAS SENDING E-MAILS BACK AND
13 FORTH TO HIMSELF WITH FULL ACTUAL SUBJECTIVE KNOWLEDGE THAT
14 THEY WOULD BE SCANNED AND THE REASONS THEY WOULD BE SCANNED.

15 AND HE'S AN EXAMPLE OF EXACTLY THE PROBLEM IN THIS CASE
16 WHICH IS WE DON'T KNOW WHAT WE ARE GOING TO DO ON THE FRONT END
17 TO GET THEM IN, AND ON THE BACK END WE ARE GOING TO HAVE TO
18 LOOK AT INDIVIDUALITY.

19 INDIVIDUALITY IS ALL OVER THIS RECORD. JUST ON
20 ASCERTAINABILITY, EVERYTHING HE SAID IF YOU ACCEPTED THAT AND
21 REJECTED EVERYTHING I SAID, WHAT'S LATENT IN THAT IS WE HAVE TO
22 LOOK AT SOMETHING MORE THAN WHAT WE WERE GIVEN IN ORDER TO
23 VERIFY RESIDENCY, NATURAL PERSON STATUS, E-MAIL THAT WAS
24 ACTUALLY SCANNED, ARE YOU A MINOR.

25 AND THAT'S AN EXTRAORDINARY PROCESS BEFORE YOU GET TO THE

1 (B) (3) PART OF THE ARGUMENT, YOUR HONOR.

2 MR. ROMMEL: IT'S NOT AN EXTRAORDINARY PROCESS IF THE
3 COMPANY VIOLATES THE LAW, JUDGE.

4 THE COURT: LET ME ASK BECAUSE I DO HAVE MORE TOPICS
5 WE NEED TO COVER.

6 LET'S GO TO THE EDUCATIONAL INSTITUTIONS. IT APPEARS
7 BASED ON THE DECISIONS THAT THERE IS A GREAT RANGE IN WHAT
8 DISCLOSURES ARE MADE AT THE VARIOUS EDUCATIONAL INSTITUTIONS.

9 SO WHAT CAN BE -- WHAT DOES THE COURT LOOK TO, TO YOU
10 KNOW, WHAT DISCLOSURES EACH EDUCATIONAL INSTITUTION MADE TO ITS
11 STUDENTS AND USERS.

12 AND I GUESS THE SECOND QUESTION THEN, ARE WE GOING TO
13 HAVE AN ISSUE OF THEN WE HAVE SUBCLASSES BY EDUCATIONAL
14 INSTITUTIONS.

15 MR. ROMMEL: NO, YOUR HONOR.

16 THE COURT: WHY NOT?

17 MR. ROMMEL: TO TALK ABOUT THE ISSUE OF CONSENT AND
18 TO TALK ABOUT THE ISSUE OF DISCLOSURES, WE HAVE TO TALK ABOUT
19 THE PROCESSES.

20 SO IF YOU WILL INDULGE ME FOR JUST A FEW MOMENTS.

21 THE MEDINA CASE ALL THE CASES THAT THE COURT LOOKED AT FOR
22 ISSUES OF CONSENT REQUIRE ACTUAL KNOWLEDGE OF AN INTERCEPTION,
23 NOT SOME BELIEF OF ONE BUT ACTUAL KNOWLEDGE OF AN INTERCEPTION.

24 SO WHAT WE HAVE IN THIS PARTICULAR INSTANCE IS, PRIOR TO
25 SEPTEMBER, OCTOBER OF 2010, WE HAD A PROCESS WITHIN GMAIL WHERE

1 THERE WAS NO DELIVERY PROCESS EXTRACTION OF CONTENT.

2 SO WHAT WE HAD WAS A PROCESS WHERE WHEN AN E-MAIL CAME
3 IN, IT WAS DELIVERED TO THE INDIVIDUAL USER'S INBOX, THEN WHEN
4 THE INDIVIDUAL USER WENT TO OPEN AN E-MAIL OR CALL UPON IF,
5 THAT'S WHEN IT WAS SENT TO THAT ADVERTISING SERVER AND THE
6 INFORMATION WAS EXTRACTED.

7 GOOGLE IN ITS CAPIA DECLARATION AND IN ITS INTERROGATORY
8 RESPONSES HAVE CONSISTENTLY SAID, AND THIS IS WHY WE MODIFIED
9 WHAT WE DID, HAS SAID THAT ALL OCCURRED AFTER THE PERSON
10 RECEIVED THE E-MAIL. SO THAT'S NOT IN THE DELIVERY PROCESS.

11 WELL, WE KNOW THAT THAT HAPPENED UP UNTIL SEPTEMBER,
12 OCTOBER OF 2010. AND GOOGLE HAD THIS THING CALLED CONTENT
13 ONEBOX THAT THEY USED IN THAT BACK END PROCESS. AND GOOGLE
14 MADE A CHOICE.

15 THEY SAID, YOU KNOW WHAT, WHEN PEOPLE ARE ACCESSING
16 E-MAILS BY AN IPHONE, WE ARE NOT ABLE TO GET THEIR INFORMATION.
17 WHEN PEOPLE AREN'T OPENING THEIR E-MAILS OR THEY ARE DELETING
18 THEM, WE ARE NOT ABLE TO GET THEIR INFORMATION.

19 WHEN PEOPLE ARE USING GOOGLE APPS ACCOUNTS WHERE ADDS ARE
20 DISABLED, WE ARE NOT ABLE TO GET THAT INFORMATION. WHEN PEOPLE
21 ARE ACCESSING GMAIL THROUGH SOME OTHER E-MAIL PROVIDER, WE ARE
22 NOT ABLE TO GET THAT INFORMATION.

23 SO WHAT THEY DID IS THEY TOOK A DEVICE THAT WAS IN
24 EXISTENCE ALREADY AND OPERATING JUST FINE BACK IN THE STORAGE
25 AREA, AND THEY MOVED IT TO THE DELIVERY PIPELINE. AND THAT WAS

1 IN SEPTEMBER, OCTOBER OF 2010. SO WHAT THEY DID IS THEY TOOK A
2 DEVICE AND THEY MOVED IT INTO THE DELIVERY PIPELINE.

3 SO BETWEEN 2004 AND SEPTEMBER, OCTOBER OF 2010, ALL OF
4 THESE DISCLOSURES, THE CHEN DECLARATION, ALL OF THOSE
5 DISCLOSURES CANNOT BE REVEALING OR PROVIDING NOTICE AS TO AN
6 INTERCEPTION. WHY? BECAUSE TECHNOLOGICALLY, GOOGLE WASN'T
7 DOING THAT. ITS OWN STATEMENTS HAVE NOW SAID THAT ALL THAT
8 PROCESSING WAS OCCURRING AFTER THE GMAIL HAD ALREADY RECEIVED
9 IT IN THEIR INBOX.

10 SO BY ITS OWN ACCOUNTS IT HAS SAID, WE WEREN'T DOING ANY
11 SCANNING PROCESSING AND DELIVERY AT THAT POINT IN TIME.

12 SO ALL OF THESE DISCLOSURES, AND IF WE ARE LOOKING AT THE
13 MULTITUDE OF DISCLOSURES IN THE OPPOSITION, CAN NOT BE
14 REVEALING IN INTERCEPTION BECAUSE GOOGLE ITSELF, THERE WASN'T A
15 DEVICE THERE TO DO AN INTERCEPTION.

16 SO WHAT HAPPENED WAS AFTER SEPTEMBER OCTOBER 2010 THIS
17 CONTENT ONEBOX WAS MOVED INTO THE DELIVERY PIPELINE AND THAT IS
18 WHERE, AND ITS SOLE FUNCTION IN LIFE TO TAKE OUT AND ACQUIRE
19 CONTENT AND INFORMATION AND CREATE METADATA AND ATTACH THAT
20 DATA TO THE E-MAIL WHERE THAT INFORMATION LIVES WITH THE E-MAIL
21 SO IT CAN BE USED BY GOOGLE THROUGHOUT IN A MUCH EASIER
22 CAPACITY.

23 AS IT'S STATED IN ITS SEALING DECLARATIONS, WHERE CONTENT
24 ONEBOX IS LOCATED IS PROPRIETARY. AS IT STATED IN ITS SEALING
25 DECLARATIONS, THE LOCATION OF CONTENT ONEBOX GIVES IT A

1 COMPETITIVE ADVANTAGE.

2 SO IT HAS DECLARED THAT WHERE IT IS IN THE PROCESS IS
3 PROPRIETARY AND SECRET. AND THEREFORE, YOUR HONOR, GOOGLE
4 ITSELF HAS ADMITTED AND DECLARED THAT THE LOCATION AND THE
5 TIMING OF CONTENT ONEBOX'S EXISTENCE IS PROPRIETARY, IT'S
6 SECRET, IT'S UNKNOWN.

7 SO WHAT HAPPENS IS NOW IS WITH REGARDS TO THE GOOGLE
8 EDUCATION APPS MEMBERS, WHEN THE E-MAIL IS COMING INTO THEIR
9 SERVER, IT GETS READ BY THIS CONTENT ONEBOX, THE INFORMATION IS
10 EXTRACTED BY CONTENT ONEBOX, BEFORE IT EVER GETS DELIVERED TO
11 THE INBOX.

12 SO NONE OF THE DISCLOSURES AT ISSUE IN THIS CASE, THERE'S
13 NOT A SINGLE DISCLOSURE IN THE OPPOSITION FROM CHEN A THROUGH
14 WHATEVER, THERE'S NOT A SINGLE DISCLOSURE IN THE RECORD WHICH
15 IDENTIFIES THAT THERE'S A CONTENT EXTRACTION FEATURE OCCURRING
16 IN THE DELIVERY PROCESS, WHICH WOULD BE THE INTERCEPTION.

17 AND I WOULD JUST POINT TO THE COURT, IF WE LOOK AT CHEN
18 EXHIBIT R, AND I DON'T KNOW IF THE COURT HAS THAT, THIS IS THE
19 BEST EXAMPLE OF WHY THE DIFFERENCES IN THE PROCESS MATTER.

20 WHERE THE DEVICE IS LOCATED AND THE MANNER IN WHICH THE
21 DEVICE OPERATES, IS NOT A TRIVIAL ISSUE.

22 CONGRESS ENVISIONED THIS AND CONGRESS SET UP TWO
23 DIFFERENT STATUTES. 2511.1(A) FOR THE WIRE TAPPING, AND IT SET
24 UP THE STORAGE COMMUNICATION. AND WHAT GOOGLE'S DISCLOSURE
25 FOCUSED SOLELY ON THOSE ACTS ON E-MAILS THAT ARE -- THAT HAVE

1 BEEN IN STORAGE, NOT IN THE DELIVERY PROCESS.

2 THE COURT: SO YOUR POSITION IS THAT ANY DISCLOSURE
3 THAT SAYS THAT GOOGLE IS READING THE E-MAIL FOR CONTENT IS
4 INSUFFICIENT UNLESS IT ALSO STATES THAT THAT PROCESS IS
5 OCCURRING BEFORE THE DELIVERY OF THE E-MAIL IS THAT WHAT YOU
6 ARE SAYING? WHAT ARE YOU SAYING? THAT IS IT.

