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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

AT&T MOBILITY, LLC,

Defendant.

Case No. C11-00409 CRB
Hon. Charles R. Breyer

**PLAINTIFF'S REPLY TO 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

1 **I. INTRODUCTION**

2 AT&T Mobility LLC (“AT&T”) opposes Plaintiff’s motion to appoint co-lead interim class
3 counsel on the sole basis that it is premature. AT&T’s “premature” argument is threefold: (1) this
4 Court must first decide whether Plaintiff is required to arbitrate his dispute on an individual basis,
5 (2) dispositive motions that would preclude a class action from proceeding remain to be decided,
6 and (3) multiple “copycat” lawsuits have not yet been filed that would require the appointment of
7 interim class counsel.

8 AT&T’s “premature” arguments directly contradict its recently filed “Unopposed Motion to
9 Stay” wherein the parties agreed to a temporary stay of the proceedings but “with a single
10 exception: The parties have agreed that briefing and hearing on [Plaintiff’s] motion to appoint [co-
11 lead] interim class counsel ... may proceed notwithstanding the stay.” [Doc. 25]. By specifically
12 agreeing that Plaintiff’s motion to appoint co-lead interim class counsel could proceed and was not
13 subject to the stay, AT&T expressly waived any such “premature” arguments. Even more
14 importantly, the decision to appoint co-lead interim class counsel is not premature, is necessary to
15 protect the interests of the proposed class, and will promote efficiency and conserve judicial
16 resources.

17 **II. ARGUMENT**

18 **A. The Determination of Arbitration Rights Is Not a Prerequisite to the**
19 **Appointment of Co-Lead Interim Class Counsel**

20 First, AT&T waived its right to delay the appointment of interim class counsel by
21 specifically agreeing to proceed with Plaintiff’s motion for appointment of co-lead interim class
22 counsel. By way of background, Plaintiff’s counsel reached an agreement with AT&T whereby the
23 parties agreed to a temporary stay, with one specifically agreed exception, pending the ruling by
24 the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, No. 09-893 (*see* 130 S.Ct.
25 3322 (2010)). The basis of this agreement was that the Supreme Court’s ruling in *Concepcion* may
26 be determinative of whether this Court will be required to enforce the arbitration agreement. If the
27 Supreme Court holds that California law is preempted, then in AT&T’s view, this Court will be
28 required to enforce the arbitration agreement. But, if the Supreme Court holds in *Concepcion* that

1 California law is not pre-empted, then this Court will be obliged to deny AT&T's motion to
2 compel arbitration. However, the sole issue that the parties agreed would be specifically excluded
3 from the agreed stay was Plaintiff's motion to appoint co-lead interim class counsel. The
4 agreement that the appointment of co-lead interim class counsel would not be delayed was the
5 inducement AT&T offered to Plaintiff to secure an agreement from Plaintiff's counsel to stay the
6 remainder of the case pending the *Concepcion* decision. AT&T cannot now point to the unopposed
7 motion to stay and argue that the appointment of interim class counsel is premature.

8 Second, AT&T argues that the validity of its arbitration provision is a threshold issue that
9 must be decided by this Court before the appointment of co-lead interim class counsel. [Response,
10 p. 3, 4]. As a preliminary matter, the law in this Circuit is crystal clear and has repeatedly
11 established that AT&T has no arbitration rights. *See, e.g., Shroyer v. New Cingular Wireless*
12 *Services, Inc.*, 498 F.3d 976 (9th Cir. 2007) (holding arbitration clause prohibiting class actions
13 unenforceable under California law); *see also Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165,
14 1175-76 (9th Cir. 2003); *Ting v. AT&T*, 319 F.3d 1126, 1148-50 (9th Cir. 2003) (same); *Stern v.*
15 *Cingular Wireless Corp.*, 2006 WL 2789367 (C.D. Ca. Jul. 28, 2006) (same); and *Laster v. T-*
16 *Mobile USA, Inc.*, 407 F. Supp. 2d 1181 (S.D. Ca. 2005) (same). In fact, AT&T recognizes that
17 “[t]he Ninth Circuit has held such agreements are not enforceable under California law.”
18 [Response, p. 2; *citing Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted*
19 *sub nom. AT&T Mobility LLC v. Conception*, 176 L.Ed.2d 1218, 130 S. Ct. 3322 (2010)]. It is
20 simply illogical to delay the appointment of co-lead interim class counsel on the grounds that that
21 this Court has not yet considered an arbitration clause that AT&T itself recognizes as
22 unenforceable.

