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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHARLENE GALLION, on behalf of herself and all others similarly situated,

Plaintiff,

v.

APPLE, INC., a California corporation, and DOES 1-100, inclusive,

Defendants.

No. CV 10-01610-RS

JOINT SUPPLEMENTAL CASE MANAGEMENT CONFERENCE STATEMENT

DATE: March 24, 2011
TIME: 10:00 a.m.
COURTROOM: 3

CHRISTOPHER CORSI, on behalf of himself and all others similarly situated,

Plaintiff,

v.

APPLE INC.,

Defendant.

No. CV 10-03316-RS

DANIEL CALIX, on behalf of himself and all others similarly situated,

Plaintiff,

v.

APPLE INC.,

Defendant.

No. CV 10-05895-RS

Hon. Richard Seeborg

Pursuant to Civil Local Rule 16-10(d), the parties respectfully submit this Joint Case Management Conference Statement.

I. PROCEDURAL STATUS

All currently-named parties have been served.

On December 30, 2010, the Court granted Plaintiffs' Motion for Order Appointing Interim Co-Lead Class Counsel (Docket No. 33). That motion was supported by all plaintiffs' counsel, including counsel in *Calix v. Apple, Inc.*, No. 10-cv-676 (M.D. La.). On January 14, 2011, the Court granted the parties' administrative motion to consider whether to relate *Calix* (Docket No. 37) (discussed below).

Since then, interim co-lead counsel ("lead counsel") convened a telephone conference among all Plaintiffs' counsel to discuss a request by counsel who filed the *Calix* action ("*Calix* counsel") that Fazio | Micheletti LLP support *Calix* counsel's application for *pro hac vice* admission. During that conference, lead counsel explained that it would not be necessary for *Calix* counsel to retain local counsel for purposes of filing their *pro hac vice* motions if all Plaintiffs agreed to formally consolidate the *Gallion, Corsi*, and *Calix* actions and file a single master complaint (the "Master Complaint"), which would include a single proposed nationwide class (and no separate Louisiana subclass). By the end of that discussion, *Calix* counsel agreed with lead counsel's proposal.

By March 11, it had become apparent that the Master Complaint would not be ready for filing before the March 24 case management conference ("CMC"). Accordingly, counsel for Plaintiff Gallion (Jeffrey Fazio) advised *Calix* counsel that, although Mr. Fazio could not agree to serve as local counsel for all purposes in the *Calix* action, *Calix* counsel could advise the Court that Mr. Fazio would serve as local counsel for the limited purpose of enabling *Calix* counsel to file their CMC statement and appear at the March 24 CMC while lead counsel were preparing the final draft of the Master Complaint.

Due to a misunderstanding on the part of *Calix* counsel, *Calix* counsel wrote to the Court three days later (on March 14) to request *pro hac vice* admission on the ground that "[l]ead counsel is unable to enroll as sponsoring attorney at this time." *See Calix* Docket No. 34. The

same day, the Court issued an order directing the parties to "meet and confer to determine if consolidation of the three actions is appropriate." *Calix* Docket No. 35. Lead counsel was unaware that *Calix* counsel had written to the Court.. Since *Calix* counsel's letter to the Court, lead counsel and *Calix* counsel have further discussed the logistics of court filings and appearances. *Calix* counsel have reconfirmed their support of lead counsel and the filing of a consolidated master complaint, which the parties anticipate filing within 60 days of the March 24 CMC (as discussed below).

After receiving the Court's March 14 Order concerning consolidation, counsel for Apple indicated to Plaintiffs' counsel that Apple also favors consolidation. By so indicating, Apple has not agreed that the inclusion of additional named plaintiffs or claims for relief is appropriate, and does not waive its right to challenge such amendments.