7 MR. ROMMEL: YES, YOUR HONOR.

8 IF THEY ARE SAYING WE ARE READING THE CONTENT OF YOUR
9 E-MAIL, THEN HISTORICALLY, AND WHEN THESE FIRST CAME OUT AND
10 THAT'S WHAT THEY HAVE GENERALLY DONE IS THEY'VE KIND OF
11 MODIFIED THE STATEMENTS, THOSE NEVER APPLIED TO AN
12 INTERCEPTION. THEY COULDN'T BECAUSE IT DIDN'T EXIST AT THE
13 TIME.

14 SO THE BEST EXAMPLE IS THAT IF WE LOOK AT THIS, CHEN
15 EXHIBIT R, AND THIS IS IMPORTANT, AND THIS ONE --

16 THE COURT: BUT THE OPPOSITION SOUNDS COMPLETELY
17 DIFFERENT THAN WHAT YOU PREVIOUSLY ARGUED TO ME IN THE MOTION
18 TO DISMISS.

19 NOW YOU ARE SAYING OH, THEY ALWAYS ALL ALONG DISCLOSED THAT
20 THE E-MAILS WERE BEING READ, THEY JUST DIDN'T DISCLOSE THE
21 TIMING OF WHEN THAT HAPPENED IN THE E-MAIL DELIVERY PROCESS.

22 MR. ROMMEL: NO, YOUR HONOR. WE HAVE NOT CHANGED.

23 THE COURT: THAT'S WHAT I'M HEARING FROM WHAT YOU ARE
24 SAYING.

25 MR. ROMMEL: NO, YOUR HONOR.

1 I WOULD STILL ASSERT THAT DISCLOSURES ARE WOEFULLY
2 INSUFFICIENT. THEY ARE MISLEADING. THEY ARE FALSE AND --

3 THE COURT: NO, THE POINT YOU WERE JUST MAKING WAS
4 THAT THE KEY INSUFFICIENCY IN THE DISCLOSURE IS THAT THAT
5 READING OR EXTRACTION IS HAPPENING DURING THE DELIVERY PROCESS
6 BEFORE THE E-MAIL IS DELIVERED. AND THAT THAT IS SOMEHOW
7 RELEVANT BECAUSE THAT'S THE INTERCEPTION --

8 MR. ROMMEL: YOUR HONOR, IF I SAID SOMETHING, I
9 MISSPOKE.

10 THE COURT: -- AND THAT'S VERY DIFFERENT.

11 MR. ROMMEL: WE HAVE ALWAYS LODGED THEY FAILED TO
12 DISCLOSE THAT INTERCEPTION IS OCCURRING. WE HAVE ALWAYS
13 ASSERTED THAT.

14 IN FACT, THE COURT ACTUALLY IN THE MOTION TO DISMISS ORDER
15 MADE A NOTE THAT IT FOUND --

16 THE COURT: YOU ARE SAYING THEY ALWAYS DISCLOSED ALL
17 ALONG THEY ARE READING THE E-MAILS. THAT WASN'T YOUR TUNE THAT
18 YOU WERE SINGING IN THE MOTION TO DISMISS.

19 MR. ROMMEL: NO, YOUR HONOR. I MISSPOKE.

20 THE COURT: THAT'S WHAT YOU JUST SAID.

21 MR. ROMMEL: I WOULD SAY THE DISCLOSURE THEY ARE
22 ASSERTING FOR THAT PURPOSE COULD NOT DISCLOSE INTERCEPTION
23 BECAUSE ACCORDING TO GOOGLE'S OWN INTERROGATORY RESPONSES AND
24 PROCESSES AT THE TIME, THEY ARE CLAIMING THAT INTERCEPTION
25 WOULD HAVE BEEN IMPOSSIBLE BECAUSE THE DEVICE WASN'T THERE.

1 SO WHAT I MEANT, YOUR HONOR, IS THAT GOOGLE'S ASSERTION
2 FOR DISCLOSURES ABOUT THAT ISSUE COULD NOT BE TRUE BECAUSE IT
3 WASN'T DISCLOSING INTERCEPTION AT ALL.

4 AND THE BEST EXAMPLE --

5 THE COURT: THIS IS NOT AN ARGUMENT THAT'S IN YOUR
6 REPLY BRIEF.

7 MR. ROMMEL: YES, IT IS, YOUR HONOR. IT'S IN THE
8 ORIGINAL BRIEF. WE HAVE ALWAYS CONTENDED THAT GOOGLE --

9 THE COURT: YOUR ORIGINAL BRIEF SAYS THAT CONSENT CAN
10 ONLY BE ACTUAL, AND THAT YOU ONLY LOOK AT THE USER AGREEMENT
11 AND IF THERE'S A USER AGREEMENT THEN THERE'S NO IMPLIED
12 CONSENT. WHICH MIGHT BE TRUE FOR CONTRACT LAW BUT IS NOT
13 REALLY TRUE FOR THE WIRE TAP LAW WHICH DOESN'T COLLAPSE ACTUAL
14 AND IMPLIED CONSENT, AND ACTUALLY ALL THE CASE LAW DOES LOOK AT
15 THEM SEPARATELY.

16 SO I DON'T REALLY, FROM READING YOUR DOCUMENTS, I DIDN'T
17 REALLY FULLY UNDERSTAND YOUR IMPLIED CONSENT ARGUMENT. AND I
18 DID WANT TO ASK YOU ABOUT IT, BUT YOU'VE RAISED ANOTHER MORE
19 INTERESTING ISSUE I DIDN'T THINK WE ARE WERE GOING TO DISCUSS.

20 MR. ROMMEL: YOUR HONOR, THE ISSUE WE ALWAYS CONTEND
21 SAYS THEY NEVER DISCLOSED INTERCEPTION.

22 THE TIMING OF THE INTERCEPTION, THE TIMING OF THE PROCESS
23 THAT WOULD NECESSITATE CONSENT, WE'VE ALWAYS CONTENDED THAT HAS
24 NOT BEEN DISCLOSED.

25 WE ALSO CONTENDED THAT THE TERMS OF SERVICE, THE PRIVACY

1 POLICY, THE LEGAL NOTICE, NONE OF THOSE DISCLOSED INTERCEPTION
2 AT ALL.

3 AND WHEN WE LOOK AT THE OTHER PURPORTED DISCLOSURES THAT
4 GOOGLE HAS MADE, WE HAVE ALWAYS CONTENDED THOSE DISCLOSURES
5 WERE MISLEADING, FALSE, OMITTED MATERIAL INFORMATION AND DIDN'T
6 DIVULGE AN INTERCEPTION AT ALL. AND WE KNOW THOSE COULDN'T
7 HAVE.

8 SO THE DISCUSSION FROM 2004 -- TO GET TO ONE OF THE POINTS
9 THE COURT INDICATED EARLIER THAT --

10 THE COURT: THAT'S STILL A DIFFERENT POINT THAN, I
11 DON'T KNOW, THE TERMS OF SERVICE AND THE PRIVACY POLICY, THAT
12 THOSE DO NOT DISCLOSE THE READING OF E-MAILS FOR CONTENT.

13 MR. ROMMEL: THEY DO NOT.

14 MR. RHODES: I HATE TO INTERRUPT YOU, YOUR HONOR, MAY
15 I RESPOND BRIEFLY?

16 THE COURT: GO AHEAD, PLEASE.

17 MR. RHODES: THERE ARE SEVERAL THINGS GOING ON HERE
18 AT WORK.

19 LOOK AT PAGE 22 OF THEIR OPENING BRIEF. PAGE 22 OF THEIR
20 OPENING BRIEF ACTUALLY SAYS THAT UNDER THIS STATUTE, DEALING
21 WITH, 25112(D). THE QUESTION IS ON CONSENT, IT'S DEFINED AS
22 PRIOR CONSENT, ONE PARTY TO THE COMMUNICATION GIVES IT PRIOR
23 CONSENT TO THE INTERCEPTION, RIGHT.

24 IF YOU LOOK AT PAGE 2 OF THEIR BRIEF, YOUR HONOR, THEY
25 SAY WHAT THAT TEST IS. THE PARTIES QUIBBLE IN THEIR BRIEFING

1 OVER HOW YOU DEFINE THE IMPLIED CONSENT TEST.

2 BUT LET'S TAKE WHAT THEY SAY IN THAT BRIEF RIGHT THERE,
3 YOUR HONOR, BY THEIR WORDS. YOU LOOK AT WHETHER OR NOT A CLASS
4 MEMBER HAD ACTUAL KNOWLEDGE OF THE SCAN. AND WHAT DO YOU DO TO
5 DETERMINE THAT? WHAT DO YOU LOOK AT? IN THEIR WORDS, YOU LOOK
6 AT THE SURROUNDING CIRCUMSTANCES.

7 AND WHY DO YOU DO THAT? AND YOU WILL SEE THE WORD
8 INFERRED THERE, YOUR HONOR. AND THE COURT, AS A TRIAL JUDGE,
9 YOU KNOW THAT AN INFERENCE ARISES FROM A BODY OF CIRCUMSTANTIAL
10 INFORMATION.

11 THE INFERRED FACT HERE WOULD BE CONSENT. THE SURROUNDING
12 CIRCUMSTANCES WOULD BE THE BODY OF EVIDENCE WE LOOK TO. AND IF
13 YOU LOOK AT THE ONE DECLARATION AND THE WRATH OF MATERIALS
14 ATTACHED TO IT, WHAT YOU WILL SEE IS THERE ARE PEOPLE IN THIS
15 WORLD THAT DID ACTUALLY UNDERSTAND THAT THE E-MAIL WAS BEING
16 SCANNED AND THE VERY PURPOSES FOR WHICH IT WAS BEING SCANNED,
17 THE ADS, THE CREATION OF PROFILES.

18 AND IN MARCH OF 2012 THE UNITIZATION OF ALL THE PRIVACY
19 POLICIES ACROSS THE SERVICES, SO USE SERVICE A, THAT
20 INFORMATION MAY SHOW UP IN SERVICE B. THAT WAS IN THE MARKET.

21 THERE IS A BODY OF PEOPLE IN THE CLASS WHO HAVE
22 SUBJECTIVE ACTUAL KNOWLEDGE OF EXACTLY WHAT'S GOING ON AND THEY
23 HAVE ACCEPTED THAT AS A FAIR TRADEOFF.

24 IF YOU LOOK AT, FOR EXAMPLE PARAGRAPH 51 OF MR. WONG'S
25 DECLARATION, THERE'S A NEW YORK TIMES ARTICLE THAT DESCRIBES

1 THE SCANNING AND THERE ARE 31 INDIVIDUAL POSTS COMMENTING ON
2 THAT ARTICLE.

3 A PERSON BY THE NAME OF JLS SAYS YEAH, IT'S A LITTLE
4 DISTURBING THAT THEY ARE SCANNING MY E-MAIL, BUT IT SEEMS TO ME
5 IT'S A FAIR TRADEOFF FOR WHAT I GET, WHICH IS A FREE SERVICE.
6 30 OTHER COMMENTS.

