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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re iPhone Application Litigation

Case No. 11-MD-02250 LHK (PSG)

JOINT SUPPLEMENTAL CASE MANAGEMENT STATEMENT

Date: October 5, 2011
Time: 2:00 PM
Ctrm: 4, 5th Floor
Judge: Honorable Lucy H. Koh

Pursuant to Civil L-R 16-10(d), the parties to this action certify that they have met and conferred, and jointly submit this Supplemental Case Management Statement.

DESCRIPTION OF SUBSEQUENT CASE DEVELOPMENTS

On August 29, 2011, the Judicial Panel on Multidistrict Litigation issued a Conditional Transfer Order transferring seven actions to the Northern District of California for consolidated or coordinated pretrial treatment pursuant to 28 U.S.C. § 1407. Plaintiffs in two of the actions, *O'Flaherty v. Apple Inc.*, No. 11-359 (S.D. Ill.) and *Snyder v. Apple Inc.*, No. 11-784 (E.D. Mo.), filed a motion to vacate the Conditional Transfer Order on September 23, 2011. Opposition briefs are due on October 11, 2011.

On September 20, 2011, the Court entered an order granting Apple's and the Mobile Industry Defendants' motions to dismiss the entire First Consolidated Class Action Complaint ("Complaint"). (September 20, 2011 Order Granting Defendants' Motions to Dismiss For Lack of Article III Standing With Leave to Amend, Dkt. No. 8.) The Court dismissed Plaintiffs' entire Complaint without prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Under the terms of the order, Plaintiffs have until November 21, 2011, to amend the consolidated complaint.

LEADERSHIP STRUCTURE OF PLAINTIFFS' COUNSEL

All Plaintiffs' counsel have been served with the prior case management orders, the CTO and this Court's Minute Order of September 9, 2011. To date, Interim Lead Counsel has not been contacted by any of the firms in the tag-along actions regarding a change to the current leadership structure. As we previously brought to the Court's attention, virtually all of the tag-along cases filed have near identical allegations to the original Northern District cases. The exception to this was the *Gupta v. Apple* action, Case no. 3:11-cv-02110-LHK, filed by the Edelson McGuire firm, which dealt exclusively with geolocation. While geolocation issues were mentioned briefly in the First Amended Complaint the Edelson McGuire firm has pled unique allegations on geolocation in the complaint that they filed. Accordingly, Interim Class Counsel and the Executive Committee members believe that it would be beneficial to the class if the Court would allow Jay Edelson of Edelson McGuire to be added to the Executive Committee. Edelson McGuire will have sufficient

autonomy in addressing such issues so as to, in the judgment of Interim Lead Counsel, assure that any unique interests are adequately represented in the litigation or in any alternative dispute resolution. At this juncture, no other changes in leadership would serve the interests of the Class.

DISCOVERY

Plaintiffs' Position

Plaintiffs anticipate serving the Defendants with a limited set of narrowly tailored discovery requests – fewer than five interrogatories and a corresponding number of document requests. Plaintiffs have shared with Apple their intention to seek limited discovery, and to work with Apple on tailoring the scope of such requests. Despite Plaintiffs' good faith efforts, it appears that Apple opposes any and all discovery and intends to seek a stay of all discovery. Apple has consistently sought to delay discovery in this case, despite those efforts being rebuffed by this Court. Plaintiffs believe the Defendants' position puts form over substance, and will cause unnecessary delay in the litigation of the case and, ultimately, any ADR procedure that may be ordered by the Court. However, if the Court is inclined to entertain a stay of discovery, Plaintiffs request an opportunity to fully brief the issue, as the case law does not favor stays in general or in a situation such as the one before this Court. Further, Plaintiffs do not believe that the instant Case Management Statement is an appropriate vehicle for that legal argument.

Defendants' Position

In light of Plaintiffs' failure to establish the Court's jurisdiction, counsel for Apple asked that Plaintiffs' counsel agree to stay discovery unless and until Plaintiffs file a complaint that adequately alleges a case or controversy. Plaintiffs' counsel have refused to do so. Defendants therefore ask the Court to stay discovery.

It is well established in the Ninth Circuit that a district court has wide discretion to stay discovery *pending resolution* of motions to dismiss, whether the motions are for lack of subject matter jurisdiction or failure to state a claim. *Alaska Cargo Transp. Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993) (district court did not abuse discretion in staying discovery pending ruling on motions made under Rules 12(b)(1) and 12(b)(6)); *Rutman Wine Co. v. W. & J.*

Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987) (affirming stay of discovery pending ruling on 12(b)(6) motion); *Jarvis v. Reagan*, 833 F.2d 149, 155 (9th Cir. 1987) (same).

Here, a Rule 12(b)(1) motion is not simply *pending*; it has been granted. It is not just *possible* that the complaint does not establish the Court's jurisdiction; the Court has already found it does not. Under these circumstances, Apple and the Mobile Industry Defendants should not be put to the time and expense of having to respond to potentially onerous discovery, and discovery is therefore appropriately stayed.