23 In sum, AT&T has stipulated to the fact that the determination of arbitration “rights” –
24 rights that the parties and this Court recognize as presently unenforceable – is not a prerequisite to
25 the appointment of interim class counsel. AT&T then insisted that if Plaintiff's motion to appoint
26 co-lead interim class counsel was to proceed it did not want its agreement to move forward to be
27 used by Plaintiff to later argue that AT&T had waived its right to compel arbitration. Plaintiff
28 specifically agreed that AT&T did not waive any of its rights in connection with an arbitration

1 agreement if, in fact, *Concepcion* reversed the current law in California that holds such arbitration
2 clauses unreasonable.¹

3 **B. The Possibility of Dispositive Motions Does Not Bar the Appointment of**
4 **Co-Lead Interim Class Counsel**

5 AT&T argues that courts “routinely hold that it is premature to appoint ‘class counsel’
6 when – as here – dispositive motions that would preclude a class action from proceeding remain to
7 be decided.” [Response, p. 3]. As stated above, AT&T should not be permitted to argue that the
8 appointment of interim class counsel is premature when the unopposed motion to stay specifically
9 excluded the instant relief sought.

10 Further, each and every case cited by AT&T in support of its position that the existence of
11 dispositive motions precludes the appointment of interim class counsel is distinguishable. AT&T
12 first relies on *Lyons v. CoxCom, Inc.*, 2009 WL 6607949 (S.D. Cal. July 6, 2009). The *Lyons* court
13 did not simply state that “appointment of interim class counsel as premature given that the case was
14 still in the pleading stage.” [Response, p. 3]. Instead, the *Lyons* court noted that defendant’s
15 motion to dismiss was recently granted and reasoned that “[t]he case has not progressed past the
16 pleading stage as [p]laintiff has yet to file a second amended complaint.” *Id.* Here, Plaintiff’s
17 complaint is pending before this Court and has not been challenged by AT&T on any other grounds
18 other than the issue of arbitration – an issue that the parties agreed to stay pending a decision from
19 the Supreme Court.

20 Further, there are numerous instances where courts appoint interim class counsel in the
21 earliest stages of the pleadings. For example, in *Zepeda v. PayPal, Inc.*, 2011 WL 570231 (N.D.
22 Cal. February 15, 2011), Judge Jeremy Fogel simultaneously granted PayPal’s motion to dismiss
23 and plaintiff’s motion to appoint lead interim class counsel. In other words, the court appointed
24 interim class counsel before the initial pleading, an amended complaint, was even filed.

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26 ¹ The declaration of Lisa W. Cornehl filed in support of AT&T’s motion to stay states in relevant
27 part, “Counsel for Mr. Hendricks subsequently authorized me to inform the court that the parties
28 had stipulated to the following agreement: that ... (3) by responding to Hendricks’ motion to
appoint interim lead class counsel and to appear at a hearing on that motion, [AT&T] would not
waive its right to compel arbitration of Hendricks’ claims...” [Doc. 25-1].

1 AT&T also relies on *Rintel v. Wathen*, 806 F. Supp. 1467 (C.D. Cal. 1992), a 1992 case
2 where the court noted that plaintiff’s counsel prematurely moved for appointment as class counsel
3 before certification. But that case was decided nearly ten years before Rule 23 was amended to
4 provide for the appointment of interim class counsel. *See* Fed. R. Civ. P. 23 Advisory Committee
5 Notes (noting that Rule 23(g)(3) was amended in 2003 to provide for appointment of interim class
6 counsel prior to certification).

7 Finally, if dispositive motions are anticipated, it is even more important for the putative
8 class to have the benefit of court-appointed interim class counsel to ensure that they are adequately
9 represented in opposing any dispositive motion.

10 **C. The Appointment of Co-Lead Interim Class Counsel Is Necessary and**
11 **Proper**

12 AT&T argues that Plaintiff has failed to show “some pressing need requiring the Court to
13 appoint interim class counsel now.” [Response, p. 1]. AT&T misstates the burden that Plaintiff
14 must meet. Notes accompanying FED.R.CIV.P. 23(g)(3) hold that interim class counsel should be
15 appointed when necessary to protect the interests of the putative class. *See, e.g., Parkinson v.*
16 *Hyundai Motor Am.*, 2006 WL2289801 at *2 (C.D. Cal. Aug. 7, 2006). Appointment is necessary
17 in the instant matter for several reasons.

18 Appointment of interim class counsel will level the playing field by providing the putative
19 class with the same advantage that AT&T has. AT&T has already chosen its designated counsel
20 and is aggressively preparing its defense of this matter. The putative class should be afforded the
21 same opportunity. Plaintiff’s counsel have already demonstrated their ability to properly represent
22 the putative class by undertaking an extensive and costly investigation into the potential claims
23 arising from AT&T’s fraudulent billing scheme. [Doc. 5, p. 5]. In addition, Plaintiff’s counsel
24 possesses the depth of experience and legal knowledge related to class actions. [Doc. 5, p. 6-8].
25 Plaintiff’s counsel’s compliance with all of the Rule 23(g)(1) factors ensures that Plaintiff and
26 those similarly situated are fairly and adequately represented in this action.