7 WHAT'S RELEVANT TODAY IS NOT JUST LITIGATING THE ACTUAL
8 END RESULT OF THAT, BUT THAT WE HAVE A RIGHT UNDER DUKES AND
9 THE PRODIGY OF THOSE CASES THAT HAVE NOW INTERPRETED THE
10 SUPREME COURT'S MANDATE, I HAVE A RIGHT TO MUSTER A STATUTORY
11 DEFENSE TO A STATUTORY CLAIM

12 AND ONE OF MY DEFENSES, NOT THE ONLY ONE, BUT ONE OF THEM
13 IS THAT SOME GROUP OF PEOPLE ACTUALLY CONSENTED, EVEN USING THE
14 ARTICULATION THEY SET OUT ON PAGE 22 OF THEIR OPENING BRIEF AND
15 PAGE 1 OF THE REPLY BRIEF, AND THAT IS SO HIGHLY INDIVIDUALIZED
16 THAT THAT'S A SHOW STOPPER FOR CLASS CERTIFICATION.

17 I ACTUALLY WANTED TO SPEND MOST OF MY TIME TODAY FOCUSING
18 YOU ON ASCERTAINABILITY BECAUSE I THINK THERE'S JUST AS MUCH
19 PROBLEM THERE WHICH IS USUALLY NOT WHAT WE TALK ABOUT IN THESE
20 MOTIONS. WE USUALLY KIND OF BUMP PAST THAT BECAUSE WE KNOW WHO
21 THE PEOPLE ARE. WE ARGUE A TYPE OF NOTICE. WE ARGUE
22 NUMEROSITY. BUT HERE WE DON'T EVEN KNOW AT THE FRONT END HOW
23 WE ARE GOING TO GET THE PEOPLE IN THE CLASS.

24 BUT THE GATING ITEM, EVEN IF YOU PUT THAT ASIDE --

25 THE COURT: LET ME ASK YOU A QUESTION, THOUGH.

1 FOR THE EDUCATION CLASS AND THE CABLE ONE CLASS, WE DO KNOW
2 WHO THOSE FOLKS ARE.

3 MR. RHODES: WE DO.

4 THE COURT: SO I DO NOT THINK ASCERTAINABILITY IS
5 MUCH OF AN ISSUE FOR THEM.

6 I AGREE WITH YOU FOR NON GMAIL USERS, FOR MINORS, FOR THEIR
7 OTHER CLASSES.

8 MR. RHODES: RESIDENCY AND ALL THAT.

9 THE COURT: FLORIDA, MARYLAND, CIPA, I AGREE WITH YOU
10 THAT ASCERTAINABILITY IS A HUGE HURDLE.

11 MR. RHODES: WHY WOULDN'T IMPLIED CONSENT BE JUST AS
12 MUCH A BARRIER FOR THOSE FOLKS.

13 BECAUSE LOOK AT THE GUY FROM UNIVERSITY OF HAWAII, I DON'T
14 WANT TO REPEAT THE RECORD, BUT HE SEEMS TO HAVE PECULIAR
15 KNOWLEDGE OF HOW IT WORKS.

16 WHY AM I NOT ALLOWED TO SHOW THE BODY OF PEOPLE THEMSELVES?

17 THE COURT: WELL, IF YOU WIN ON ASCERTAINABILITY, I
18 DON'T THINK WE NEED TO GO THERE FOR THOSE PARTICULAR CLASSES.

19 BUT I DO WANT TO GET TO THE IMPLIED CONSENT ISSUE BECAUSE
20 I THINK FOR THE CABLE ONE CLASS AND EDUCATIONAL CLASS WE ARE
21 GOING TO HAVE TO GO LOOK BEYOND ASCERTAINABILITY.

22 MR. RHODES: POTENTIALLY SO. THAT'S WHY I'M MAKING
23 THIS IMPLIED CONSENT ARGUMENT.

24 WHAT I'M SUGGESTING TO THE COURT IS --

25 THE COURT: I'M GOING TO LET YOU FINISH, BUT THEN I

1 DO WANT TO GET TO THE PLAINTIFFS BECAUSE AS I READ THE MOTION,
2 AND MY SENSE WAS OKAY, THEY'RE GOING TO WANT TO FOCUS ON
3 CONTRACT LAW WHICH IS NOT REALLY WHAT'S RELEVANT HERE.

4 MR. RHODES: NO.

5 THE COURT: AND THEN I GET TO THE REPLY AND IT SAYS,
6 WELL, FOR IMPLIED CONSENT YOU ONLY LOOK AT GOOGLE'S OWN
7 DOCUMENTS AND GOOGLE'S OWN DISCLOSURES.

8 AND MY FIRST QUESTION IS, WHY IS THAT? WHY CAN'T YOU
9 LOOK AT THE OTHER NEWSPAPER ARTICLES THAT THEY CITE?

10 MR. ROMMEL: TWO POINTS. AND HOPEFULLY THIS WILL
11 CLARIFY.

12 THE COURT: OKAY. WHAT'S THAT?

13 MR. ROMMEL: FIRST OF ALL, IT IS DIFFICULT SOMETIMES
14 AS COUNSEL IN A CASE THIS SIZE, AND BEFORE YOU GET TO A
15 SUBSTANTIVE COMPONENT SUCH AS MOTIONS FOR SUMMARY JUDGEMENT OR
16 EVEN TRIAL, TO WANT TO GIVE UP SOMETHING, IN A PROCEDURAL
17 STAGE.

18 SO WHAT WE DID IN THE REPLY WAS WE LOOKED AT GOOGLE'S
19 OPPOSITION, WE LOOKED AT THE EVIDENCE AND THE DISCOVERY WE HAD.
20 WE LOOKED AT THE CASE LAW. AND WE SAID WE EVER GOING TO
21 STREAMLINE THIS CASE. WE ARE GOING TO MAKE THIS CASE VERY
22 STREAMLINED AND VERY EASY FOR THE COURT. AND HERE'S HOW WE DID
23 THAT.

24 WE FOCUSED ON ESSENTIALLY THREE DEVICES. WE FOCUSED ON
25 THE GMR CONTENT ONEBOX TRANSACTION THERE, WHICH IS I THINK WE

1 SUBMITTED INTERCEPTION. WE FOCUSED ON MEDLEY AND NON CHANGING.
2 THAT IS ALL IN THE DELIVERY PROCESS. NOTHING AFTER THE PERSON
3 HAS RECEIVED AN E-MAIL.

4 SO WHAT WE ESSENTIALLY SAID IS WE ARE NO LONGER SEEKING
5 CLASS CERTIFICATION AND WE ARE NOT GOING TO BE PRESENTING
6 CLAIMS AT TRIAL ON THE PROCESSING OF THE CAT II MIXER IN THIS
7 BACKGROUND AREA.

8 SO WHAT WE SAID WAS WE ARE NO LONGER ACCUSING THAT
9 DEVICE, WE ARE HONING IN FOR SIMPLICITY FOR YOU AND THE JURY ON
10 THIS ISSUE THAT'S OCCURRING ADMITTEDLY BY GOOGLE, AND IT USES
11 THE PHRASE DELIVERY PROCESS THROUGHOUT, AND SEALED THAT PHRASE.
12 BUT IN THAT PROCESS.

13 SO WHAT THAT DID WAS, YOUR HONOR --

14 THE COURT: THIS IS A LONG WIND UP AND I'M WAITING
15 FOR THE PITCH.

16 MR. ROMMEL: HERE IT COMES.

17 THE COURT: SO BRING IT ON, BRING IT ON, BECAUSE I'M
18 READY. COME ON.

19 MR. ROMMEL: FOR DAVID POGUE'S ARTICLE AT EXHIBIT 7
20 OF KYLE WONG'S DECLARATION WHICH WAS WRITTEN IN 2004, OKAY, FOR
21 PURPOSES OF THE CONTENT ONEBOX, IT COULD NOT HAVE BEEN
22 DISCLOSING INTERCEPTION BECAUSE CONTENT ONEBOX DIDN'T EXIST IN
23 THE DELIVERY PROCESS AT THAT TIME. THERE WAS NO PROCESS IN THE
24 DELIVERY PROCESS IN TRANSMISSION FOR GOOGLE TO HAVE MADE A
25 DISCLOSURE ABOUT IT.

1 DAVID POGUE'S ARTICLE IN 2004 MAY BE REALLY RELEVANT TO
2 GOOGLE OBTAINING THE AUTHORITY ON THE STORED COMMUNICATIONS ACT
3 BUT IT HAS NO BEARING ON INTERCEPTION BECAUSE IT'S A MATTER OF
4 GOOGLE'S OWN TECHNOLOGY, IT WASN'T DOING ANYTHING.

5 NOT TO MENTION THE FACT THAT GOOGLE ITSELF IN ITS REPLY
6 TO OUR OBJECTIONS SAID, WE ARE NOT OFFERING THAT FOR THE TRUTH
7 OF THE MATTER ASSERTED, WE ARE OFFERING IT SIMPLY FOR NOTICE.
8 AND THAT'S KEY BECAUSE NOTICE ALONE OF A FACT IF IT'S UNTRUE,
9 IS NOT SUFFICIENT.

10 AND IN THIS PARTICULAR CASE, NOW THAT WE HAVE STREAMLINED
11 THE CASE AND FOCUSED ON THE CONTENT ONEBOX, THE COURT AND THE
12 JURY WILL HAVE TO LOOK AT ALL OF THESE DISCLOSURES FROM
13 MR. WONG PUT IN THAT WE'VE OBJECTED TO FROM THIRD PARTIES, AND
14 ANSWER THIS QUESTION: WHEN THAT STATEMENT WAS WRITTEN IN 2004,
15 DID CONTENT ONEBOX EVEN EXIST IN THE DELIVERY PROCESS? COULD
16 THERE HAVE BEEN AN INTERCEPTION? AND THE ANSWER IS NO.

17 WHEN THE DISCLOSURE MADE IN EXHIBIT R, THE CHEN EXHIBIT R
18 SAYS, "IT IS IMPORTANT TO NOTE THAT AS GENERATED BY THIS
19 MATCHING PROCESS ARE DYNAMICALLY GENERATED EACH TIME A MESSAGE
20 IS OPENED."

21 COULD THAT POSSIBLY BE DESCRIBED IN THE CONTENT ONEBOX?
22 AND THE ANSWER IS NO, THAT'S DESCRIBED IN THE CAT II MIXER
23 WHICH IS NOT IN THE DELIVERY PROCESS.

24 WHEN WE LOOK AT THE OTHER BRAD CHEN EXHIBITS, AGAIN, THIS
25 IS THE FIFTH TIME, YOU WANT TO TALK ABOUT REDO'S, THIS IS THE

1 FIFTH TIME THAT GOOGLE HAS HAD THE OPPORTUNITY TO PUT THE
2 DISCLOSURE IN THE RECORD.

3 THERE'S NOT A SINGLE DISCLOSURE IN THE RECORD WHICH
4 IDENTIFIES ALERTS, GIVES NOTICE ABOUT, TELLS ANYBODY THAT
5 THERE'S AN INTERCEPTION OCCURRING. IT'S NOT THERE. DOESN'T
6 EXIST. DOESN'T EXIST IN THE USER AGREEMENTS OR ANY AGREEMENT.
7 BECAUSE THEY MOVED INTO THE TIME OF THE PROCESS OF WHERE IT IS.