II. ANTICIPATED MOTIONS

Plaintiffs' Statement. Plaintiffs anticipate filing a motion for class certification as well as a motion for "partial" summary judgment. The timing of these motions depends on when Apple and third parties (*i.e.,* 3M Company ("3M"), AT&T Mobility, LLC ("AT&T"), and Squaretrade, Inc. ("Squaretrade")) produce certain documents and other information that the *Gallion* and *Corsi* Plaintiffs have sought through formal discovery requests. As discussed below, Plaintiffs have met with resistance to these requests and are now working on resolving the disputes that have arisen in their wake. Should Plaintiffs be unable to resolve those disputes, it will be necessary to move for an order compelling the production of the documents and information Plaintiffs seek.

Defendant's Statement. Defendant anticipates filing a motion for summary judgment. Defendant proposes that a class certification schedule be set at a future case management conference once discovery has been substantially completed.

III. AMENDMENT OF PLEADINGS

As discussed above, Plaintiffs anticipate that the parties will move to formally consolidate the *Gallion*, *Corsi*, and *Calix* actions and to file the Master Complaint described above. Plaintiffs also anticipate that the Master Complaint will include additional named

Plaintiffs and amendments of the allegations and claims for relief. At this juncture, Plaintiffs anticipate that they will be ready to seek formal consolidation of the three related actions and to file the Master Complaint within 60 days of the March 24 CMC.[1]

IV. STATUS OF DISCOVERY

A. Current Discovery

1. *Plaintiffs' Statement*

Initial Disclosures. Apple and Plaintiff Gallion exchanged initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) on July 23, 2010. Apple and Plaintiff Corsi exchanged initial disclosures on October 28, 2010.

Document Production. On June 25, 2010, Plaintiff Gallion served Apple with a First Request for Production of Documents.[2] On July 29, 2010, Apple served its written responses to the *Gallion* Plaintiff's first set of production requests. The parties' extensive meet-and-confer efforts are described in their prior status conference statement.

Since then, Apple has produced documents on the following dates: **September 27, 2010** (approximately 300 pages); **November 5, 2010** (approximately 2,200 pages); **December 3, 2010** (approximately 7,800 pages, more than 6,000 of which are illegible); **January 19, 2011** (the reproduction of 44 excel spreadsheets from the original production on December 3, 2010, along with approximately 9,000 additional pages, of which approximately 4,000 appear to be spreadsheets produced in a non-native, unreadable format); **February 11, 2011** (approximately 4,000 pages, of which more than 500 appear to be spreadsheets that were produced in a non-native, unreadable format); **March 4, 2011** (approximately 4,100 pages, of which a little over 1000 pages are duplicate email messages, or have been redacted for attorney client privilege, or

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[1] Plaintiffs reserve the right to seek leave to amend as may be warranted and permitted by law in the future.

[2] Plaintiff Corsi subsequently joined in Plaintiff Gallion's requests for production. Plaintiff Pennington (whose action is pending before the Santa Clara County Superior Court) served Apple with a set of document requests in March 2010. The parties in all pending actions have shared discovery with one another, and lead counsel have been actively pursuing coordinated discovery and litigation efforts with counsel for Plaintiff Pennington.

are illegible spreadsheets and pages containing no data). Plaintiffs are requesting that Apple reproduce the illegible spreadsheets in their native excel format, so that Plaintiffs can make use of these documents.

In its section on discovery (*i.e.,* Section IV.A.2., below), Apple states that "a list of keyword search terms was finalized on November 30, 2010 . . . ." Plaintiffs do not consider the list of keyword search terms to be final at all. To the contrary, when Plaintiffs' counsel expressed concern about Apple relying so heavily on search terms to locate responsive documents, Apple's counsel allayed those concerns by assuring Plaintiffs' counsel that the process would be collaborative, and that Plaintiffs' counsel would participate in the process of refining the list of search terms during the course of their review of the documents Apple produces. Moreover, when third parties (such as AT&T) produce the documents Plaintiffs seek from them, it is likely that those documents will also contain information that will require the list of search terms to be modified.

