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AT&T Mobility LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PATRICK HENDRICKS, on behalf of himself and all others similarly situated,

Plaintiff,

v.

AT&T Mobility LLC,

Defendant.

Case No. C11-00409 EMC

DEFENDANT AT&T MOBILITY LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO APPOINT CO-LEAD INTERIM CLASS COUNSEL PURSUANT TO FED. R. CIV. P. 23(G)(3)

Date: March 25, 2011
Time: 10:00 a.m.
Courtroom 8

Honorable Charles R. Breyer

INTRODUCTION

On the same day that plaintiff Patrick Hendricks served defendant AT&T Mobility LLC ("ATTM") with his lawsuit, he moved to appoint his attorneys as interim co-lead counsel of a potential class. His request is both premature and improper, and accordingly should be denied.

First, whether class counsel ever need be appointed in this case—interim or otherwise—remains wholly speculative at this early stage in this litigation. As ATTM has separately explained, it would respond to Hendricks' lawsuit by moving to compel arbitration of Hendricks' disputes in accordance with the arbitration provision in his wireless service agreement. If this Court compels Hendricks to arbitrate—a question that likely turns on how the Supreme Court decides *AT&T Mobility LLC v. Concepcion*—further proceedings in court will cease, mooting the need to consider whether class counsel should be appointed.

Second, Hendricks' motion is improper at this stage of proceedings under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), as it would interfere with ATTM's right to a threshold determination of whether this case should be moved to an arbitral forum. When, as here, the issue of arbitrability has been raised, the FAA precludes the consideration of any merits-related matters, including Hendricks' attempt to litigate procedural aspects of his class action.

Third, Hendricks has failed to show that there is some pressing need requiring the Court to appoint interim class counsel now. There are no related cases pending in this Court, although a separate lawsuit involving similar claims—*Guardian v. AT&T Mobility LLC* which Hendricks failed to mention in his motion—has been pending in the Southern District of California for over six months. (There, as here, the parties stipulated to a stay of proceedings to await the Supreme Court's decision in *Concepcion*.) But the fact that each of the cases—currently pending in different federal courts—is on hold at the very outset of the proceedings only underscores that it is too early for this Court (or any other Court) to assess whether any lawyer should be anointed as the lead representative of a putative class.

At bottom, Hendricks' motion amounts to pure gamesmanship. Hendricks' counsel recently tried a similar tactic in another set of lawsuits against ATTM. The court in those cases

rejected such efforts, instead admonishing, "Don't play games, counsel." Cornehl Decl. Ex. 1 at 5 (Tr. of Jan. 3, 2011 Hr'g, *Cook v. AT&T Mobility LLC*, No. CV 10-8870 (C.D. Cal.) and *Thein v. AT&T Mobility LLC*, No. 10-1796 (C.D. Cal.)).

The attempt to repeat that strategy here should fare no better.

BACKGROUND

Hendricks filed this lawsuit on January 27, 2011. He alleges that ATTM "systematically overbill[s] for every data transaction" and bills for "phantom data traffic when there is no actual data usage initiated by the customer." Compl. ¶ 2. He seeks to represent a putative nationwide class of ATTM customers with a usage-based data plan for an Apple iPhone or iPad (*id.* ¶ 13). Hendricks served ATTM with the summons and complaint on February 8, 2011—the same date that he initially filed the motion to appoint interim class counsel (Dkt. No. 5).[1]

On February 28, 2011, ATTM informed Hendricks' counsel that it intended to respond to the complaint by filing a motion to compel arbitration. Under the arbitration provision in ATTM's service contracts, the parties are required to arbitrate their disputes on an individual, rather than class-wide, basis. The Ninth Circuit has held that such agreements are not enforceable under California law. *See Laster v. AT&T Mobility LLC,* 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom. AT&T Mobility LLC v. Concepcion*, 176 L.Ed.2d 1218, 130 S. Ct. 3322 (2010). But the U.S. Supreme Court is poised to decide in *Concepcion* whether the FAA preempts California law and requires the enforcement of ATTM's arbitration provision. Hendricks' counsel agreed not to oppose a stay of proceedings pending the Supreme Court's resolution of *Concepcion*, but has insisted that the motion to appoint interim class counsel go forward. (ATTM's unopposed motion for a stay was filed on March 1, 2011, and is currently pending before the Court.)

[1] The case was originally filed before United States Magistrate Judge Edward M. Chen, and was reassigned to this Court (Hon. Charles R. Breyer, presiding) on February 15, 2011. Dkt. No. 11. Two days later, Hendricks re-filed the motion to appoint interim class counsel and set the hearing date for March 25, 2011—the earliest available hearing date.