8 THE COURT: ALL RIGHT.

9 SO I THINK I UNDERSTAND YOUR VIEW OF WHATEVER HAS BEEN
10 SUBMITTED IN THE OPPOSITION, IT DOESN'T DISCLOSE IN YOUR VIEW
11 THE INTERCEPTION. IT DOESN'T DISCLOSE THE TIMING OF THE
12 EXTRACTION OF THE INFORMATION OF THE CONSENT OF THE E-MAIL
13 DURING THE DELIVERY PROCESS. I UNDERSTAND THAT.

14 MR. ROMMEL: YES, YOUR HONOR.

15 THE COURT: ALL RIGHT.

16 BUT WHAT IS YOUR BASIS IN YOUR REPLY BRIEF, AND I DON'T
17 KNOW, MAYBE YOU ARE GOING TO WALK AWAY FROM THIS, BUT IN YOUR
18 REPLY BRIEF YOU SAY THAT THE IMPLIED CONSENT DOCUMENTS HAVE TO
19 BE GOOGLE'S OWN.

20 IS THERE A --

21 MR. ROMMEL: YES.

22 THE COURT: WHAT IS THE BASIS FOR THAT?

23 MR. ROMMEL: THIS IS A DIFFERENT, I GUESS, ASPECT TO
24 ARTICULATE, SO I WILL TRY TO DO IT -- WE OBVIOUSLY DIDN'T DO IT
25 ON PAPER WELL ENOUGH.

1 SOURCES LIKE DAVID POGUE, SOURCES LIKE MR. RHODES
2 INDICATED WHERE PEOPLE HAVE A SUBJECTIVE ATTITUDE AND WRITE
3 THESE THIRD-PARTY SOURCES, IT'S ALL HEARSAY. AND GOOGLE SAYS
4 WE ARE NOT OFFERING IT FOR THE TRUTH OF THE MATTER ASSERTED, WE
5 ARE OFFERING IT FOR NOTICE.

6 SO MY QUESTION IS NOTICE OF WHAT. BECAUSE ONLY GOOGLE
7 WHO HAS SEALED THE PROPRIETARY ASPECT THAT CONTENT ONEBOX IS
8 EVEN IN THE DELIVERY PROCESS KNOWS THAT THAT'S WHERE THE
9 INTERCEPTION IS OCCURRING.

10 NOBODY OUTSIDE OF THESE WALLS TODAY, NOBODY OUTSIDE OF
11 GOOGLE KNOWS WHERE THE INTERCEPTION IS OCCURRING OR IN FACT
12 THAT THERE EVEN IS INTERCEPTION.

13 THEY HAD THIS BELIEF, DAVID POGUE, AND AS GOOGLE
14 PERPETUATED, THIS IS ALL HAPPENING IN YOUR INBOX, THIS IS ALL
15 HAPPENING WHEN YOU OPEN UP YOUR MESSAGE. WELL THAT'S NOT TRUE
16 ANYMORE, BECAUSE IT DOESN'T MATTER WHETHER THE GMAIL PERSON
17 OPENS THEIR MESSAGE OR NOT, THE INFORMATION HAS ALREADY BEEN
18 TAKEN IN THE DELIVERY PROCESS.

19 IT DOESN'T MATTER WHETHER YOU HAVE ADS DISABLED OR NOT.
20 AND YOU MAY SAY, I WANT A GOOGLE ADS ACCOUNT BECAUSE I DON'T
21 WANT ADS AND I DON'T WANT GOOGLE READING MY MAIL. WELL, GUESS
22 WHAT, THEY ARE ALREADY DOING IT IN THE DELIVERY PROCESS WITH
23 CONTENT ONEBOX.

24 YOU MAY SAY, I WANT TO USE OUTLOOK OR AN E-MAIL PROVIDER
25 THAT DOESN'T ACCESS AND DOESN'T USE THIS INTERFACE WITH GMAIL.

1 GUESS WHAT, IT'S ALREADY BEEN EXTRACTED.

2 AND IMPORTANTLY, A GMAIL USER MAY ACTUALLY OPT OUT OF
3 PREFERENTIAL ADVERTISING BELIEVING THAT GOOGLE IS NOT DOING
4 THIS ANYMORE.

5 THE OPT OUT, I'M TELLING YOU, DON'T DO THIS, THE GMAIL
6 USER IS SAYING DON'T DO THIS. GUESS WHAT, CONTENT ONEBOX HAS
7 ALREADY EXTRACTED THE INFORMATION. WHY? BECAUSE IT'S
8 OCCURRING IN THE DELIVERY PROCESS, NOT AFTER RECEIPT INTO THE
9 INBOX.

10 THAT'S THE SECRET. THAT IS THE SECRET. IT IS FACTUALLY
11 INACCURATE TO SAY THAT THE LOCATION AND THE TIMING OF THE
12 INTERCEPTION THAT OCCURS IS PUBLIC RECORD.

13 MR. RHODES: YOUR HONOR, THEY NEVER ANSWERED YOUR
14 QUESTION.

15 THE QUESTION WAS VERY SIMPLE. IS THERE ANY CASE LAW THAT
16 SAYS THAT THE SOLE SOURCE OF EVIDENCE SHOWING IMPLIED CONSENT,
17 WHICH IS IT DEFINED AS MAY BE IMPLIED FROM SURROUNDING
18 CIRCUMSTANCES, MAY IT ONLY EXTEND FROM GOOGLE?

19 THAT WAS THE QUESTION THE COURT ASKED. YOU NEVER GOT AN
20 ANSWER TO THAT. AND THE ANSWER IS, THERE IS NO CASE LAW THAT
21 SAYS THAT.

22 MORE PARTICULARLY, JUST AS TWO CONCRETE EXAMPLES OF WHY THE
23 STUFF WE ATTACHED TO MR. WONG'S DECLARATION PROVES THE POINT,
24 PARAGRAPH 52 AND PARAGRAPH 55 ARE CITES TO ARTICLES THAT BEGIN
25 WITH THE FOLLOWING: GOOGLE SAYS, BOTH OF THEM, "GOOGLE IS THE

1 SOURCE OF THAT INFORMATION."

2 SO EVEN IF THE COURT WERE TO ENTERTAIN THIS LIMITATION
3 FOR WHICH THERE IS NO CASE SUPPORT AND THEY NEVER RESPONDED TO
4 YOUR QUESTION, THE FACT OF THE MATTER IS THE EVIDENCE WE PUT
5 INTO THE RECORD SAYS THAT INFORMATION DERIVES FROM GOOGLE.

6 MR. ROMMEL: WHAT ARE THE DATE OF THOSE? IS THIS
7 BEFORE SEPTEMBER AND --

8 MR. RHODES: 2011 AND 2012, YOUR HONOR.

9 MR. ROMMEL: IT'S DESCRIBING ADVERTISING PROCESSES BY
10 CAT II, NOT CONTENT ONEBOX.

11 MR. RHODES: IF YOU CALL AND GET A VOICE RECORDING
12 THAT SAYS, YOUR HONOR YOUR PHONE CALL MAY BE RECORDED FOR
13 QUALITY SERVICE. DO WE HAVE TO THEN SAY, BY THE WAY, I'M USING
14 A HARD DRIVE TO RECORD IT AND WHEN I GET THE HARD DRIVE I'M
15 GOING TO HAVE A CACHE COPY AND THEN I WILL SEND IT TO A CENTRAL
16 SERVER.

17 THAT'S WHAT THEY'RE ARGUING FOR. THEY ARE ARGUING FOR A
18 DISCLOSURE THAT IT'S A RIDICULOUS TO A CERTAIN LEVEL OF MINUTIA
19 FOR IT TO EVEN RISE TO A LEVEL OF BEING A BODY OF EVIDENCE FROM
20 WHICH WE CAN EXTRAPOLATE AN INFERENCE OF CONSENT. THERE'S
21 NO LAW TO SUGGEST THAT.

22 THE COURT: LET ME ASK A QUESTION.

23 FOR THE EDUCATIONAL APPS, THERE'S AN OPTION FOR THE APPS
24 ADMINISTRATOR TO CIRCUMVENT GOOGLE'S INTERCEPTIONS.

25 THE RECORD DOESN'T SAY HOW MANY OF THOSE INSTITUTIONS

1 ACTUALLY HAVE OPTED JUST FOR THE CIRCUMVENTION. DO WE KNOW?

2 MR. ROMMEL: YOUR HONOR, THIS GETS INTO THE POINT OF,
3 AND I DON'T WANT TO SAY REAL CONTENTION IN THIS CASE BECAUSE
4 HERE'S WHAT YOU HAVE, YOU HAVE IN THE RECORD, AND THIS WAS ONE
5 OF THE REASONS WHY DR. GREEN WAS, WE FILED THE REPLY BRIEF
6 WHICH HE'S NOT A SECRET, HE'S BEEN KNOWN SINCE AUGUST OF 2011
7 AND SUFFICIENTLY DISCLOSED.

8 BUT HERE THE ISSUES YOU ARE TALKING ABOUT ARE DEALING
9 WHAT WE CALL THE REP SERVERS. AND SO GOOGLE HAD PUT IN A
10 DECLARATION FROM BRANDON LONG WHERE IT SAYS THAT THE APPS
11 ADMINISTRATOR CAN BYPASS CONTENT ONEBOX ALL TOGETHER THROUGH
12 THIS REP SERVICE.

13 SO WE WERE GENERALLY AWARE OF THAT TYPE OF ASSERTION.
14 AND MR. TAPLEY TOOK THE DEPOSITION OF BRANDON LONG. AND WHEN
15 HE TOOK THE DEPOSITION OF BRANDON LONG, KNOWING FULL WELL THAT
16 THAT WAS A POTENTIAL ISSUE, HE ASKED MR. WONG POINT BLANK IN
17 THE DEPOSITION, NOW IF THERE'S A DIFFERENCE BETWEEN HOW APPS
18 ARE TREATED AND HOW GMAIL IS TREATED, YOU NEED TO LET ME KNOW.

19 AND HE SAID, THAT'S FINE. I CAN DO THAT.

20 SO WHAT HAPPENED WAS, WE GET INTO THE DISCUSSION OF THE
21 E-MAIL FLOW, AND THIS IS FROM EXHIBIT A, THIS IS THE TESTIMONY
22 OF GOOGLE. SO NOT JUST OF BRANDON LONG, THE INDIVIDUAL, BUT
23 THE TESTIMONY OF GOOGLE IN THIS RECORD AS IT EXISTED TODAY IS
24 AS FOLLOWS:

25 "ALL RIGHT, WHAT HAPPENS AFTER THE CONTENT ONEBOX

1 PROCESSING?"

2 I'M AT PAGE 39 OF THE DEPOSITION OF GOOGLE WHO THE
3 DEPONENT WAS BRANDON LONG. THIS IS EXHIBIT A TO THE ROMMEL
4 DECLARATION. PAGE 39.

5 "QUESTION: ALL RIGHT. WHAT HAPPENS AFTER THE
6 CONTENT ONEBOX PROCESSING?

7 "ANSWER: THE MESSAGE IS SENT TO THE SPAM
8 CLASSIFICATION SERVER.

9 "QUESTION: AGAIN?