Such changes to the list of search terms is of critical importance, particularly in light of the extent to which Apple is relying on search terms to locate documents (as opposed to interviewing its personnel who were involved in matters that relate to the issues in this litigation and examining the documents they have maintained to determine whether they are responsive to Plaintiffs' requests). Modifying the list of search terms is also important because it will require Apple to run additional searches to determine whether responsive documents will be located as a result of the inclusion or modification of terms. Accordingly, Plaintiffs disagree that the parties have finalized that list. Rather, the process is ongoing and the list will not be final until Plaintiffs have completed their review of the documents produced and confirm that they do (or do not) intend to add to or otherwise modify the list of search terms.

Other Written Discovery. Apple has agreed to provide narrative responses to some of the requests included in Plaintiff Gallion First Request for Production, and to provide explanations in writing regarding issues raised by Apple's written responses to those document requests. Apple made that commitment in October 2010, and although it has provided some of the promised explanations, others are still outstanding. Apple has indicated that it is still in the process of

locating the information it needs to respond, but it has not yet given Plaintiffs a date by which they can expect to receive the written explanations regarding the rest of remaining outstanding issues. Plaintiffs and Apple are also in the midst of discussion regarding the adequacy of Apple's responses to Plaintiff Corsi's First Set of Interrogatories and First Request for Production (both of which were served on Apple on November 22, 2010). Depending on the outcome of those discussions, it is possible Plaintiffs will file a motion to compel

Subpoenas. In mid-November, Plaintiffs jointly served subpoenas *duces tecum* on AT&T, 3M, and Squaretrade, seeking information based largely on those companies' involvement in events related to the issues presented by this litigation. Since then, Plaintiffs have had inordinate difficulties securing compliance from these third parties, and have been actively meeting-and-conferring with their counsel in an effort to resolve disputes that have arisen over the information Plaintiffs seek from them. For example, after securing multiple extensions to respond to Plaintiffs' subpoena *duces tecum* and assuring Plaintiffs that it understood what Plaintiffs were seeking and that it would sign on to protective order in this case, AT&T's counsel advised Plaintiffs on the day of production that AT&T would not agree to sign the existing protective order after all, thus forcing Plaintiffs to engage in further, unexpected negotiations, which are still ongoing.

3M and Squaretrade have been equally resistant to discovery. For example, 3M's in-house counsel has insisted that Plaintiffs agree to pay it various production costs along with an hourly rate established by 3M for every hour spent by every person in counsel's office (a number 3M declines to estimate) in conjunction with 3Ms efforts to collect, organize, and produce documents, and has also refused to adopt the protective order this Court has issued in connection with this litigation. Similarly, Squaretrade—which has sold warranties for the iPhone and iPod touch devices at issue in this litigation and has issued formal reports as to the reliability of those devices, including their propensity to suffer "accidental water damage"—has taken the position that it need not produce the information Plaintiffs seek regarding Squaretrade's warranties and reliability reports because that information is "irrelevant."

Plaintiffs' efforts to resolve these disputes short of motion practice is ongoing, but if these companies remain intransigent, Plaintiffs will move for an order compelling each of these entities to produce the documents Plaintiffs seek in the near future. Such motions will be brought in the Courts from which the subpoenas issued. For example, because 3M is located in Minnesota, any motion that Plaintiffs file relating to the 3M subpoena must be filed in the District of Minnesota.

2. *Defendant's Statement*

Apple has followed the document collection and review process described to plaintiffs and agreed upon by the parties. Apple identified key personnel involved with the subject matter of the case and collected their documents, including their e-mail. Apple collected over 1 Terabyte of data as part of this collection, the bulk of which consisted of files and custodians' email accounts that all parties agreed should be searched using keywords. Since a list of keyword search terms was finalized on November 30, 2010, Apple has been diligently processing this custodian data and a team of attorneys has been reviewing the data as soon as it was processed. Apple has been producing responsive, non-privileged documents from this data on a rolling basis approximately every two to three weeks. Apple attempts to remove duplicate documents via an automated process and Apple has agreed to produce native versions of those specific documents identified by the Plaintiffs to date.