ARGUMENT

A. It Is Premature To Address Whether Interim Class Counsel Should Be Appointed.

Hendricks' motion should be denied as premature. A threshold issue is whether Hendricks will be required to pursue his disputes in arbitration on an individual basis rather than in court. If the Supreme Court decides *Concepcion* in ATTM's favor, all proceedings in a judicial forum would cease, obviating the need ever to consider whether class counsel (interim or otherwise) should be appointed under Federal Rule of Civil Procedure 23(g).

Courts routinely hold that it is premature to appoint "class counsel" when—as here—dispositive motions that would preclude a class action from proceeding remain to be decided. *See, e.g,. Lyons v. CoxCom, Inc.*, 2009 WL 6607949 *2 (S.D. Cal. July 6, 2009) (denying appointment of interim class counsel as premature given that the case was still in the pleading stage); *Webb v. Onizuka*, 2009 U.S. Dist. LEXIS 49850, at *4 (D. Haw. June 15, 2009) (denying plaintiff's motion for appointment of class counsel on grounds that it was "premature because there [were] pending motions to dismiss, one of which argued[d] that, even if plaintiff alleges a class action, the district court does not have diversity jurisdiction over]the action"); *Rintel v. Wathen*, 806 F. Supp. 1467, 1468 (C.D. Cal. 1992) (noting prior denial of plaintiff's motion for appointment as co-lead class counsel on grounds that it was premature where the motion was filed prior to the court's ruling on defendants' motions to dismiss); *cf. Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 763, 774 (N.D. Ohio 2009) (after parties agreed that defendant's motion to compel arbitration should be heard before the plaintiff's motion to appoint interim class counsel, the court granted the arbitration motion, mooting the class counsel motion).

Moreover, in virtually identical circumstances, another federal court recently rejected the same tactics that Hendricks' counsel has employed here. *See* Cornehl Decl. Ex. 2 (*Cook v AT&T Mobility LLC*, No. 10-8870 (C.D. Cal.) (Dkt. No. 22); *Thein v. AT&T Mobility LLC*, No. 10-1796 (C.D. Cal.)). There, as here, counsel for Hendricks sought early appointment as lead counsel—even following the same playbook by serving a motion for class counsel status at the same time that they served the complaints. The court refused to approve such maneuvering,

denying the motion as "premature" and admonishing counsel not to "play games." Cornehl Decl. Ex. 1 at 5. The lessons appear not to have been learned.

B. Appointment of Interim Class Counsel Is Improper Under the FAA.

Hendricks' motion also is improper under the FAA at this stage of the proceedings.

As the Supreme Court has explained, the FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). Thus, when the threshold question of arbitration has been raised, "a federal court may consider ***only*** issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (citing 9 U.S.C. §§ 3-4) (emphasis added). In other words, "the Federal Arbitration Act requires that the Court resolve the threshold issue of whether the parties agreed to mandatory arbitration before the litigation of this matter can continue." *PCH Mut. Ins. Co. v. Cas. & Sur., Inc.*, 569 F. Supp. 2d 67, 78 (D.D.C. 2008).

The arbitrability inquiry in this case is currently on hold; ATTM has filed an unopposed motion to stay proceedings pending *Concepcion*. Until *Concepcion* is decided—and ATTM's anticipated motion to compel arbitration in this case is ultimately resolved—any litigation over issues of judicial class action procedure would interfere with ATTM's right to an initial determination of whether this case should proceed in accordance with the parties' agreement—*i.e.*, by arbitration on an individual basis. As the Seventh Circuit has put it in an analogous context—involving "[d]iscovery on the merits"—permitting such merits-related issues to go forward before "the issue of [the] arbitrability [of the dispute] is resolved puts the cart before the horse." *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002). The same is true here: It puts the cart before the horse to decide who (if anyone) should be appointed interim lead class counsel when the first question is whether the case proceeds in court at all.

C. Appointment of Interim Class Counsel Is Unnecessary.

Even if the Court were to reach the question, it should reject the bid by Hendricks' counsel to be declared interim lead counsel. Under Rule 23, a federal court "*may* designate interim counsel to act on behalf of a putative class before determining whether to certify the

action." Fed. R. Civ. Proc. 23(g)(3)) (emphasis added). But the Advisory Committee Notes indicate that a court need not designate interim counsel unless it is "necessary to protect the interests of the putative class." Advisory Committee Notes to Fed. R. Civ. P. 23(g)(2)(A). Hendricks has fallen far short of demonstrating the requisite necessity that would call for the appointment of interim class counsel.

Hendricks asserts that interim class counsel is needed because "a significant amount of discovery and related motion practice is expected to take place prior to the determination of certification." Mtn. 6. Yet given the threshold question of arbitration, discovery on the merits and related motions practice cannot proceed.