10 "ANSWER: YES.

11 "QUESTION: WHAT HAPPENS NEXT?

12 "ANSWER: THE MESSAGE IS NEXT.

13 WELL, IF IT'S A GOOGLE APPS MESSAGE, THE MESSAGE MAY BE
14 SENT TO THE REP SERVER FOR RULES PROCESSING. THAT OCCURS AFTER
15 THE CONTENT ONEBOX PROCESSING."

16 SO WHAT WE HAVE HERE IS BRANDON LONG PUT IN A DECLARATION
17 IN THE OPPOSITION THAT SAYS THERE MAY BE AN ISSUE WITH APPS
18 SERVERS AND REPS ISSUES THAT THEY COULD BYPASS CONTENT ONEBOX.
19 ABSOLUTELY CONTRADICTED BY HIS GOOGLE'S DEPOSITION TESTIMONY IN
20 AUGUST OF 2013 SAYING SOMETHING DIFFERENT.

21 IT'S VERY MUCH LIKE STACY COMPATIO PUTTING IN A GENERAL
22 ISSUE ABOUT AIR RATES WHEN THE TESTIMONY IS COMPLETELY TO THE
23 CONTRARY.

24 AND I WOULD ASSERT THIS, YOUR HONOR --

25 THE COURT: I THINK I'M A LITTLE BIT CONFUSED.

1 WHAT ARE YOU SAYING? EVEN IF SOMEONE OPTS OUT, THERE'S
2 NO TRUE CIRCUMVENTION OF THE INTERCEPTION, THAT IT HAPPENS
3 REGARDLESS?

4 MR. ROMMEL: CORRECT. THAT'S BRANDON LONG'S
5 TESTIMONY.

6 AND MR. TAPLEY -- YOU CAN LOOK AT THE PRECEDING PAGES,
7 37 -- ACTUALLY, IF YOU CAN GO BACK TO --

8 THE COURT: SO WHAT DOES THE OPT OUT, IF ANYTHING,
9 DO?

10 MR. ROMMEL: NOTHING. NOT TO CONTENT ONEBOX.
11 DOESN'T HAVE ANY AFFECT ON IT AT ALL ACCORDING TO GOOGLE IN ITS
12 30(B)(6) DEPOSITION.

13 AND I WOULD MAKE THIS POINT, IF A DEFENDANT IS GOING TO
14 CITE IN ITS OPPOSITIONS PAPER THE WAL-MART V DUKES THEN IT
15 SHOULD BE PREPARED TO SUPPORT WHATEVER GENERAL ASSERTION IT
16 MAKES WITH EVIDENCE.

17 AND HERE'S MY POINT, IF GOOGLE IS GOING TO MAKE AN
18 ARGUMENT CONTRARY TO ITS OWN TESTIMONY THAT THE REP SERVERS IN
19 CERTAIN AD APPS ADMINISTRATORS CIRCUMVENT PROCESSING, THEN IT
20 SHOULD IDENTIFY TO THE COURT WHICH AND THE NUMBER OF APPS
21 ADMINISTRATORS HAVE DONE THAT TO MAKE THIS AN ISSUE FOR
22 CERTIFICATION.

23 THIS MAY BE AN ISSUE THAT MAY COME DOWN THE ROAD FOR
24 SUMMARY JUDGEMENT OR SOMETHING, BUT WE ARE TALKING ABOUT
25 CERTIFICATION. WHEN YOU WANT TO START TALKING ABOUT YOU NEED

1 TO SUPPORT YOUR ARGUMENTS WITH FACTS, AS THE DEFENDANT TRIES TO
2 ASSERT WITH REGARDS TO THE DUKES OPINION, THEN IT TOO, IF IT'S
3 GOING TO MAKE A GENERAL ASSERTION, SHOULD SUPPORT THAT WITH
4 FACTS AND SUPPLY THE NECESSARY INFORMATION FOR THE COURT TO BE
5 ABLE TO WEIGH WHETHER THIS IS EVEN AN ISSUE FOR PREDOMINANCE.

6 MR. RHODES: YOUR HONOR, DOCUMENT 106 IN THIS CASE,
7 PARAGRAPHS 2, 3 AND 5 ANSWER THE COURT'S QUESTION. I DON'T
8 NEED TO QUOTE THEM. MR. WONG IS VERY EXPLICIT.

9 AND WHAT THEY ARE TRYING TO DO IS THEY ARE TRYING TO SAY
10 IGNORE THE EVIDENCE WE PUT IN BECAUSE HE SAID SOMETHING
11 DIFFERENT IN HIS DEPO.

12 IF YOU READ THE WHOLE DEPO, HE DIDN'T SAY ANYTHING
13 DIFFERENT. THERE IS NOT A SINGLE REFERENCE TO REP SERVERS IN
14 HIS DECLARATION. HIS POINT THAT THE COURT PICKED UP IS VERY
15 SIMPLE WHICH IS THAT THOSE ADMINISTRATORS CAN IN FACT BYPASS
16 GOOGLE SYSTEM AND THEREFORE NOTHING IS SCANNED. AND HE SAYS --

17 THE COURT: HOW MANY HAVE? WHAT PERCENTAGE HAVE?

18 MR. RHODES: HE SAYS IN PARAGRAPH 5, WE DON'T KNOW
19 THE ANSWER TO THAT.

20 DID THEY GO AND SUBPOENA THOSE IT ADMINISTRATORS AND ASK
21 THEM TO TAKE THOSE DEPOSITIONS? NO. WE PUT IN THE RECORD THE
22 ANSWER TO THE COURT'S QUESTION. IT'S PARAGRAPH 5 OF
23 DOCUMENT 106.

24 MR. ROMMEL: YOUR HONOR, THE COURT IS GOING TO HAVE
25 TO WEIGH WHETHER IT WANTS TO LOOK AT THE DECLARATION THAT WAS

1 PROVIDED AFTER GOOGLE'S TESTIMONY ON THE EXACT IDENTICAL ISSUE
2 AND MAKE THAT DETERMINATION.

3 IN THE TESTIMONY OF GOOGLE ON THE ISSUE OF DATA FLOW WHICH
4 HE WAS THE REPRESENTATIVE FOR, MR. TAPLEY SET IT UP AND SAID,
5 IF THERE'S EVER A DIFFERENCE BETWEEN HOW ACCOUNTS ARE TREATED,
6 YOU NEED TO LET ME KNOW. AND MR. WONG SAID YES, THAT'S FINE.

7 AND I NEED TO READ FURTHER ON PAGE 39, AT LINE 14.

8 SO THIS IS AFTER HE'S ALREADY SAID AFTER CONTENT ONEBOX
9 PROCESSING IT GOES TO SPAM AND WHAT HAPPENS NEXT, THEN THE REP
10 SERVER CAN ISSUE TO INDICATE THE RULES.

11 AND WHAT'S THE NEXT SUBSTANTIVE QUESTION.

12 ALL RIGHT, SO WE'VE GOT SORT OF A FORK IN THE ROAD WHERE
13 SOMETHING DIFFERENT MAY HAPPEN TO A GOOGLE APPS MESSAGE THAN A
14 GMAIL.COM MESSAGE?

15 ANSWER, YES.

16 SO HE REAFFIRMS THE PROCESS THERE. SO WHAT WE HAVE IS
17 TESTIMONY IN THE RECORD, AND IT'S NOT UNUSUAL IN THIS CASE TO
18 DATE FOR US TO GET SOME TYPE OF INFORMATION AND TO THEN
19 SUBSEQUENTLY, THE ISSUE ABOUT WHETHER SENT E-MAILS PROCESSES
20 HAS BEEN CHANGED FOUR TIMES. THIS IS NOT UNUSUAL IN THIS CASE.
21 BUT THE TESTIMONY IS THAT EVERY E-MAIL IS SENT TO CONTENT
22 ONEBOX. THE TESTIMONY IS THAT THE REP SERVER CAN ONLY MAKE
23 THOSE CHANGES AFTER THE CONTENT ONEBOX

24 THE COURT: ALL RIGHT.

25 I WOULD LIKE TO TAKE A TEN-MINUTE BREAK. I DO WANT TO

1 FINISH THIS NO LATER THAN 4:30 TODAY.

2 I HAVE A COUPLE MORE QUESTIONS WHEN WE RETURN, BUT LET'S GO
3 AHEAD AND TAKE A BREAK NOW.

4 THANK YOU.

5 (WHEREUPON A RECESS WAS TAKEN.)

6 THE COURT: OKAY. WELCOME BACK. PLEASE TAKE A SEAT.

7 IN THE REPLY BRIEF THERE IS A FOOTNOTE WHICH, THE VERY
8 LAST FOOTNOTE ON THE LAST PAGE IT SAYS, OH, AND IF YOU DENY
9 CLASS CERT, GIVE LEAVE TO AMEND SO WE CAN TRY TO CERTIFY AN
10 INJUNCTIVE CLASS.

11 LET ME ASK WHY YOU ALL DIDN'T MOVE NOW, AND IF YOU'VE
12 WAIVED THAT?

13 I MEAN, I ONLY SEE IT IN THE REPLY. I DON'T SEE THAT AT
14 ALL IN THE MOTION. DO YOU WANT TO RESPOND TO THAT?

15 MR. ROMMEL: YES, YOUR HONOR.

16 WE'VE MOVED UNDER (B) (3) OBVIOUSLY WHICH WOULD ALLOW FOR
17 BOTH INJUNCTIVE RELIEF AND STATUTORY DAMAGES.

18 IF THE COURT HAD CERTAIN CONCERNS ABOUT ASCERTAINABILITY
19 AND THE ISSUES THAT THE DEFENDANT HAS RAISED WITH REGARDS TO
20 PREDOMINANCE AND CONTENT ONEBOX, THE CONTENT APPLICATION TO
21 LESS THAN ONE PERCENT OF THE E-MAILS OR WHATEVER, THEN SEVERAL
22 WE BELIEVE THAT -- WE ARE IN A SITUATION IN THE CASE WHERE THE
23 DEFENDANT HAS ADMITTED DOING THE CONDUCT, IT JUST SAYS YOU
24 CAN'T PROVE IT, YOU HAVE LESS THAN ONE PERCENT OF THE TIME
25 WHERE THERE MIGHT BE AN ERROR RATE. OR YOU CAN'T PROVE IT FOR

1 THIS TYPE OF SITUATION.

2 SO A PURELY INJUNCTIVE RELIEF CLASS WOULD BE APPROPRIATE
3 IF THE COURT HAD CONCERNS ABOUT ISSUES SUCH AS PREDOMINANCE.
4 BUT I WOULD ASSERT TO THE COURT THAT THAT'S NOT ALL TOGETHER
5 NECESSARY ESPECIALLY TO GET BACK TO THE QUESTION WE HAD EARLIER
6 ABOUT THE GOOGLE APPS EDU CASES AND THE CABLE ONE.

7 IF YOU LOOK AT CHEN B, WHICH IS THE GOOGLE APPS TERMS OF
8 SERVICE, GOOGLE SPECIFICALLY LIMITS AT PARAGRAPH 3 THE
9 INFORMATION THAT IT CAN ACCESS IN GOOGLE APPS MEMBERS ACCOUNT.
10 AND IT SAYS IT MUST HAVE A GOOD FAITH BASIS TO DO THAT TO
11 COMPLY WITH THE GOVERNMENT REQUEST OR TO PROTECT ITS SYSTEM.