Plaintiffs in this case are now in the same position as a potential plaintiff who has yet to file a lawsuit and wishes to conduct pre-litigation discovery in order to develop a complaint that can survive a motion to dismiss. Such prospective plaintiffs are not permitted to invoke the Federal Rules of Civil Procedure to propound discovery. Rule 27(a) of the Federal Rules of Civil Procedure – "Depositions to Perpetuate Testimony, (a) Before an Action Is Filed" – contains a narrow exception for "a person who wants to perpetuate testimony about any matter cognizable in a United States court," but the exception is inapplicable here, and, in any event, the case law makes clear that Rule 27 pre-litigation discovery aimed at shaping an unfiled complaint is an "[a]buse of the rule." *See State of Nev. v. O'Leary*, 63 F.3d 932, 936 (9th Cir. 1995). Rule 27 permits pre-litigation discovery only in narrow circumstances, in order to perpetuate testimony that could become unavailable if a potential party who cannot yet sue waits until after the commencement of litigation to obtain that testimony. F.R.C.P. 27(a); *Martin v. Reynolds Metal Corp.*, 297 F.2d 49, 55 (9th Cir. 1961) (holding that a potential party is entitled to use Rule 27 discovery "to preserve important testimony that might otherwise be lost"). However, Rule 27 discovery is *not* permitted where the potential plaintiff seeks discovery of information that he or she "hopes will assist in the future when the petitioner applies for judicial relief." *State of Nev. v. O'Leary*, 63 F.3d at 933. In fact, Rule 27 is designed to *prohibit* plaintiffs from trying to use the rule to engage in pre-litigation discovery where the reason for that discovery is only to help guide the development of a sustainable complaint. *Id.* at 936.

Moreover, a stay of discovery is particularly appropriate here in light of the asymmetry of the parties' potential discovery burdens. Simply hoping that groundless claims will be "weeded

out early in the discovery process through 'careful case management'" is insufficient, as plaintiffs with "groundless claims" will be able "to take up the time of a number of other people," creating enormous cost for the court and for the parties. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 559 (2007). As Judge Easterbrook noted in the article on which the Supreme Court relied in *Twombly*, "Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves." *Id.* (quoting Easterbrook, Discovery as Abuse, 69 B.U.L. Rev. 635, 638 (1989)). Indeed, the threat of that "expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id*. The Supreme Court acknowledged that Rules 8 and 12 operate, in part, to prevent economic distortions caused by discovery expense. *Id.* (noting that, because discovery costs permit even plaintiffs with "groundless claim[s]" to push for favorable settlement, deficient claims should "be exposed at the point of minimum expenditure of time and money by the parties and the court"). Thus, the best alternative for protecting against the expense of discovery is to require an adequately pleaded complaint to be filed prior to allowing discovery to proceed. *Id.* Here, Plaintiffs do not even have a complaint on file sufficient to invoke the subject-matter jurisdiction of the Court.

The Supreme Court's comment in *Twombly* was made in part with regard to the cost of economic experts in antitrust cases, but the comment is equally applicable here. Indeed, e-discovery costs can be comparable to, if not in excess of, expert costs in antitrust cases. In consumer class action cases, there is an enormous disparity in the parties' vulnerability to the imposition of e-discovery costs – plaintiffs generally have virtually nothing to produce, while defendants may have exabytes of electronic data in which relevant documents *might* be found. *See, e.g.*, Schwartz and Appel, Rational Pleading in the Modern World of Civil Litigation, 33 Harv. J.L. & Pub. Pol'y 1107, 1141 (2010) (noting that the average large organization receives 300 million e-mail messages a month, which, in response to discovery requests, must be reviewed by attorneys document-by-document, resulting in millions of dollars in costs to defend a case). While commercial litigants may exercise restraint in what they demand of their opponents, lest

they receive equally burdensome demands in return, there is no "do unto others" restraint in class action plaintiffs' approach to discovery.

Here, as this Court's September 20 Order makes abundantly clear, Plaintiffs have been unable to articulate a basis for federal court jurisdiction, and unless and until they do (which will require curing the myriad deficiencies set forth in the Court's Order, a task Defendants believe Plaintiffs will be unable to accomplish consistent with their obligations under the Federal Rules), they should not be permitted to use federal court mechanisms that will impose unrecoverable expense on the Defendants. Moreover, the Defendants have represented to the Court that they "each have taken and are taking appropriate steps to ensure the preservation of evidence related to the matters alleged in the Consolidated Complaint," (5-18-11 Initial Joint Case Management Statement, Docket No. 105), and Plaintiffs will suffer no prejudice whatsoever – much less unfair prejudice – by having to file a complaint that can pass Rule 12(b)(1) and 12(b)(6) muster *before* being permitted to serve discovery. Additionally, given the Court's instruction to Plaintiffs that "[i]n any amended complaint, Plaintiffs must identify what action each Defendant took that caused Plaintiffs' harm, without resort to generalized allegations against Defendants as a whole," (Dkt. No. 8 at 12) it is probable that even if Plaintiffs can file a complaint sufficient to invoke the Court's jurisdiction, not all of the existing Defendants will be included in such a complaint. In fact it is most likely that none of the Mobile Industry Defendants will be left. Defendants therefore respectfully ask that the Court stay discovery pending further order of the Court.

ALTERNATIVE DISPUTE RESOLUTION

The Defendants do not believe a discussion of ADR is appropriate unless and until Plaintiffs are able to file a complaint that can survive a motion to dismiss.

Dated: September 28, 2011

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EXECUTIVE COMMITTEE FOR
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GENERAL ATTESTATION

I, James F. McCabe, am the ECF User whose ID and password are being used to file this JOINT CASE MANAGEMENT STATEMENT. In compliance with General Order 45, X.B., I hereby attest that all persons signing this stipulation have concurred in this filing.

Date: September 28, 2011

/s/ James F. McCabe
James F. McCabe