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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

In re Apple iPhone 3G Products Liability Litigation	CASE NO. M 09-02045 JW
	CLASS ACTION
THIS MATTER PERTAINS TO:	**JOINT CASE MANAGEMENT CONFERENCE STATEMENT**
ALL ACTIONS.	Date: June 21, 2010 Time: 10:00 a.m. Courtroom 8, 4th Floor Hon. James Ware

Pursuant to this Court's December 2, 2009 Scheduling Order (Docket No. 58), the parties hereby file their Joint Case Management Conference Statement in advance of the Case Management Conference scheduled for June 21, 2010. In accordance with Civil Local Rule 16-10(d), this joint statement reports progress or changes since the joint statement filed with the Court on November 25, 2009 (Docket No. 56)[1] and makes proposals for future case management.

1. Joint Updated Procedural History:

This multi-district litigation ("MDL") includes twelve class action lawsuits filed in various jurisdictions around the country and transferred to this Court against Apple Inc. ("Apple") and/or AT&T Mobility LLC ("ATTM") arising out of the purchase and sale of the iPhone 3G. The MDL Panel transferred certain related actions to the Northern District of California that had not already been either filed in or voluntarily transferred to this Court in an order dated July 2, 2009.[2]

The Court held an initial case management conference on September 21, 2009. On September 22, 2009, the Court set a schedule for Plaintiffs to file a master consolidated complaint and defendants to file related motions. (September 22, 2009 Order, Docket No. 16.) On October 21, 2009, Plaintiffs filed a Master Administrative Consolidated Amended Complaint ("Master Complaint"). On December 4, 2009, Apple and ATTM moved to dismiss the Master Complaint under Federal Rules 12(b)(6) and 9(b). ATTM also moved to compel arbitration of Plaintiffs' claims. On April 2, 2010, this Court dismissed the claims asserted in the Master Complaint with prejudice on the ground that such claims were preempted by the Federal Communications Act ("FCA"). (Docket No. 184.) The Court found that "leave to amend to assert claims under the FCA is warranted" (*id.* at 15) and granted leave to amend "consistent with the terms of this Order"

[1] The parties also previously submitted a joint case management conference statement dated September 11, 2009 (Docket No. 11).

[2] Counsel for plaintiffs in all of the related actions transferred to this Court pursuant to that MDL order agreed on the record during the September 21, 2009 status conference held by this Court that such actions should remain before this Court for all purposes. At the status conference, Apple and ATTM orally objected to the procedure and the Court set a date for Apple and ATTM to file written objections. Pursuant to that Order, on October 5, 2009, Apple and ATTM filed a joint statement objecting to the proposed procedure as contrary to the United States Supreme Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Apple and ATTM declined to waive their rights under *Lexecon*. (Docket No. 42.)

(*id*. at 16). Plaintiffs requested leave to file a motion to seek reconsideration of the Court's April 2, 2010 order, which was denied. (May 25, 2010 Order, Docket No. 198).

On May 7, 2010, Plaintiffs filed a Master Administrative Consolidated Second Amended Complaint ("Second Master Complaint"). (Docket No. 190.) Apple and ATTM intend to file motions in response to the Second Master Complaint. The Court has set a June 24, 2010 deadline for Apple and ATTM to file their anticipated motions directed at the Second Master Complaint. (May 25, 2010 Order, Docket No. 198.)

2. Proposed Schedule For Responsive Motions:

a. Plaintiffs' Proposed Schedule: Plaintiffs propose the following schedule for briefing and hearing defendants' motions filed in response to the Second Master Complaint:

