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APPLE COMPUTER, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS WILLIAM SLATTERY, Individually, And On Behalf Of All Others Similarly Situated,

Plaintiff,

v.

APPLE COMPUTER, INC.,

Defendant.

Case No. C 05 00037 JW

CLASS ACTION

APPLE COMPUTER, INC.'S ADMINISTRATIVE REQUEST FOR LEAVE TO FILE MOTION FOR SUMMARY JUDGMENT

[Redacted Version]

Pursuant to Civil Local Rule 7-11 and the Court's November 15, 2005 Case Management Order, defendant hereby requests leave of court to file a motion for summary judgment.

At the November 14, 2005 Case Management Conference, the Court set a schedule for briefing and hearing a motion by plaintiff to certify a class. *See* November 15, 2005 Order Following Case Management Conference.[1] The Court stated at the case management conference

[1] Plaintiffs' motion to certify is due March 6; defendants' opposition April 10; with a further case management conference April 17 and a hearing on the certification motion May 1.

that defendant should not move for summary judgment without first obtaining leave of the Court. The Case Management Order stated that defendant shall not move for summary judgment before the class certification motion is decided, and that none of the dates in the order may be changed without making a motion under the local rules. At his January 30, 2006 deposition, plaintiff Slattery demonstrated that the key allegations in his complaint are false. With this new information, defendant seeks leave to file a Rule 56 motion now.

The complaint, filed January 3, 2005, alleges that Slattery purchased music online from Apple's iTunes music store during the class period (*i.e.*, April 2003 to the date of the complaint) (Compl., ¶ ¶ 9, 56); that he was "forced to purchase an Apple iPod device . . ." to play that music (Compl., ¶ 9); and that he "has been forced to continue purchasing online digital music files solely from Apple's iTunes store . . . ." (Compl., ¶ 9). The first amended complaint repeated these allegations.

These allegations are false.

[REDACTED]

[REDACTED]

In short, neither of Slattery's tying claims in his complaint is true. He was not forced to buy an iPod by having purchased music from Apple. To the contrary, he obtained his iPod before he obtained any music from Apple. And having an iPod did not force him to obtain or "continue" obtaining music from Apple. Indeed, almost all of his music comes from free services or from CDs that he made himself or received from others. Plus, he confirmed that music from Apple's store can be played on competing devices, and *vice versa*.

These admissions show that Slattery's allegations are false, and they provide the information that the Court was looking for at the hearing on the motion to dismiss. As the Court observed to plaintiff's counsel: "But the tie . . . is not compelled then by the defendant. . . . I can buy both products separately. I can subscribe to iTunes on my computer and never buy an iPod and I can then listen to the music that I download and take it with me; is that correct?" Strong Decl. Ex. C (1/6/05 Hrg. Tr. at 18:25-19:7). The Court concluded: "I'm inclined to grant the motion but at the same time worried I should allow the complaint and wait for the inevitable motion so I could have more information because I have to accept . . . the well pleaded facts as true . . . and if I'm in summary judgment mode then I am going to get more information from you all." *Id.* at 27:19-25. Now Slattery has provided the information demonstrating that his claims should be dismissed.

Filing a Rule 56 motion at this time will cause no cognizable prejudice to Slattery. It is for defendant's protection that class certification motions are usually heard before Rule 56 motions, but if a defendant is willing to give up that protection, it causes no harm to the named plaintiff. *Wright v. Shock,* 742 F.2d 541, 544 (9th Cir. 1984) ("[i]t is reasonable to consider a Rule 56 motion first when early resolution of a motion for summary judgment seems likely to protect both parties and the court from needless and costly further litigation;" "[w]here the defendant assumes the risk that summary judgment in his favor will have only stare decisis effect on the members of the putative class, it is within the discretion of the district court to rule on the summary judgment motion first"). Although the Court limited initial discovery to class issues, Slattery's discovery rights will be protected because he can avail himself of the provisions of Rule 56(f) and, if he desires to invest further in this case, he can depose any Rule 56 declarant

before his opposition is due. We submit that, in light of Slattery's deposition testimony, the most efficient course is to determine whether his claims should be dismissed under Rule 56 before the Court determines whether this action should proceed as a class action.

Dated: February 21, 2006

JONES DAY

By: /s/
Robert A. Mittelstaedt

Counsel for Defendant
APPLE COMPUTER, INC.