Since the last conference, Apple has completed the keyword processing of collected documents. As of March 16, 2011, Apple has reviewed just under half of the documents collected. Apple estimates that it will have finished reviewing, and produced any non-privileged responsive documents from, approximately 90-95% of the unreviewed data by mid-May 2011. Apple anticipates completing review and production from the remaining documents by the end of June 2011.

Plaintiff in the *Calix* action has served Apple with interrogatories and requests for production, but has agreed to defer that discovery. Apple will work to coordinate discovery in the *Calix* action with the discovery in the *Gallion* and *Corsi* actions, and has no objection to

providing plaintiff with copies of the written discovery and documents produced in those actions, subject to plaintiffs' agreement to a protective order.

B. Contemplated Discovery

Additional Discovery Contemplated by Plaintiffs. Plaintiffs anticipate propounding at least one more set of interrogatories and requests for admissions, and engaging in targeted follow-up discovery, including additional document discovery and depositions of specifically-identified Apple personnel and of persons that Apple designates as most knowledgeable witnesses under Rule 30(b)(6).

Discovery Contemplated by Defendant. Defendant anticipates propounding written discovery and taking the deposition of the named Plaintiffs.

IV. RELATED CASES

To date, the only other action that has been filed against Apple based on the same operative facts that underlie the three related federal actions (*i.e., Gallion, Corsi,* and *Calix*) is *Pennington v. Apple, Inc.*, No. 1-10-CV-162659 (Cal. Sup. Ct., Cty. of Santa Clara). Unlike the related actions, which seek to certify a nationwide class of consumers who own any iPhone or iPod touch device equipped with external LSIs, *Pennington* originally sought to certify a class of California consumers who own some, but not all, of the iPhones (and none of the iPods) at issue in the present case, and sought equitable relief, but not damages on behalf of the proposed class.

On January 28, 2011, the *Pennington* complaint was amended and is now much more similar to the complaints that have been filed in the related actions. More specifically, the First Amended Complaint in *Pennington* includes more devices (the iPhone 3G, 3GS, and "4G" [*sic*: iPhone 4], and the iPod touch), adds claims for breach of warranty, breach of the covenant of good faith and fair dealing, and unjust enrichment; and now seeks monetary damages and restitution.

V. SETTLEMENT AND ADR

The parties to the *Gallion* action have attended ADR Phone Conferences on July 26, 2010, October 25, 2010, December 15, 2010, and January 19, 2011. The parties to the *Corsi* action attended ADR Phone Conferences on October 26, 2010, and January 19, 2011. A further

ADR Phone Conference for both actions is scheduled for April 20, 2011, at 11:00 a.m. No ADR Phone Conference is currently scheduled in the *Calix* action. The parties agree that it is premature to attempt to engage in ADR until discovery is at a more advanced stage. The parties do not foreclose the possibility of engaging in ADR later, but meaningful participation will depend on substantial developments in discovery and motion practice, including class certification and the dispositive motions mentioned above.

VI. SCHEDULING AND TRIAL

The parties believe that discovery should be largely completed before a class certification motion schedule is briefed. The parties anticipate discussing this issue prior to the March 24 conference, so that they may provide the Court with proposed tentative dates for the filing of that motion, along with a proposed briefing schedule that will enable each side to depose the witnesses whose testimony is submitted in support of or in opposition to class certification. The parties respectfully suggest that other dates, such as the discovery cutoff, a deadline for the filing of dispositive motions, and the trial date, be set following the ruling on the class-certification motion. The parties agree that not all of Plaintiffs' claims are subject to jury trial, and that it is premature to estimate the length of trial prior to a ruling on class certification.

Respectfully submitted,

DATED: March 17, 2011

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