12 AND THEN IF YOU LOOK AT ROMMEL DECLARATION, EXHIBIT R,
13 WHICH IS THE GOOGLE APPS DOCUMENTATION AND SUPPORT, IT SAYS
14 THERE IS NO AD RELATED SCANNING OR PROCESSING IN GOOGLE APPS
15 FOR EDUCATION OR BUSINESSES WITH ADS DISABLED. AND CONTENT
16 ONEBOX IS AN ADMITTED AD-RELATED SCANNING AND PROCESSING.

17 SO THIS GETS BACK TO THE ISSUE OF THIRD PARTIES MAKING
18 STATEMENTS WHICH MAY BE CONTRARY TO GOOGLE'S OWN STATEMENTS.
19 GOOGLE AT SOME POINT HAS TO BE BOUND BY THAT.

20 SO I WOULD ASSERT TO THE COURT THAT THROUGH ALL THE
21 DISCLOSURES AND EVERYTHING THAT A PURE INJUNCTIVE CLASS IS NOT
22 REQUIRED BUT WE WOULD ASK THAT IF THE COURT IS HAVING CONCERNS
23 ABOUT ASPECTS OF ASCERTAINABILITY OR MORE ASPECTS OF
24 PREDOMINANCE AS TO WHETHER OR NOT A PERSON CAN ACTUALLY PROVE
25 THAT SOMETHING ACTUALLY HAPPENED DURING THE E-MAIL DESPITE THE

1 EVIDENCE WE HAVE SHOWN THAT WE CAN ESTABLISH THROUGH CABLE ONE
2 GOOGLE APPS AND WE BELIEVE ARE MINOR GMAILERS AND THE GOOGLE
3 APPS EDU FOLKS READILY HAVE INFORMATION AS SENDING ROMMEL
4 EXHIBIT XX, WHICH IS THE ACTUAL PRINTOUT OF THE METADATA THAT
5 SHOWS THE E-MAIL WAS PROVIDED BY CONTENT ONEBOX. IT SHOWS THE
6 E-MAIL WHICH ARE THE MONETIZATIONS ANNOTATIONS.

7 SO WE WOULD ASSERT THAT INJUNCTIVE RELIEF WOULD BE,
8 YOUR HONOR, I GUESS WOULD BE SOMETHING AS A LAST RESORT IF THE
9 COURT DID INDEED HAVE CONCERNS THAT DIDN'T BELIEVE WE COULD
10 OVERCOME WITH A (B) (3).

11 THE COURT: SO WHAT WOULD BE THE INJUNCTIVE RELIEF
12 YOU ARE REQUESTING?

13 MR. ROMMEL: TO MAKE THEM DISCLOSE WHAT THEY ARE
14 DOING. OR TO MAKE THEM PUT CONTENT ONEBOX BACK WHERE IT WAS AS
15 OPPOSED TO IN THE DELIVERY PROCESS, BECAUSE THAT'S ESSENTIALLY
16 IT.

17 ESSENTIALLY, WE WOULD SEEK SOME INJUNCTIVE RELIEF TO CHANGE
18 THE BUSINESS MODEL WHERE DISCLOSURES WERE APPROPRIATELY MADE.

19 THE COURT: ALL RIGHT.

20 LET ME GIVE DEFENSE COUNSEL AN OPPORTUNITY TO ADDRESS THIS.

21 MR. RHODES: IT SOUNDS LIKE HE WANTS A DIVESTITURE
22 REMEDY WHICH IS AN EXTRAORDINARY REMEDY THAT'S NOT AVAILABLE TO
23 THE COURT UNLESS THE COURT WAS THE DEPARTMENT OF JUSTICE.

24 THEY HAVE CHANGED THEIR THEORY SO MANY TIMES THAT WE HAVE
25 GOTTEN DIZZY.

1 I ACTUALLY ANTICIPATED HIM SAYING WHAT HE JUST SAID TO
2 YOU WHICH IS, WE DIDN'T GET A CHANCE TO LITIGATE THE INJUNCTIVE
3 RELIEF CLASS, IT'S IN THE REPLY BRIEF IN THE FOOTNOTE.

4 WE WERE SANDBAGGED WITH GREEN IN THE REPLY BRIEF. I
5 ACTUALLY PREPARED FOR THE COURT IF THE COURT WANTS, I LISTED
6 EVERY SINGLE TIME THEY CHANGED THE CLASS DEFINITION AND EVERY
7 SINGLE CLASS THEY HAVE DEFINED ALONG THE WAY IN THESE MANY
8 CASES.

9 I HAVE THAT TABULATED IF THE COURT IS INTERESTED. THE
10 POINT IS, AT SOME POINT WE HAVE TO LITIGATE THE ISSUE AT HAND.
11 THEY HAVEN'T LITIGATED ANY INJUNCTIVE RELIEF CLASS. THEY HAVE
12 ABSOLUTELY WAIVED IT. WHAT ARE WE GOING TO DO, START BACK FROM
13 SQUARE ONE AND TALK ABOUT THE STRUCTURAL REMEDY HE'S THROWING
14 OUT? I'VE NEVER HEARD OF THAT BEFORE.

15 I HAVE NEVER HEARD BEFORE THIS VERY MOMENT, THE NOTION
16 THEY COULD GO INTO GOOGLE'S GMAIL INFRASTRUCTURE AND ASK THE
17 COURT TO MOVE SERVERS AROUND. PUT THIS SERVER OVER HERE.
18 THAT'S EXTRAORDINARY.

19 WHEN DO I GET TO BE HEARD ON THAT, YOUR HONOR? THEY ARE
20 GOING TO GET LEAVE TO DO THIS ALL OVER AGAIN?

21 THEY HAD TWO BITES AT THE APPLE IN DUNBAR THEY HAD A BITE
22 IN DIAMOND. THEY HAD ANOTHER BITE BEFORE YOUR HONOR WHEN THEY
23 WENT BACK TO SQUARE ONE.

24 THEY HAD THE SAME THING HAPPEN IN MARIN COUNTY. I WENT
25 UP THERE AND ARGUED, A LENGTHY RULING, DENIAL OF CLASS CERT ON

1 THE SAME GROUNDS THAT YOU WERE POSITING TODAY.

2 AND WHAT THEY SAID, THEY HANDED ME A DEFINITION A BRAND
3 NEW ONE AS I WALKED INTO COURT, THIS IS ENDEMIC.

4 THE PROBLEM IS WHEN YOU ARE TRYING TO STATE A CLASS
5 ACTION UNDER THESE FACTS, IT DOESN'T FIT. IT JUST DOESN'T FIT.
6 THAT'S THE PROBLEM. THAT'S THE REASON WHY THEY KEEP CHANGING
7 THE ANALYSIS.

8 THE COURT: LET ME ASK YOU ONE QUESTION ON
9 ASCERTAINABILITY.

10 OTHER THAN CARRERA, DO YOU HAVE ANY OTHER CASE THAT
11 ADDRESSES THIS SPECIFIC QUESTION OF WHETHER SELF-REPORTING BY A
12 CLASS MEMBER WOULD BE SUFFICIENT?

13 NOW FOR THE MINORS THERE IS APPARENTLY SOME AGE DATA THAT
14 COULD BE USED TO COMPARE AGAINST WHAT'S SELF-REPORTED. THERE'S
15 NOTHING THAT RESIDENCE DATA COULD BE COMPARED AGAINST. IS
16 THERE A CASE THAT ADDRESSES THIS PARTICULAR ISSUE?

17 MR. RHODES: NO.

18 AND THE REASON I CITED CARRERA WAS BECAUSE IT GAVE -- IT'S
19 SIGNIFICANT FOR TWO THINGS. ONE, IT'S RELATIVELY RECENT. AND
20 I CITED TO JUDGE CONTI BECAUSE HE CITED IT IN A FEBRUARY 13TH
21 OPINION DENYING CLASS CERT.

22 AND HE NOTED, BY THE WAY, TO BE PERFECTLY CANDID WITH THE
23 COURT, AT LEAST HE THOUGHT THERE WAS SOME CONFLICT IN THIS
24 DISTRICT, AND PERHAPS THE CIRCUIT, ABOUT WHETHER CARRERA
25 APPLIES. SO THE COURT SHOULD BE WARY OF THAT. BUT CARRERA

1 WAS INTERESTING ON TWO LEVELS.

2 THE COURT: WHAT CAN I RELY ON?

3 MR. RHODES: YEAH, I UNDERSTAND.

4 THE COURT: WHAT DO I RELY ON TO SAY THAT'S NOT
5 ENOUGH EVEN IF YOU HAVE THE AGE AND THEN USE THE PROFILE.

6 MR. RHODES: I UNDERSTAND THE COURT'S QUESTION.

7 SO I THINK THERE ARE TWO PRONGS TO CARRERA THAT ARE
8 INSTRUCTIVE.

9 THE FIRST IS IT IS THE MOST RECENT CIRCUIT LEVEL
10 ARTICULATION OF THE NOTION THAT THE RIGOROUS ANALYSIS TEST OF
11 DUKES APPLIES WITH PEOPLE FORCED TO ASCERTAINABILITY. SO
12 THAT'S NUMBER ONE. THAT'S THE BURDEN AND A LEVEL OF EVIDENCE
13 REQUIRED COMPONENT.

14 THE SECOND REASON IT'S INSTRUCTIVE IS BECAUSE WHAT
15 HAPPENED THERE IS THEY COULDN'T FIGURE OUT WHO BOUGHT THE
16 DIETARY SUPPLEMENT AT ISSUE.

17 SO THE QUESTION WAS WELL, HOW DO YOU DO THAT? AND THE
18 PLAINTIFF PROPOSED A MODEL BY WHICH THE CLASS MEMBER WOULD
19 SUBMIT AN AFFIDAVIT AND DESCRIBE HOW MANY PILLS THEY BOUGHT,
20 WHERE THEY BOUGHT AND SO FORTH.

21 SO THE QUESTION PRESENTED WAS, SHOULD THE COURT ACCEPT
22 THAT? AND WHAT VALIDATION DO WE NEED TO DO. AND IT GIVES A
23 VERY GOOD EXAMPLE OF THE PROBLEM WHEN THE PLAINTIFF DOESN'T
24 COMPLETE THE ANALYSIS.

25 WHAT THE COURT SAID THERE WAS, THE PROBLEM WAS THEY NEVER

1 GAVE US ANY MODEL OF HOW THEY WOULD ACTUALLY DO IT, AND WHAT
2 THEY WOULD ACTUALLY DO TO TEST TO SEE WHETHER IT WAS RELIABLE.

3 WHAT CARRERA SAYS IS THAT ASCERTAINABILITY IS SUPPOSED TO
4 BE READILY DISCERNABLE FROM READILY, AVAILABLE DATA WITHOUT
5 UNDUE INDIVIDUALIZED INQUIRY.