Events	Proposed Dates
Responses to Second Master Complaint to be filed	**June 24, 2010*** [*set by this Court's May 25, 2010 Order]
Opposition to motions to be filed and served	**July 30, 2010**
Replies for motions to be filed and served	**August 27, 2010**
Hearing on motions	**September 20, 2010**

b. Defendants' Proposed Schedule: ATTM will file a motion to stay this action pending the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 2010 U.S. LEXIS 4309 (U.S. May 24, 2010), in which the United States Supreme Court recently granted *certiorari* to review the Ninth Circuit's decision in *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), involving an ATTM arbitration agreement that is identical or materially

equivalent to the arbitration provisions at issue in this case. In *Concepcion*, the Supreme Court is poised to determine whether the Federal Arbitration Act preempts states from refusing to enforce arbitration agreements on the ground that the arbitration agreement does not authorize the use of class-action procedures. ATTM's position is that the Court should decide ATTM's motion for stay before requiring briefing and argument on defendants' other responsive motions. Accordingly, ATTM proposes that the motion for stay be briefed and argued on the following accelerated schedule:

Event	Proposed Dates
ATTM's Motion For Stay to be filed	**June 21, 2010**
Opposition to Motion For Stay to be filed and served	**June 29, 2010**
Reply for Motion For Stay to be filed and served	**July 2, 2010**
Hearing on Motion For Stay	**July 19, 2010**

Apple contends that the stay of proceedings should extend to Apple as well as ATTM. As the Court has previously ruled, "the claims against Apple are inextricably tied to the claims alleged against defendant ATTM" and the Court is "unable to reasonably separate Plaintiffs' claims that pertain only to defendant Apple." (April 2, 2010 Order, at 14; Docket No. 184.) The Court concluded that the case cannot proceed against Apple alone. For the same reasons, if the case is stayed against ATTM, it should also be stayed as to Apple.

In addition to ATTM's motion for stay, on June 24, 2010, both ATTM and Apple will file motions to dismiss, and ATTM will file motions to compel arbitration. Defendants' position is

that the Court should defer further briefing (i.e., filing of opposition and reply briefs) and argument on the motions to dismiss and to compel arbitration until after ruling on ATTM's motion for stay. Should the Court decline to defer briefing and argument on the motions to dismiss and compel arbitration, however, defendants will agree to plaintiffs' proposed briefing and hearing schedule set forth in Paragraph 2.a above.

3. Amended Case Management Deadlines:

a. Plaintiffs' Position:

Plaintiffs' position is that the Court should set a new case management schedule immediately. A delay of no more than six months in the existing deadlines is appropriate. There is no reason to delay further the progress of this case.

Any motions defendants desire to bring directed at the Second Master Complaint should be briefed in accordance with the schedule set forth above, just as this Court handled the previous round of motions. As defendant ATTM recognized in its previous motion to compel directed at the claims brought under California law (Dkt. No. 101 at 6; Dkt. No. 132) the current state of the law—which has been the law in California for years—is that under California law such clauses are unconscionable. As to the other states at issue, ATTM has asserted such clauses are enforceable. Whether the clause at issue is "identical" or not, or whether the issues that may be decided in *Concepcion* could affect the current state of the law on this point in California or other states, is beyond the scope of this Case Management Conference report. That ATTM and Apple both could benefit from such a stay, when the issue only impacts ATTM, would make such a delay even more egregious. Apple has not claimed the benefit of such a clause.

This is a case involves rapidly evolving technology. Indeed, Apple recently announced that its "4G" iPhone, the "iPhone4," will soon be released. If ATTM has its way, this matter would not complete motion briefing until January 2011 at the earliest, and possibly as late as September 2011. Such seriatim scheduling would place this case on hold for another year, meaning trial would not take place until August 2012 at the earliest for a series of action initially filed in August 2008. Thus, the delay requested by ATTM would materially prejudice plaintiffs,

who as a result of defendants' refusal to participate in discovery, despite no stay order being in place (see discussion below) have already been delayed in having their claims resolved.

b. Defendants' Position:

Defendants' position is that the Court should vacate the dates set in its December 2, 2009 Scheduling Order (Docket No. 58) and defer setting a new case management schedule until after it rules on ATTM's motion for stay. Defendants propose that the Court set a further Case Management Conference following the hearing on ATTM's motion for stay to further consider the case management schedule. Should the Court find it necessary to set a case management schedule at this time, defendants agree with plaintiffs that the case management dates originally set by the Court should be adjusted by approximately six months in light of the status of the litigation as set forth in Section 3.c below. Once the Court rules on ATTM's motion for stay, these dates can be vacated or adjusted as appropriate.

