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In re iPhone Application Litigation	Case No. 10-cv-5878 LHK (PSG) The Honorable Lucy H. Koh iPHONE PLAINTIFFS' GROUP OPPOSITION TO PLAINTIFF ANTHONY CHIU'S RECOMMENDATION THAT MILBERG LLP BE APPOINTED INTERIM CLASS COUNSEL
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1 **I. INTRODUCTION**

2 This is an Internet privacy class action. KamberLaw, LLC, the iPhone Plaintiffs' Group
3 proposed Interim Class Counsel, has served as lead counsel in over a half-dozen Internet privacy
4 class actions that have *successfully resolved* in 2010-2011 (and many more over the prior
5 decade) and is currently litigating over a dozen Internet privacy class actions, several of which
6 are likely to go to trial¹. Moreover, every member of the proposed iPhone Plaintiffs' Group²
7 executive committee is currently litigating at least as many privacy lawsuits as Milberg, LLP,
8 has listed in its moving papers. *See* Chiu Brief at 8. Milberg's 'self-recommendation' only
9 identifies two privacy class actions, one which it is currently litigating against MySpace and one
10 it litigated against DoubleClick in 2000. Yet, irrespective of the facts that relate to the
11 'qualifications' aspect of leaders in class actions of this nature, Milberg refuses to agree to a
12 leadership structure that does not include them as essentially lead or co-lead counsel.

13 The cornerstone of the iPhone Plaintiffs' Group recommendation to this Court that the
14 attorneys from KamberLaw serve as Interim Class Counsel is that not only do they have vast
15 and specialized experience with Internet privacy class actions, but they use their substantive and
16 class action expertise to build consensus for the betterment of the Class. Where KamberLaw
17 and the iPhone Plaintiffs' Group have sought consensus at every turn, Milberg has acted
18 otherwise. There is no doubt—and it is a fortunate circumstance—that all the firms representing
19 plaintiffs in these consolidated matters present certain leadership credentials. There is also no
20 doubt that counsel for the iPhone Plaintiffs' Group have recognized the importance of agreeing

21 _____
22 ¹ Just today, in the matter *Valentine et al. v. Nebuad, Inc. et al*, an Internet privacy class
23 action pending before Judge Henderson in this District, KamberLaw successfully defeated a mo-
24 tion to dismiss and the Court issued an Order which was quite significant for Internet privacy
rights in California and directly relevant to this Case. Judge Henderson ruled that ECPA does
not preempt state law claims and that CIPA and CCCL may be brought on behalf of non-
California Plaintiffs.

25 ² The iPhone Plaintiffs Group is comprised of all plaintiffs and their counsel with the ex-
26 ception of Mr. Anthony Chiu. The iPhone Plaintiffs Group agreed, by self-order, to propose to
27 the court a single "lead" class counsel, with an executive committee consisting of one firm from
each of the four filed complaints.

1 on a workable leadership structure. They have elevated consensus-building over contentiousness
2 to agree on a leadership structure, modulating their respective leadership aspirations to
3 accomplish that objective. Unfortunately, Mr. Chiu’s counsel, Milberg LLP, would not
4 compromise. As a result, Milberg has filed a “self recommendation” urging that it, and it alone,
5 be appointed lead counsel. As evidenced by the events prior to the plaintiffs’ meet and confer
6 on leadership recommendation, coupled with the actions of Milberg counsel over the past two
7 weeks, the initial recommendation of the supermajority decision by other counsel was the only
8 practicable way to proceed in the best interests of the class, both from the standpoint of
9 expertise, experience, and temperament.

10 With the opposition here presented, the iPhone Plaintiffs’ Group respectfully submits
11 that permitting Milberg to serve as lead or co-lead counsel over other skilled and qualified
12 counsel, who in fact have greater relevant experience, who sought and achieved consensus
13 would in essence penalize consensus-building and allow Milberg to achieve its objectives
14 without demonstrating even the slightest interest or ability to build the type of agreement
15 necessary to manage this litigation.

16 **II. DISCUSSION**

17 In its March 15, 2011 Order, *supra*, n.**Error! Bookmark not defined.**, the Court clearly
18 set forth the procedure for the orderly, fair, and efficient self-selection of leadership counsel,
19 consistent with the principals set out in the Manual for Complex Litigation (4th) to encourage
20 counsel to coordinate amongst themselves. *See* Manual for Complex Litigation (4th) section §
21 10.22. In fact, the Order implemented “[b]y far the most common” approach to selection of
22 class counsel—the so-called “private ordering” approach.” Manual for Complex Litigation (4th)
23 section 21.272.

24 Plaintiffs all followed the first step of the Court’s procedure and were able to obtain near
25 unanimous consent on the selection of KamberLaw, LLC as Interim Class Counsel and an
26 Executive Committee consisting of representatives from each of the consolidated cases. The
27 group recommended KamberLaw, LLC due to its unique experience in prosecuting *and*
28

1 *resolving* a multitude of Internet privacy class action lawsuits over the past decade. Experience
2 with which the Milberg firm simply does not have. Further, KamberLaw Managing Partner
3 Scott A. Kamber has litigated privacy cases against and worked constructively with most
4 defense counsel involved in this case, and has resolved matters that involved approximately four
5 of the Defense firms. Finally, as the only plaintiffs’ class action counsel from the United States
6 invited to speak at 32nd International Conference of Data Protection and Privacy Commissioners
7 this past October in Jerusalem, Scott A. Kamber prepared and served on a discussion panel with
8 Christopher Wolf, lead counsel for defendant Apple in this matter.

9 Despite KamberLaw’s proven track record in the Internet privacy field, past experience
10 with a number of the same defense counsel who have appeared in this case, and the nearly
11 unanimous agreement among counsel to this appointment, *Milberg refused to agree to any*
12 *structure that did not include its firm as lead counsel.* Instead, then as is true now, Milberg
13 insisted that it was ‘entitled’ to serve as co-lead counsel position. Otherwise, Milberg attorneys
14 would claim that it and only it had the ability to be appointed as interim class counsel. Now,
15 having filed its own “self recommendation” as interim sole class counsel, Milberg has advised
16 its fellow plaintiffs’ counsel that it also intends to file an opposition to the iPhone Plaintiffs’
17 Group recommendation to the Court—seeking a second bite at the judicial apple and add more
18 confusion and paperwork³.

19 Ultimately, Milberg’s efforts to re-write counsel structure procedures and its insistence
20 on its purported superiority to other more qualified counsel only further demonstrates a
21 penchant for needless antagonism between itself and the rest of the counsel in this. In fact, for
22 Milberg, it appears that co-lead must be obtained at all cost, causing justifiable concern about
23

24 ³ The iPhone Plaintiffs’ Group believed the matter of leadership is fully briefed, unfortu-
25 nately counsel for Mr. Chiu did not agree. The iPhone Plaintiffs’ Group interpreted the March
26 15, 2011 Order as requiring a single recommendation for Interim Class Counsel as a result of a
27 best-effort at self-ordering, and if any plaintiff disagreed they had ten days to file an opposition.
28 This appeared to be a streamlined procedure. Mr. Chiu’s counsel interpreted the Order to mean
that a single plaintiff could recommend Interim Class Counsel and also object.

1 Milberg's ability to work with other counsel on this case if their self-recommendation is
2 accepted.⁴ Even more concerning, is that this case is not in an area where Milberg has
3 demonstrated any particular past expertise and, for it, this case presents a chance at 'resume'
4 building in this area.

5 The iPhone Plaintiffs' Group position is simple: KamberLaw, augmented by the
6 proposed executive committee and liaison counsel, is the most capable law firm which can
7 address the unique issues presented by the case and bring this litigation to a successful
8 resolution. And every firm involved on behalf of plaintiffs acknowledges this *except* for Mr.
9 Chiu's Counsel. The successful litigation of this Action requires more than the claimed hiring of
10 an expert to investigate the technical issues involved in Apple's actions, but an understanding of
11 ongoing developments in the technological advancements that demand proficient review and
12 adaptation as they emerge. The iPhone Plaintiffs' Group recommended leadership structure has
13 already been proven in this case by the efficient work to have all counsel agree to both the first
14 Case Management Order as well as the recently filed Joint Case Management Statement.
15 Unfortunately, the later Statement was certainly not made easier by the 'efforts' and
16 gamesmanship evidenced by the attorneys at Milberg during the process of drafting and filing
17 the Statement⁵.

18 Further, this Court sought the plaintiffs' best efforts at self-organization. Thus, all
19 counsel but Milberg have come together with a singular recommendation. This recommendation

20 ⁴ For example, among Milberg's demands on the draft case management statement was
21 that it had to be listed first on the signature line.

22 ⁵ Somewhat surprisingly Milberg over the past week has initiated two different corre-
23 spondence exchanges seeking to have the iPhone Plaintiffs' Group justify filing its recommen-
24 dation in the form of a motion rather than the "filing/other" category chosen by Milberg. This is
25 mentioned here since it seems to be material to Milberg and may be part of its opposition pa-
26 pers. Suffice it to say that in the judgment of the iPhone Plaintiffs' Group, a notice of motion
27 and option seemed to be the most logical captioning of the recommendation to make it con-
28 sistent with an ECF category and the simple procedural fact that when seeking action of the
Court, a motion is proper. Here, the return date and timing of opposition was not relevant be-
cause the Court had previously addressed that opposition papers would be due in ten days. The
iPhone Plaintiffs' Group would prefer that the time expended by Class Counsel be spent on pur-
suits more for the benefit for the Class.

1 should be given significant weight by this Court. *See In re Intel Corp. Microprocessor Antitrust*
2 *Litig.*, MDL No. 05-1717, Slip Op. (D. Del. April 18, 2006) (“appointing class counsel, in part
3 because they were “closer to being the choice of the private ordering process favored by most
4 courts and by the Third Circuit Task Force”) (citing *Third Circuit Task Force Report: Selection*
5 *of Class Counsel*, 208 F.R.D. 340, 356 (2002)). So the record is clear, the iPhone Plaintiffs’
6 Group were careful to ensure that the self-order was not simply a case of the “majority” of
7 ‘votes’ wins and the non-majority group is excluded from the leadership structure.. As the
8 submissions indicate, every case will have a representative in the leadership structure (i.e., the
9 Executive Committee) and that the firm with the most experience would serve as the interim
10 lead class counsel.

11 Given the respect each law firm in the iPhone Plaintiffs’ Group has for KamberLaw’s
12 abilities, this litigation is far more likely to proceed in an orderly and efficient manner, without
13 the inefficient and distracting jockeying necessitated by the appointment of co-lead counsel. It is
14 for these reasons that KamberLaw was the consensus recommendation to serve as sole lead
15 counsel in this case. Since its selection serves the best interests of the Class, the iPhone
16 Plaintiff’s Group respectfully requests that the Court honor this selection and the process by
17 which it was arrived at and appoint KamberLaw to serve as Interim Class Counsel.

18
19 **III. CONCLUSION**

20 The iPhone Plaintiff’s Group respectfully submits that, in the area of Internet privacy
21 class actions, the KamberLaw as Interim Lead Counsel with the proposed executive committee
22 and plaintiffs’ liaison counsel, will better serve the Class and the efficient administration of
23 justice than appointment of Milberg as sole or even co-Interim Lead Counsel.

24 However, notwithstanding the issues set forth herein, the iPhone Plaintiffs Group remain
25 committed to including each of the four first filed cases on the executive committee including
26 Milberg LLP as representative counsel in the Chiu matter. The iPhone Plaintiffs Group hope
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28

1 that, sooner rather than later, the attorneys at Milberg realize that this proposal is fair,
2 reasonable, extremely equitable and more importantly, serves the best interest of the class.
3

4 Date: April 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I, Scott A. Kamber, an attorney, hereby certify that on April 4, 2011, I caused the above *iPhone Plaintiffs' Group Opposition to Plaintiff Chiu's Recommendation*, by causing true and accurate copies of such documents to be electronically filed and transmitted to counsel of record through the Court's CM/ECF electronic filing system.

Date: April 4, 2011

Respectfully submitted,

KAMBERLAW, LLC

By: s/Scott A. Kamber