6 THAT'S WHAT IT SAYS. SO THAT'S WHY I GAVE IT TO YOU AND
7 THAT'S WHY I CITE TO JUDGE CONTI BECAUSE HE SEEMED TO THINK
8 IT'S PERSUASIVE THAT HE FOLLOW ITS REASONING, NOTING SOME OF
9 THE OTHER CASES IN THE DISTRICT WHICH CAST SOME LIGHT ABOUT
10 WHERE IT SHOULD FALL.

11 I JUST WANT TO GIVE THE COURT A BROAD PERSPECTIVE.

12 BUT THE CHALLENGE HERE IS EVEN IF YOU PUT TO THE SIDE THE
13 NOTION OF WHETHER YOU CAN DO A CLASS WHERE IT'S ALSO
14 SELF-REPORTED, ACCEPT JUST FOR THE SAKE OF ARGUMENT THAT CAN BE
15 DONE, THE QUESTION FOR THE COURT TODAY IS:

16 HAVE THEY DEMONSTRATED THE EVIDENCE, THE FORMULA, THE
17 MODEL? AND HAVE THEY SATISFIED THEIR BURDEN TO SHOW YOU HOW IT
18 WOULD WORK, WHAT ARE ITS HALLMARKS AND VERIFICATION AND
19 LIABILITY ARE, AND WHAT WOULD BE THE RESULT AT THE FRONT END
20 BEFORE WE EVER GET TO THE PREDOMINANCE BAR?

21 AND I'M SUGGESTING THEY HAVEN'T DONE THAT.

22 MR. ROMMEL: YOUR HONOR, I GUESS I WOULD ASSERT WE
23 HAVEN'T HEARD ABOUT, WE DIDN'T PREPARE A PLAN.

24 AND THE DUNBAR CERTIFICATION WAS ISSUED, IT WAS A FIFTH
25 CIRCUIT, HAS A MORE RIGOROUS ASPECT WITH REGARDS TO A TRIAL,

1 AND THAT'S WHAT JUDGE FOLSOM WAS REFERENCING. AND IT'S NOT A
2 PLAN OR ABILITY TO SHOW THE CASE, HE WAS REFERENCING A TRIAL
3 PLAN.

4 THE COURT: I'M SORRY TO INTERRUPT YOU, BUT WHAT'S
5 YOUR BEST CASE TO SUPPORT WHAT YOU'RE ADVOCATING, WHICH IS THAT
6 YOU CAN SEND THIS BLAST E-MAIL AND SELF-REPORTING OF CLASS
7 MEMBERS IS SUFFICIENT FOR ASCERTAINABILITY?

8 MR. ROMMEL: YES, MA'AM.

9 THE COURT: WHAT'S YOUR BEST ONE?

10 MR. ROMMEL: FOR THE GOOGLE APPS EDU AND CABLE ONE
11 ACCOUNT?

12 THE COURT: I DON'T THINK THAT ONE ON
13 ASCERTAINABILITY IS A BIG ISSUE.

14 MR. ROMMEL: OKAY. LET'S GO WITH THE NON GMAIL.

15 WHEN THEY RECEIVE THAT E-MAIL, THEY CAN GO INTO THEIR
16 INBOX AND THEY CAN LOOK IN THEIR INBOX AND THEY CAN SEE AN
17 E-MAIL THAT THEY HAVE SENT AND PROBABLY RECEIVED OR REPLIED.

18 AGAIN, THIS GOES BACK TO THE ISSUE OF, CAN YOU PROVE THE
19 CLAIM? WE'VE AGREED THERE MAY BE CIRCUMSTANCES THAT THE PERSON
20 FALLS WITHIN THE CLASS.

21 BUT BECAUSE OF THE EXPIRATION OF TIME OR WHATEVER JUST
22 LIKE IN ANY CASE, THEY MAY NOT BE ABLE TO PUT FORTH A VALID
23 CLAIM. BUT THE EXAMPLES THAT WE HAVE GIVEN TO YOUR HONOR AS
24 FOLLOWS.

25 THAT THEY CAN GO IN IF THEY HAD A REPLY E-MAIL FROM THE

1 GMAIL USER, THERE'S A PUBLIC HEADER INFORMATION. AND WE TALK
2 ABOUT HEADERS IN EXHIBIT YY AND ZZ, THAT GOOGLE HAS PUT
3 DOCUMENTATION ON BY HEADERS.

4 AND -- OH, I'M SORRY, BEST CASE. IT'S ZEISEL V. DIAMOND
5 FOODS. THEY WOULD GO IN -- AND THE IN RE TFTLCD ANTITRUST
6 LITIGATION. THOSE TWO CASES ARE THE BEST CASE FOR AUTHORITY
7 FOR ASCERTAINABILITY WHICH IS HOW TO VERIFY OBJECTIVELY.

8 WE ARE NOT RELYING UPON SOMEBODY COMING IN AND SAY, I
9 SENT AN E-MAIL TO A GMAIL PERSON IN NOVEMBER 2011, HERE'S MY
10 AFFIDAVIT. THEY WOULD BE REQUIRED, YOUR HONOR, TO PUT FORTH
11 THE OBJECTIVE EVIDENCE, ALL OF WHICH CAN BE TESTED AND VERIFIED
12 BY GOOGLE.

13 THERE'S NOT A SINGLE PIECE OF INFORMATION OTHER THAN
14 RESIDENCY, POTENTIALLY, OR AGE, WITH REGARDS TO THE PROOF OF
15 CLAIM THAT CANNOT BE TESTED BY GOOGLE WITH ITS OWN RECORDS.

16 SO THE HEADER INFORMATION, ALL THAT INFORMATION THAT
17 WOULD BE PROVIDED CAN BE TESTED BY GOOGLE AND THEY CAN VERIFY,
18 YES, THAT E-MAIL WAS RECEIVED.

19 SO ALL OF THAT, SO DUE PROCESS CONCERNS, ALL OF THAT'S
20 ADDRESSED, BUT THOSE TWO CASES ARE YOUR BEST CASES.

21 THE COURT: ALL RIGHT.

22 I'M GOING TO GIVE MR. RHODES OR MR. SOMVICHIAN THE LAST
23 OPPORTUNITY TO ADDRESS WHAT I THINK WAS NEW FROM ANOTHER ISSUE
24 THAT I THINK WAS NEW TODAY.

25 AND THAT IS THE CONTENTION THAT ANY DISCLOSURE THAT IS

1 BEFORE OCTOBER OF 2010, JUST SIMPLY CANNOT PER SE BE SUFFICIENT
2 BECAUSE IT WAS CAT II MIXER INSTEAD OF CONTENT ONEBOX.

3 MR. RHODES: WELL, THERE'S NO PROPOSITION IN THE LAW
4 FOR THAT.

5 THE STATUTORY LANGUAGE IS CONSENT BY ONE PARTY TO THE
6 COMMUNICATION TO QUOTE SUCH AN EXCEPTION. SO THEY ARE TRYING
7 TO SAY, SUCH AN EXCEPTION MEANS THAT YOU HAVE TO DESCRIBE IN
8 MANIACAL DETAIL, EVERY ATTRIBUTE OF THE INTERCEPTION INCLUDING
9 THE NAME OF THE SERVER THAT DOES IT, WHERE IT DOES IT AND SO
10 FORTH.

11 WHAT I WOULD SUGGEST YOU DO IS IF YOU GO TO THE WONG
12 DECLARATION AND YOU FOLLOW THE TIMELINE OF ALL THE PUBLIC
13 DISCLOSURES, MANY OF WHICH ARE TRIVIAL TO GOOGLE ITSELF, IT WAS
14 CLEAR 2004 TO 2010, THAT THEY WERE SCANNING FOR E-MAIL TO SERVE
15 ADS.

16 AFTER THAT IT BECAME CLEAR THAT THEY WERE CREATING
17 PROFILES OF PEOPLE FROM WHICH THEY COULD EXTRAPOLATE ADDITIONAL
18 ADVERTISEMENTS.

19 IN 2012 THERE WAS A WHOLE WRAP OF PUBLICITY EXPLAINING
20 THAT THE USE OF ONE SERVICE COULD BE IMPACTED BY ANOTHER WHEN
21 WE DID THIS UNIFORM PRIVACY POLICY CHANGE.

22 SO WHAT I'M SUGGESTING TO THE COURT IS, IT'S A QUESTION
23 OF WHETHER IN THE WORDS OF BERGER V. HOME DEPOT, THE
24 NINTH CIRCUIT CASE THAT CAME OUT VERY RECENTLY, THE QUESTION IS
25 WHETHER INFORMATION, THE TOTALITY OF THE INFORMATION MIXED,

1 NEGATES THE ALLEGED MISREPRESENTATION. THAT'S A QUESTION OF
2 FACT THAT IS HIGHLY INDIVIDUALIZED BASED ON THE BODY OF
3 INFORMATION.

4 AND THERE'S NO PROPOSITION IN THE LAW THAT SAYS THAT
5 GOOGLE HAS TO DISCLOSE IT IN A PARTICULAR WAY AND A PARTICULAR
6 TIME AND WE ARE ONLY LIMITED TO THAT.

7 THIS IS, AS YOU POINTED OUT, NOT A CONTRACT DISPUTE.
8 THIS IS A STATUTORY TORT WHERE THE DEFENSE IS CONSENT.

9 AND WHAT I'M SUGGESTING IS THAT THE PROBLEM HERE IS NOT
10 THE GRANULARITY OF THE DISCLOSURE OR HOW SPECIFIC IT WAS,
11 BECAUSE ON MOTION TO DISMISS WE WERE TRYING TO CONVINCING YOU AND
12 YOU DISAGREED THAT AT AN EXPRESS CONSENT LEVEL, WE HAD IT, AND
13 YOU SAID I DON'T THINK YOU DO.

14 NOW THIS IS AN IMPLIED CONSENT ARENA, THEY AGREE THAT
15 IMPLIED CONSENT CONTAINS, THEY SAY THAT IN THEIR PAPERS. SO
16 MEDINA SAYS THAT, THE NINTH CIRCUIT.

17 SO THE QUESTION NOW IS, WHAT IS THE TOTAL MIX OF
18 INFORMATION THAT THE DEFENDANT HAS A RIGHT TO PROFFER TO YOU ON
19 EACH INDIVIDUAL CLAIM TO SHOW THAT THAT PERSON HAD ACTUAL
20 KNOWLEDGE AND THEREFORE ACTED WITH KNOWLEDGE OF THE SCANNING
21 AND THAT PERSON DIDN'T.

22 AND THAT'S THE PROBLEM. WE CAN'T DIFFERENTIATE THE TWO
23 FOR CLASS CERTIFICATION PROCESSES. AND THAT'S WHERE WE'RE --
24 MISCOMMUNICATION.

25 HE WANTS US TO HAVE AN ENCYCLOPEDIA OF DISCLOSURE. SO

1 EVERY TIME WE CHANGE A MOTHERBOARD, HE WANTS US TO DISCLOSE IT.
2 BY THE WAY, NOW YOU'VE CHANGED THE NAME FROM CONTENT ONEBOX TO
3 FLAG BOX TO MEDALLION BOX, TO -- IT'S NOW A SERVER -- THERE'S
4 NO PROPOSITION IN THE LAW THAT SAYS I HAVE TO GIVE THAT KIND OF
5 GRANULARITY.

