NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM BACKHAUT; KENNETH MORRIS, individually and on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. APPLE INC., Defendant-Appellee.	No. 15-17523 D.C. No. 5:14-cv-02285-LHK MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

Argued and Submitted November 15, 2017
San Francisco, California

Before: GOULD and MURGUIA, Circuit Judges, and GRITZNER,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

Apple, Inc. ("Apple") provides a text messaging service known as "iMessage." [1] This service routes text messages between Apple devices through Apple's servers free of charge, rather than using the traditional Short Message Service or Multimedia Messaging Service ("SMS/MMS") protocols, which are routed through a user's wireless carrier and may have fees attached to their use. However, iMessage cannot be used to transmit messages to non-Apple devices. Apple's method of determining whether someone has stopped using an Apple device has not proved infallible, so Apple has sometimes tried to deliver a text message via iMessage to a person who had transferred his or her phone number from an Apple device to a non-Apple device. When this has happened, the text message could not be delivered and was instead stored on Apple's servers for thirty days while Apple, under its routine and automatic procedures, tried to transmit the message via iMessage with no success because the person messaged was no longer using an Apple product.

Plaintiffs Adam Backhaut and Kenneth Morris were sent text messages by users of Apple devices after Plaintiffs had switched to using non-Apple phones. Apple routed these messages via iMessage, and as a consequence Plaintiffs never received those messages. Plaintiffs brought suit on behalf of themselves and a

[1] To the extent that this disposition references information that has been filed under seal, we hereby unseal that information for purposes of this disposition.

putative class under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Wiretap Act"), 18 U.S.C. § 2510 *et seq.*, and state law. The district court denied class certification and granted summary judgment to Apple. Plaintiffs appeal both rulings, arguing that the district court erred in granting summary judgment on the Wiretap Act claims and that class certification was improperly denied.

The Wiretap Act imposes liability on any person, with some exceptions, who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(a).

Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002), is instructive here. There we were confronted with circumstances where the plaintiff's employer had logged on to the plaintiff's website, on which the plaintiff posted bulletins critical of his employer. *Id.* at 872–73. We there concluded, based on statutory language and legislative history, that Congress had intended only for electronic communications that were in transmission to be covered by the Wiretap Act. *Id.* at 878–79. On this basis we squarely held: "for a website such as Konop's to be 'intercepted' in violation of the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage." *Id.* at 878. We held that there was no interception there, as Konop's employer had accessed his website

while it was in storage. *Id.* at 879.

Similarly, here there was no interception. The initial misclassification of a text message to be sent via iMessage, when that was no longer possible, to a person who was no longer using an Apple device was not an interception within the meaning of the Wiretap Act, as the district court reasoned. The misclassification occurred when the recipient's phone number was first entered in the "To" field by the user of the Apple product trying to send a message. This misclassification occurred before any message was sent, not "during transmission" of a message. *See id.* at 878. Indeed, a user may enter a number and then change his or her mind about sending a message at all. Further, a user can override the classification of a text message as an iMessage by manually directing the user's phone or other Apple product to send the text via SMS/MMS instead.

Nor was there an interception simply because a message was initially misclassified and sent via iMessage. Apple gave users the option to elect to have an iMessage text sent via SMS/MMS if the text was not delivered after five minutes. If a user selected that option, then a message initially misclassified as an iMessage would still successfully be delivered, and Plaintiffs have conceded in their briefing that in those circumstances there would be no interception.

Finally, we reject the argument that an interception occurred when a message became trapped in Apple's iMessage servers. At that point, the message

was no longer in transmission—it was in temporary storage—and so under *Konop* could not be "intercepted" within the meaning of the Wiretap Act. *See id.* at 878–79. Absent any interception, there is no Wiretap Act liability. *See* 18 U.S.C. § 2511(a). We hold that the district court properly granted summary judgment on the Wiretap Act claims.

Because we hold that summary judgment was properly granted on this theory, we need not reach the questions of whether the summary judgment should be sustained because Apple's conduct occurred in the ordinary course of business or because Apple only had encrypted versions of the text messages. Where summary judgment is properly given against the claims of the named plaintiffs, there can be no class action, so we also need not reach the question of whether the district court properly denied class certification. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
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* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk