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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

REUBEN BERENBLAT, ANDREW PERSONETTE, EARL C. SIMPSON, LAURA MILLER, On behalf of themselves and all others similarly situated,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. C-08-04969 JF

APPLE INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR ADMINISTRATIVE RELIEF

Date: --
Time: --
Courtroom: 3

Pursuant to Local Civil Rule 7-11(b), Defendant Apple Inc. ("Apple") respectfully opposes Plaintiffs' Motion for Administrative Relief:

I. INTRODUCTION

Plaintiffs have already had three chances to state a viable cause of action against Apple. By this demand for discovery *before* attempting a fourth complaint, Plaintiffs concede that they are unaware of any facts that would constitute an actionable claim. Yet they now ask this Court to sanction post-dismissal discovery to try to manufacture a claim where none exists. This request for discovery stands the Federal Rules of Civil Procedure on their head and is a practice the Ninth Circuit has specifically ruled against. *See Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (denying request for discovery after Rule 12(b)(6) dismissal as "unsupported and def[ying] common sense" and stating that allowing such discovery "would represent an abdication of our judicial responsibility.").

Plaintiffs' request should be denied for the additional reason that Local Civil Rule 7-11 is not an appropriate vehicle for such a request which should have been brought by a noticed discovery motion.

The parties have been accommodating with each other concerning extensions of time. While Apple vehemently opposes leave to conduct discovery, Apple would not oppose a reasonable extension of time for Plaintiffs to file their amended complaint.

II. BACKGROUND

Plaintiffs filed this action on October 10, 2008. On April 2, 2009, Plaintiffs filed a First Amended Complaint ("FAC"). On June 1, 2009, Apple moved to dismiss the FAC pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On August 21, 2009, the Court granted Apple's motion, dismissing the FAC with leave to amend.

On September 21, 2009, Plaintiffs filed a Second Amended Complaint ("SAC"). On November 5, 2009, Apple moved to dismiss the SAC pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. On April 7, 2010, the Court granted Apple's motion, dismissing the SAC with leave to amend as to Plaintiffs' claims under the California Unfair

Competition Law ("UCL") and for unjust enrichment. The Court's April 7 Order required that any amended complaint be filed within 30 days.

On April 22, 2010, Plaintiffs filed their Motion for Administrative Relief pursuant to Local Civil Rule 7-11, requesting limited discovery prior to filing another amended complaint, and further requesting an extension of their deadline for filing such a complaint.

III. DISCOVERY IS NOT PERMITTED TO AMEND DISMISSED COMPLAINT

Having twice had their complaint dismissed for failure to state a claim, Plaintiffs now ask this Court to permit them discovery before their deadline to file yet another amended complaint. In making this request, Plaintiffs effectively concede that they cannot state a claim against Apple. Nonetheless, they wish to force Apple to bear the cost, interruption and inconvenience of discovery in the unsubstantiated hope that they will unearth something, anything, that will survive dismissal under Rule 12(b)(6). This motion should be denied.

The Ninth Circuit has held that discovery should be denied in just these circumstances. "The purpose of F.R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery." *Rutman Wine,* 829 F.2d at 738. Where, as here, "the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." *Id.* Likewise, this Court has followed *Rutman Wine* to deny similar requests for discovery in aid of post-dismissal amendments. *See, e.g., APL Co. PTE, Ltd. v. UK Aerosols Ltd., Inc.*, 452 F. Supp. 2d 939, 945 (N.D. Cal. 2006) (The "plaintiff is required to state a viable claim at the outset, not allege deficient claims and then seek discovery to cure the deficiencies."); *Syverson v. IBM*, No. C-03-04529-RMW, 2007 U.S. Dist. LEXIS 75056, *21 n.6 (N.D. Cal. Oct. 3, 2007) ("Plaintiffs appear to seek limited discovery prior to filing an amended complaint. The court denies plaintiffs' request.").

This long-standing rule is in accord with the recent ruling of the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-561 (2007), in which the Court cautioned at length against courts permitting the burden of discovery to be imposed before a viable cause of

action has been pleaded. The *Twombly* Court was also skeptical of and unpersuaded by "reassurances of plaintiffs' counsel that discovery would be 'phased' and 'limited'" *Id*. at 559, n.6.

Plaintiffs offer no justification for a deviation from *Rutman Wine* and its progeny. Indeed, Plaintiffs cite no authority at all for the proposition that they are entitled to discovery prior to filing a *post-dismissal* amended complaint, let alone their *third* such amended complaint.[1] Instead, Plaintiffs cling to the Court's holding that "because there is a reasonable possibility that Plaintiffs could provide additional factual support for [their Unfair Competition Law] claim, leave to amend will be granted." (Apr. 7, 2010 Order at 15:5-6.) Plaintiffs then transform the fact that they received leave to amend into a justification for pre-amendment discovery, since they effectively concede that they cannot state a viable claim without first conducting such discovery. (Pls. Mot. for Admin. Relief at 2:15-21.) But a grant of leave to amend is not a finding that Plaintiffs can amend, but only an opportunity to do so if Plaintiffs have sufficient facts to state a claim. If they do not, then dismissal, not discovery, is the appropriate result. *See Rutman Wine*, 829 F.2d at 738.

Plaintiffs' claim that they should be allowed discovery because certain facts are allegedly only within the knowledge of defendant is likewise inadequate justification to permit post-dismissal, pre-amendment discovery. It is axiomatic that the facts sought to be discovered will be outside the plaintiffs' knowledge or control any time a plaintiff seeks discovery to amend a complaint: they would not need discovery if it were otherwise. Indeed, such circumstances were present in both the *Rutman Wine* and *APL Co. PTE* cases cited above. In *Rutman Wine*, dismissal was based in part on insufficient allegations of (1) a "specific intent to terminate a distributor with the purposeful intent to bring about harm to competition," 829 F.2d at 735, and (2) a "specific intent to control prices or destroy competition," *id*. at 736. Likewise, in *APL Co. PTE*, the plaintiff sought leave to discovery the "substance of the relationship between [the two defendants]

[1] Plaintiffs' discussion of *Tietsworth v. Sears, Roebuck & Co.*, No. 09-CV-00288-JF (HRL) (N.D. Cal. Mar. 31, 2010), is inapposite. Nothing in the Court's May 31, 2010 Order in *Tietsworth* addresses the propriety of conducting discovery prior to filing an amended complaint.

and on that basis allege facts demonstrating [one of the defendant's] acceptance of the Bill of Lading." 452 F. Supp. 2d at 945. However, even though the information sought to be discovered in both cases was known only to the defendant, the Ninth Circuit and this Court both denied leave for post-dismissal discovery. The same result is appropriate here.

IV. USE OF LOCAL RULE 7-11 TO OBTAIN DISCOVERY IS INAPPROPRIATE

Civil Local Rule 7-11 is meant to cover requests for relief in connection with "miscellaneous administrative matters." L.R. 7-11. Motions under L.R. 7-11 "include matters such as motions to exceed otherwise applicable page limitations or motions to file documents under seal." *Id.* Requests to serve document requests and depose a witness are not "administrative matters" like those described in the Local Rule and Plaintiffs cite no authority to suggest that they are. Instead, these are plainly discovery matters that should have been presented by way of a regularly noticed discovery motion like all other discovery-related matters. Local Civil Rule 7-11 is not the appropriate vehicle for requests for substantive relief. *C.f. Omoregie v. Boardwalk Auto Ctr., Inc.*, No. C 07-3884-PJH, 2008 U.S. Dist. LEXIS 110233, *1-2 (N.D. Cal. Oct. 31, 2008) (inappropriate to use L.R. 7-11 to request stay of litigation); *Dister v. Apple-Bay E., Inc.*, No. C 07-01377-SBA, 2007 U.S. Dist. LEXIS 86839, *9-10 (N.D. Cal. Nov. 14, 2007) (L.R. 7-11 an "improper vehicle to bring a motion to stay in a putative class action suit").

V. CONCLUSION

For the reasons stated herein, Apple respectfully requests that the Court deny Plaintiffs' request for leave to conduct discovery.

Dated: April 26, 2010

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