27 There is also a significant possibility of “tag-along” cases being filed by other law firms.
28 An interim class counsel appointment will discourage such activities and lead to a more efficient

1 use of judicial resources since there will be less likelihood of interference from any other counsel.
2 *See, e.g.*, FED.R.CIV.P. 23, Advisory Committee Notes (2003) (stating that “[i]n some cases ... there
3 may be rivalry or uncertainty that makes formal designation of interim counsel appropriate”). Both
4 the putative class and the Court benefit from the appointment of competent interim class counsel
5 without delay.

6 As a corollary, AT&T contends that it is not necessary to “appoint Plaintiffs’ lawyers as
7 ‘class counsel’ before a class has been certified” because “copycat” lawsuits have not yet been filed
8 by other firms. [Response, p. 6]. It should be noted though that it is unclear whether AT&T is
9 taking the position that the *Guardian v. AT&T Mobility LLC* matter is a related case or not. On the
10 one hand, AT&T argues that it is a lawsuit involving “similar claims,” but then also argues that
11 “the lawsuits are not identical.”² [Response, p. 1, 6]. AT&T’s ambiguity is simply not helpful in
12 resolving this motion. If *Guardian* is a “similar claim,” AT&T’s position is that the appointment
13 of interim class counsel is unnecessary because both cases are stayed. If *Guardian* is not a “similar
14 claim,” then AT&T argues that appointment of interim class counsel is premature because related
15 cases do not exist. Either way AT&T has already appointed its designated counsel but objects to
16 the putative class having the same opportunity.

17 One must question why AT&T so strongly opposes the appointment of interim class
18 counsel. Significantly, AT&T does not attack the suitability of the undersigned counsel in terms of
19 experience, investigation into the instant class action, knowledge of the applicable law, or ability to
20 commit resources to the instant matter. In regards to the considerations set out in Rule 23(g)(1), it
21 appears that AT&T does not oppose the motion and agrees that Plaintiff’s counsel deserves
22 appointment as co-lead interim class counsel. The only plausible rationale for opposition on the
23 basis that it is “premature” would be that AT&T wants to take advantage of the detrimental

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25 ² To be clear, the *Guardian v. AT&T Mobility LLC* matter is an unrelated and different case. The
26 *Guardian* matter alleges a class of California residents only, while the instant matter alleges a
27 nationwide class. The *Guardian* matter alleges fraudulent overbilling, while the instant matter
28 alleges phantom data charges, billing time stamp issues, and data transaction overbilling.
Moreover, the *Guardian* matter does not identify a particular mobile device, while the instant
matter addresses the Apple iPhone and iPad and discusses specific testing conducted by an
independent consultant.

1 consequences to the proposed class; namely, pre-certification disputes between competing counsel
2 that will delay the proceeding, detract from the real issues in the case, and discourage counsel for
3 the putative class from properly prosecuting the matter. It is particularly compelling in this case
4 that Plaintiff's counsel has already spent significant time and money in its pre-suit investigation
5 and representation of the putative class. AT&T would like nothing more than to slow that process
6 down and create uncertainty for the class as to who will be its counsel while it continues to build its
7 defense to the action. In the *Zepeda* matter discussed above, the defendant did not oppose the
8 motion to appoint interim class counsel, but reserved the right to challenge plaintiff's counsel's
9 suitability as putative class representatives in connection with any motion for class certification.
10 There is no such challenge here. The relief sought herein by Plaintiff does not prejudice AT&T.

11 Finally, AT&T alleges that Plaintiffs' counsel is employing "tactics" that amount to
12 "gamesmanship" and refers to a comment made by the Honorable Manuel L. Real wherein Judge
13 Real commented, "[d]on't play games, counsel." Whatever "tactics" were employed in the case
14 before Judge Real have no bearing whatsoever on the pending motion in this case. Furthermore,
15 Judge Real's mysterious comment from the bench is difficult to interpret, and may have been
16 directed to AT&T's counsel and the "tactics" they employed in that matter. In any event, the
17 pending motion should be judged on its merits, not by trying to divine the meaning of another
18 judge's comment in an unrelated matter.

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1 **III. CONCLUSION**

2 In the interest of judicial economy and for the reasons set forth above, Plaintiff respectfully
3 requests that the Court appoint Bursor & Fisher, P.A. and Thornton, Davis & Fein, P.A. as Co-
4 Lead Interim Class Counsel.

5 Dated: March 11, 2011

BURSOR & FISHER, P.A.

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8 By: _____ /s/
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