c. Proposed Amended Schedule:

Subject to their respective positions set forth above, the parties agree to the following schedule amending the December 2, 2009 Scheduling Order (Docket No. 58):

Events	Proposed Amended Dates	Original Dates
Interim Case Management Conference	**January 24, 2011**	June 21, 2010
Interim Joint Case Management Statement	**January 14, 2011**	June 11, 2010
Close of All Discovery	**September 12, 2011**	February 28, 2011
Hearing on Plaintiffs' anticipated Motion for Class Certification	**August 15, 2011**	February 7, 2011

Last Date for Hearing Dispositive Motions (60 days after the Close of All Discovery)	**November 14, 2011**	May 2, 2011
Preliminary Pretrial Conference Statements (Due 10 days before conference)	**August 12, 2011**	January 24, 2011
Preliminary Pretrial Conference (30 days before the Close of All Discovery)	**August 22, 2011**	January 14, 2011

4. Timing of Discovery:

The parties have a dispute regarding the timing of discovery. The parties' positions are set forth separately below.

a. Plaintiffs' Statement Regarding Timing of Discovery

As noted above, on November 25, 2009, the parties filed their Joint Case Management Conference Statement in preparation for the December 7, 2009 conference with the Court (Dkt. No. 56). In that Joint Statement the parties stated their respective positions on the timing of discovery. While the parties disagreed when Initial Rule 26(a) disclosures would be exchanged and when fact discovery would commence, even under Defendants' proposal such discovery was to begin in March 2010. Critically, defendants did *not* request discovery be stayed until after the Court ruled on their motions, but only until after the Court held a hearing on their outstanding motions. Thus, the parties agreed that commencement of discovery was not contingent upon the pleadings being at issue.

In response to that joint statement, on December 2, 2009 the Court issued a Scheduling Order (Dkt. No 58) stating that the parties should proceed with their Joint Discovery Plan that agreed discovery should go forward (at least as of March 1, 2010), set deadlines for expert witness disclosures to take place in December 2010 and a preliminary pre-trial conference for January 24, 2001 (with statements due 10 days beforehand), set the class certification hearing for February 7,

2011, and set a discovery cut-off date of February 28, 2011. Based upon the Order of the Court, on December 3, 2009 Plaintiffs thereafter served discovery, a proposed ESI protocol and a proposed protective order for commercially sensitive trade secret information, and at defendants' request provided them an extension of time to respond to that discovery until the protocol and protective order could be resolved.

The Court held oral argument on Defendants' pending motions on March 1, 2010, focusing on whether the claims at issue were preempted by the FCA, as well as on ATTM's motions to enforce its anti-class action waiver provision. After that argument, even though counsel had previously indicated they would provide comments on the draft protocol and protective order (which they claimed was a pre-condition to their responding to discovery and producing responsive information), ATTM and Apple then subsequently took the position neither would respond to the proposed ESI protocol, the draft protective order, or the outstanding discovery until further the Court issued a further order – even though no stay was in place, and even though they did not ask the Court to vacate its prior December 2009 order that permitted discovery to proceed.

On April 2, 2010, this Court dismissed the state law claims under the Master Complaint on the ground such claims are preempted by the FCA, but with leave to amend. Plaintiffs filed the Second Master Complaint on May 7, 2010. Plaintiffs gave defendants, at their request, additional time to respond to the outstanding discovery, and after further meet and confer discussions agreed to present the issue of the timing of providing responses to the outstanding discovery to Magistrate Judge Trumbull, as part of a scheduling conference to be set in early June. Now defendants have refused even to participate in that conference until the Court has addressed this issue, further delaying the initiation of discovery or even the discussion of a discovery plan.[3]

Defendants have informed plaintiffs that they now intend to move to dismiss the Second Master Complaint under Rules 12(b)(6) and 9(b), and that ATTM intends to move, or ask the

[3] The parties attempted to reach agreement on a stipulation to set an initial scheduling conference before Magistrate Judge Trumbull on June 15, 2010. When they could not reach agreement, the earliest available date for such a conference was after this Conference.