Hendricks also contends that interim lead class counsel is needed to "create one unified voice" for the putative class. Yet (notwithstanding the pendency of the *Guardian* matter), there is no actively competing set of voices clamoring for the Court's attention. Rather, it appears that Hendricks' counsel simply wants to preemptively strike all potential rivals, including Guardian's counsel. But that would be an abuse of the interim counsel rule. "[T]he kind of matter in which interim counsel is appointed is one where a large number of putative class actions have been consolidated or otherwise are pending in a single court." *Donaldson v. Pharmacia Pension Plan*, 2006 WL 1308582, at * 1 (S.D. Ill. May 10, 2006). By contrast, the appointment of interim lead class counsel is unwarranted when, as here, a "single group of counsel represents th[e] class" and "there are not multiple complaints, nor * * * a gaggle of law firms jockeying to be appointed class counsel." *Parrish v. Nat'l Football League Players Inc.*, 2007 WL 1624601, at *9 (N.D. Cal. June 4, 2007); *see also, e.g., Donaldson*, 2006 WL 1308582, at * 2 (declining to appoint interim class counsel because there was only a single putative class action pending before the court); *see also Lyons v. CoxCom Inc.*, 2009 WL 6607949, at * 2 (S.D. Cal. July 6, 2009) (denying plaintiff's motion for appointment of interim class counsel in part because there were no "lawyers competing for class counsel appointment at this time"); *In re Issuer Plaintiff Initial Public Offering Antitrust Litig,* 234 F.R.D. 67, 69-70 (S.D.N.Y. 2006) (denying appointment of interim class counsel where there was a lack of "interference or rivalry from any other counsel").

It is true—although Hendricks has failed to disclose the fact—that this action is in many respects a copycat of a different putative class-action lawsuit, *Guardian*, filed by different attorneys nearly six months ago in a different federal court. *See* Cornehl Decl. Ex. 3 (First Amended Complaint, *Guardian v. AT&T Mobility LLC*, No. 10-1846 WQH (CAB) (S.D. Cal., action filed September 3, 2010)). Both lawsuits allege that ATTM measures customers' use of data inaccurately. While the lawsuits are not identical, it is unlikely to be pure coincidence that the two complaints invoke virtually the same imagery. *Compare Guardian* First Am. Compl. ¶ 2 (characterizing alleged conduct as "a high-tech version of a gas pump meter that incorrectly measures the gallons of gas being pumped and then applies the per gallon charge to the fraudulent measure of gas, so that the consumer pays more than is proper.") *with Hendricks* Compl. ¶ 1 (describing alleged conduct to be "like a rigged gas pump that charges for a full gallon when it pumps only nine-tenths of a gallon into your car's tank").

Similarities aside, this case has not yet been coordinated with the *Guardian* case, and there is no immediate conflict over how to manage these parallel litigations. Indeed, proceedings in *Guardian* are currently stayed—and a stay is unopposed here—minimizing any chance that such a conflict could arise soon. If *Concepcion* is decided in ATTM's favor, there will be no need for this Court (or the Southern District) ever to decide which attorneys should take lead status.[2]

In short, there is no basis for an interim counsel appointment before knowing if any related cases will be coordinated and before examining the qualifications of competing firms. *See e.g., Nutz for Candy v. Ganz, Inc.*, 2008 WL 4332532 *1-*2 (N.D. Cal. September 19, 2008) (denying interim counsel motion where similar class actions were pending in other courts; the

[2] In ATTM's view, the plaintiffs' disputes both in *Guardian* and this case should be decided in accordance with the parties' arbitration agreements. In the event that ATTM does not succeed in compelling arbitration of the disputes, however, that would not necessarily mean that this Court would have to confront the question of interim lead class counsel. ATTM reserves its right to seek a transfer of this case to the Southern District of California so that it can be coordinated with the first-filed *Guardian* case in light of the similarities between the two actions. If this case is ultimately transferred and coordinated with *Guardian*, the Southern District may well be better positioned to address whether interim lead counsel is appropriate, and if so, which counsel should be selected.

court could later be presented with a motion by different counsel to replace interim lead counsel, thereby undermining principles of judicial efficiency).

CONCLUSION

For the foregoing reasons, Hendricks' motion should be denied.

Dated: March 4, 2011

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CERTIFICATE OF SERVICE

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 350 South Grand Avenue, 25th Floor, Los Angeles, California 90071-1503. On March 4, 2011, the following documents were served electronically via the CM/ECF system:

DEFENDANT AT&T MOBILITY LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO APPOINT CO-LEAD INTERIM CLASS COUNSEL PURSUANT TO FED.R.CIV.P. 23(G)(3)

I further certify that I mailed the document(s) listed above in a sealed UPS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a UPS agent for delivery addressed as set forth below:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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

Executed on March 4, 2011, at Los Angeles, California.

Simoné Hernandez