6 IT'S A QUESTION OF FACT, FRANKLY, AS TO WHETHER SOMEONE
7 ACTUALLY KNEW. THAT'S WHAT IT IS. THAT'S THE PROBLEM WITH THE
8 (B) (3) TEST HERE IS THAT IT'S SO INDIVIDUALIZED, HOW WOULD WE
9 EVER TEASE OUT OF THE CLASS PEOPLE THAT ACTUALLY KNEW.

10 IF WE ARE TRYING THE CASE, YOUR HONOR, HOW ARE WE GOING
11 TO TRY IT? THEY ARE GOING TO PUT ON 50 PEOPLE THAT SAID, I
12 HAVE NO IDEA. I WILL FIND 50 PEOPLE THAT SAID I HAVE EVERY
13 IDEA. I WAS THE GUY WHO WROTE TERMS OF SERVICE OVER AT EBAY, I
14 TOTALLY GOT IT.

15 SO WE PUT 50 DIFFERENT PEOPLE IN FRONT OF THE JURY AND
16 THE JURY SAYS, I TRUST THESE 50 AND I DON'T TRUST THOSE 50.
17 THAT'S A TRIAL BY FORMULA.

18 WAL-MART SAYS YOU CAN'T DO THAT. THAT ABRIDGES MY
19 CLIENT'S RIGHT TO MUSTER A STATUTORY DEFENSE TO EACH AND EVERY
20 CLAIM.

21 THAT'S THE PROBLEM WITH THIS CASE.

22 MR. ROMMEL: YOUR HONOR, IF I MAY.

23 THE COURT: OKAY.

24 MR. ROMMEL: THE STATUTE DOES SAY SUCH INTERCEPTION.
25 THE CASE LAW DOES REQUIRE THE DISCLOSURE OF AN INTERCEPTION.

1 AND THE MEDINA CASE SAYS THE RISK OF WIRE TAPPING.

2 IF YOU ARE NOT TALKING ABOUT SOMETHING THAT'S OCCURRING
3 DURING THE INCEPTION OF WIRE TAPPING, YOU ARE NOT DISCLOSING
4 AND NO THIRD PARTY COULD PROVIDE INFORMATION ABOUT SOMETHING
5 YOU ARE NOT DISCLOSING.

6 IF YOU LOOK AT LECKLER V. CASHCALL CASE, IT'S THE
7 NORTHERN DISTRICT OF CALIFORNIA CASE, AND SPECIFICALLY ON PAGE
8 1030, THIS WAS A TCPA CASE, BUT THEY MAKE THIS DISTINCTION
9 WHICH IS IMPORTANT IN THIS CASE.

10 THUS, IN ORDER FOR THE EXEMPTION TO APPLY, THE CALLED
11 PARTY MUST EXPRESSLY CONSENT NOT ONLY TO RECEIVE TELEPHONE
12 CALLS, BUT TO RECEIVING CALLS MADE BY A CALLER OR AUTO DIALER
13 OR A PRERECORDED MESSAGE.

14 SO THE LAW THERE PRESCRIBES AUDIO DIALING OR PRERECORDED
15 MESSAGES BEING DONE.

16 SO THE LECKLER CASE SAYS WAS, IT'S NOT ENOUGH THAT THE
17 PERSON KNEW ABOUT, GAVE INFORMATION WHERE THE COMPANY COULD
18 CALL IT, THEY HAVE TO CONSENT TO ESSENTIALLY, I WOULD ARGUE IN
19 THIS CASE, THE INTERCEPTION.

20 SO IT'S NOT ENOUGH THAT GOOGLE HAS PROVIDED INFORMATION
21 ABOUT ITS SCANNING PRACTICES INVOLVING CONTENT OF THE E-MAIL
22 WHEN IT'S NOT IN TRANSMISSION.

23 IT'S NOT ENOUGH THAT GOOGLE GETS TO TRANSPOSE
24 THIRD-PARTY'S ASSUMPTION ABOUT WHAT OCCURS IN STORAGE OR WHAT
25 OCCURS AFTER TRANSMISSION. AND TRANSPOSE THAT CONSENT TO AN

1 INTERCEPTION, BECAUSE THAT'S NOT DISCLOSED IN THE INTERCEPTION.

2 SUCH INTERCEPTION IS WHAT 252 (D) SAYS. IT'S NOT
3 INTERCEPTION IF IT'S NOT OCCURRING IN THESE OTHER PLACES.

4 SO WHEN WE LOOK AT THESE DISTINCTIONS, WE ARE NOT ASKING
5 GOOGLE TO PUT INTO THE NEW YORK TIMES WHAT CONTENT ONEBOX DOES.
6 BUT WE ARE ASKING GOOGLE OR WE ARE ASKING THE COURT TO REQUIRE
7 GOOGLE AS A MATTER OF LAW TO SAY, IF YOU ARE GOING TO SAY THAT
8 SOMEBODY CONSENTS, SHOW ME ONE DISCLOSURE THAT'S APPLICABLE TO
9 THE PROPRIETARY INFORMATION OF CONTENT ONEBOX WHICH YOU'VE KEPT
10 UNDER SEAL.

11 THEY CAN'T EVEN ALLOW IT TO BE SEEN IN THE FILINGS.
12 EVERY TURN, DELIVERY PROCESSING IS BLACKED OUT IN THIS CASE.
13 CONTENT ONEBOX, IN ASSOCIATION WITH DELIVERY PROCESSING,
14 BLACKED OUT IN THIS CASE.

15 IF IT'S KNOWN, IF THAT INTERCEPTION IS KNOWN, NOT EVEN
16 WHAT CONTENT ONEBOX DOES, BUT THE FACT THAT IT'S DOING
17 SOMETHING THAT WE CLAIM IS EXTRACTING CONTENT IN THE DELIVERY
18 PROCESS, IF THAT'S KNOWN BY GOOGLE AND THE WORLD AND THIRD
19 PARTIES, WHY IS IT UNDER SEAL? WHY IS IT PROPRIETARY?

20 AND USING THE QUOTE OF HAN LEE, SECRET AND KEPT UNKNOWN
21 TO COMPETITORS, THE GMAIL USERS AND THE PUBLIC. BECAUSE IT IS
22 AN ADVANTAGE FOR US TO HAVE THAT IN THE DELIVERY PROCESS.

23 YOU CANNOT ARGUE IN THIS CASE THAT THE WORLD KNOWS ABOUT
24 YOU INTERCEPTING SOMETHING AND AT THE SAME TIME HAVE DELIVERY
25 PROCESS AND CONTENT ONEBOX BLACKED OUT IN ALL THE PUBLIC

1 FILINGS. YOU CANNOT DO IT.

2 MR. RHODES: YOUR HONOR, I HAVE TO RESPOND TO THAT.

3 I WANT TO BE CLEAR TO THE COURT. WE CAME HERE TODAY AND WE
4 UNBURDENED THE COURT OF ANY SEALING EFFORT. WE AGREED THAT ALL
5 OF THE MATERIAL THAT HAD BEEN PREVIOUSLY DESIGNATED
6 CONFIDENTIAL, COULD BE AIRED IN THE PUBLIC COURTROOM SO THAT
7 THOSE FOLKS BACK THERE IN THE MEDIA COULD SEE THAT GOOGLE HAS
8 NOTHING TO HIDE HERE.

9 AND I RESENT THE IMPLICATION THAT MY CLIENT IS TRYING TO
10 PLAY FAST AND LOOSE WITH THE SEALING RECORD. I DON'T THINK
11 THAT'S BEEN THE CASE.

12 MR. ROMMEL: I DIDN'T SAY THEY INAPPROPRIATELY SEALED
13 ANYTHING, BUT YOU CAN'T STEAL SECOND WITH YOUR FOOT ON FIRST BY
14 SAYING, EVERYBODY KNOWS WHAT WE DO, BUT YET THIS IS PROPRIETARY
15 AND WE KEEP IT UNDER SEAL. YOU CAN'T DO THAT.

16 AND THAT'S WHAT WE ARE TALKING ABOUT HERE. MR. RHODES AND
17 GOOGLE WANTS TO SAY WE HAVE ALL THIS INFORMATION OUT THERE
18 ABOUT THESE SCANNING PROCESSES OF YOUR E-MAIL, BUT THAT'S NOT
19 INTERCEPTION. IT DOESN'T DISCLOSE INTERCEPTION. IT'S TALKING
20 ABOUT A COMPLETELY DIFFERENT PROCESS.

21 YOU CAN'T GET CONSENT ABOUT A PROCESS. IT'S EXACTLY
22 THIS. WE HAVE SHOWN THE COURT, WE HAVE SHOWN THE COURT THIS
23 EVIDENCE WHERE GOOGLE SAYS, WHEN WE DO SPAM AND VIRUS
24 FILTRATION THE GMAIL FILTERING SYSTEM ALSO SCANS FOR
25 ADVERTISEMENT.

1 WE KNOW THAT'S COMPLETELY FALSE. WE KNOW THE SPAM
2 CLASSIFICATION SERVER IS COMPLETELY SEPARATE FROM THE CAT II
3 MIXER.

4 WE KNOW THAT THAT THE CAT II MIXER, THE FILTERING DEVICE
5 IN 2008 THEY ARE TALKING ABOUT, IS NOT EVEN CONSIDERED A PIECE
6 OF GMAIL INFRASTRUCTURE. COMPLETELY FALSE STATEMENT.

7 IT'S NOT TALKING ABOUT AN INTERCEPTION BECAUSE IT'S NOT
8 IN THE DELIVERY PROCESS.

9 BUT SO WE CAN'T -- THAT'S THE DANGER OF MR. RHODES
10 ARGUMENT AND GOOGLE'S ARGUMENT IS, IF WE TELL YOU ABOUT THIS
11 PROCESS THEN YOU CAN APPLY IT ANYWHERE WITHIN THE FORMULA.

12 WELL, THAT'S NOT TRUE. THAT'S WHY WE HAVE TWO DIFFERENT
13 STATUTES, THE STORED COMMUNICATIONS ACT STATUTE AND A WIRE
14 TAPPING STATUTE.

15 AND AGAIN, THEIR DISCLOSURES ABOUT CAT II, ALTHOUGH WE
16 STILL BELIEVE THEY ARE FALSE AND MISLEADING AND OMIT MATERIAL
17 INFORMATION, MAY BE SUFFICIENT TO AVOID A STORED COMMUNICATIONS
18 ACT CLAIM, BUT THEY HAVE ABSOLUTELY NO RELEVANCE TO A WIRE TAP
19 CLAIM, ZERO.

20 THE COURT: ALL RIGHT.

21 BUT I DON'T EVEN THINK YOU ARE ALLEGING ANY CLAIM WITH
22 REGARDS TO THE CAT II MIXER ANY WAYS.

23 MR. ROMMEL: NO, YOUR HONOR.

24 THE COURT: ANYWAY. ALL RIGHT.

25 THANK YOU ALL VERY MUCH.

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MR. RHODES: THANK YOU, YOUR HONOR.

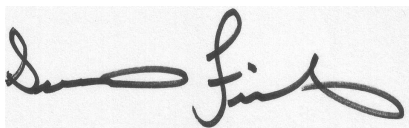
(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

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

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



SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 3/5/14