Court to rule on, it motion compel enforcement of its class action waiver provision (presumably including the motion it concedes must be denied under California law). Defendants have also claimed that the previous discovery served is no longer relevant in light of the allegations and claims in the Second Master Complaint. Plaintiffs will provide that discovery to the Court at the conference if necessary, but has reviewed that discovery to see if any specific requests are no longer relevant in light of the allegations of the Second Master Complaint. Plaintiffs believe each outstanding request satisfies the requirements of Fed. R. Civ. Proc. 26. Significantly, defendants have failed to identify any specific request that is no longer "relevant".

Defendants have taken the position that they will not respond to outstanding discovery until those motions are decided, even though they (1) have never requested a discovery stay despite the Court's prior order permitting discovery to proceed, (2) have not filed a motion requesting a discovery stay, and (3) specifically agreed – knowing they were filing motions that presumably they believed would be granted at least in part—that discovery should start at least by the date of the March 1, 2010 hearing on their previous motions. Plaintiffs believe defendants' unilateral refusal to participate in any discovery is directly opposed to and in violation of this Court's December 2 Order as well as their own proposed discovery schedule. If Defendants' refusal to respond to discovery is extended until the Fall of this year, the case would have not progressed at all for the better part of 2010. In addition, it would be very difficult, if not impossible, to keep even the revised schedule as set forth above if discovery were stayed.

While this Court previously set what plaintiffs believed at the time were realistic dates to complete discovery and prepare this case for class certification and trial, the Plaintiffs have been stymied for several months in getting ATTM and Apple to provide any response to discovery that was propounded in December 2009. Since even under defendants' proposed discovery schedule back in November 2009 such discovery was to begin in the beginning of March 2010, plaintiffs believe that adjusting the current pre-trial schedule by five months so that defendants will provide substantive responses to the outstanding discovery by the beginning of August 2010 would result in plaintiffs not being prejudiced by defendants' delay. The Plaintiffs, therefore, request the Court simply make clear what the record should already make clear -- that there is no discovery stay and

discovery should proceed. This will permit the parties to create immediately an efficient plan for taking discovery, with input from Magistrate Judge Trumbull as necessary if further disputes arise.

b. Defendants' Statement Regarding Timing of Discovery

Background

Plaintiffs' arguments regarding the timing of discovery ignore a critical intervening development: their complaint was dismissed with prejudice in its entirety. The Court granted plaintiffs leave to amend to *attempt* to allege an FCA claim, but the Court reached no conclusion as to whether that attempt would succeed. Rather, the Court stated that it discerned a "*potential* basis for asserting claims under the FCA" (April 2, 2010 Order at 15, Docket No. 184 (emphasis added)). Defendants do not believe plaintiffs can successfully state an FCA claim, nor a claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"). The discovery plaintiffs seek to pursue was directed to claims that have been dismissed with prejudice. Given the Court's preemption holding and the serious legal obstacles that defendants believe bar plaintiffs' new claims, the Court should not open the doors to expensive and burdensome discovery until and unless plaintiffs are able to state a viable claim.

Moreover, plaintiffs' suggestion that defendants have "unilateral[ly] refused to participate in discovery" ignores what really happened. Prior to the March 1, 2010 hearing and the Court's April 2, 2010 Order, the parties met and conferred regarding various aspects of discovery. The plaintiffs did not move to compel or suggest that they would move to compel. After the hearing and subsequent dismissal, defendants did—and do—contend that discovery should not go forward. There is nothing remarkable in defendants' position that dismissal properly precludes discovery.[4]

Defendants' Position

[4] Plaintiffs' recitation of events regarding a possible hearing before Magistrate Trumbull is misleading. Once this Court denied reconsideration, the parties agreed that the issue of how this case, including discovery, should proceed at this time in light of the status of the pleadings was more properly addressed to the Court at the June 21 case management conference.

Consistent with defendants' position that the Court should decide ATTM's motion for stay before requiring briefing and argument on defendants' other responsive motions, defendants believe that discovery should not commence until any stay is lifted and the pleadings are settled following the Court's consideration of defendants' motions to dismiss and to compel arbitration.

As with plaintiffs' prior Master Complaint, the Second Master Complaint should be dismissed with prejudice. The Second Master Complaint realleges the fourteen previously dismissed causes of action. Those claims are foreclosed by this Court's orders dismissing those claims and denying plaintiffs' request to file a motion for reconsideration. The Second Master Complaint also alleges two new federal causes of action, including alleged violations of the FCA and the RICO. The Court did not grant plaintiffs leave to allege a RICO claim.

Plaintiffs' FCA and RICO claims face serious legal obstacles that will be set forth in Apple's and ATTM's motions to dismiss. ATTM will also seek to enforce its right to arbitrate plaintiffs' claims. To effectuate the strong federal policy favoring the enforcement of arbitration agreements, defendants are generally not required to litigate the merits of the plaintiffs' claims during the pendency of a motion to compel arbitration. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999). Requiring a defendant to respond to merits discovery in the face of a motion to compel arbitration would subject that defendant to the "very complexities, inconveniences[,] and expenses of litigation that the [parties] determined to avoid [by agreeing to arbitrate]." *Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649-50 (11th Cir. 1988).

Defendants should not be required to expend resources on discovery before plaintiffs have established that they can state a claim that is not subject to arbitration and that withstands dismissal. Where, as here, there is an immediate and clear possibility that defendants are likely to prevail on a motion to dismiss, courts have consistently declined to unlock the doors to expensive and burdensome discovery. *See Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1950 (2009) (federal pleading standards do "not unlock the doors of discovery for a plaintiff armed with

nothing more than conclusions"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557-59 (2007).[5] As a result, Apple and ATTM propose that discovery commence only after: (1) any stay ordered by the Court has been lifted; and then (2) after the Court determines which claims, if any, survive motions to dismiss and ATTM's motion to compel arbitration. At that time, the parties will be in a better position to tailor discovery to the remaining claims, if any.

5. Other Matters:

In its Order setting this Conference the Court asked the parties to update it on the status of any settlement negotiations. At this time no such discussions have taken place, and no such discussions are contemplated or scheduled at this time. Plaintiffs remain willing to participate in such discussions. Defendants believe that any such discussion would be premature at this time.

DATED: June 11, 2010

Respectfully Submitted,

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[5] *See also, e.g, Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002); *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987); *Hall v. Tilton*, No. C 07-3233 RMW, 2010 U.S. Dist. LEXIS 11162, at *3-4 (N.D. Cal. Feb. 9, 2010).

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I, Penelope A. Preovolos, am the ECF user whose ID and password are being used to file this Joint Motion and accompanying papers. In compliance with General Order 45, section X.B., I hereby attest that I have on file the concurrences for any signatures indicated by a "conformed" signature (/s/) within this e-filed document.

By: /s/ Penelope A. Preovolos
Penelope A. Preovolos

CERTIFICATE OF SERVICE BY MAIL
(Fed. R. Civ. Proc. rule 5(b))

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482; I am not a party to the within cause; I am over the age of eighteen years. The documents described herein will be deposited with the United States Postal Service on the date listed below with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

JOINT CASE MANAGEMENT CONFERENCE STATEMENT

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I declare under penalty of perjury that the above is true and correct.

Executed at San Francisco, California, this 11th day of June, 2010.

Carol J. Peplinski
(typed)

/s/ Carol J. Peplinski
(signature)

I, Penelope A. Preovolos, am the ECF User whose ID and password are being used to file this Certificate of Service. In compliance with General Order 45, section X.B., I hereby attest that Carol J. Peplinski has read and approved this Certificate of Service and consents to its filing in this action.

By: /s/ Penelope A. Preovolos
Penelope A. Preovolos