UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS "MMS" MARKETING AND SALES PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:

***Aleman v. Apple Inc. et al*. No. 10-cv-502**
Case No. 10-11 (S.D. Texas)
***Baxter v. Apple Inc. et al*., No. 10-cv-19**
Case No. 2:09-cv-13938 (E.D. Michigan)
***Carbine v. Apple Inc. et al*., No. 09-cv-5470**
Case No. 09-5470 (E.D. Louisiana)
***Franklin v. Apple Inc. et al*., No. 10-cv-18**
Case No. 09-704 (S.D. Alabama)
***Friloux* v. *Apple Inc. et al*., No. 10-cv-501**
Case No. 09-618 (E.D. Texas)
***Davis v. Apple Inc. et al*., No. 10-cv-497**
Case No. 09-1133 (M.D. Alabama)
***Storner v. Apple Inc. et al*., No. 09-cv-7609**
Case No. 4:09-cv-1480 (E.D. Missouri)
***Irving v. Apple Inc. et al*., No. 09-cv-7608**
Case No. 09-2613 (D. Minnesota)
***Jackson v. Apple Inc. et al*., No. 10-cv-500**
Case No. 3:10CV003 (S.D. Mississippi)
***Meeker v. Apple Inc. et al*., No. 09-cv-7607**
Case No. 3:09-cv-00607 (S.D. Illinois)
***Mejia v. Apple Inc. et al*., No. 10-cv-499**
Case No. 8:09-CV-2582 (M.D. Florida)
***Monticelli v. Apple Inc. et al*., No. 10-cv-20**
Case No. 1:09-CIV-9505 (S.D.N.Y)
***Novick v. Apple Inc. et al*., No. 10-cv-498**
Case No. 2:20-CV-2 (M.D. Florida)
***Padden v. Apple Inc. et al*., No. 10-cv-821**
Case No. 1:10-128 (E.D. New York)
***Sullivan v. Apple Inc. et al*., No. 09-cv-7611**
Case No. 1:09-CV-1993 (N.D. Ohio)
***Sterker v. Apple Inc. et al*., No. 09-cv-7604**
Case No. 09-4242 (N.D. California)

CIVIL ACTION

MDL No. 2116

SECTION "J"
JUDGE BARBIER

MAGISTRATE JUDGE WILKINSON

MOTION TO CONTINUE AND RE-SET BRIEFING SCHEDULE ON APPLE INC.'S PRELIMINARY MOTIONS

NOW INTO COURT, through undersigned counsel, comes defendant, Apple Inc. ("Apple") and respectfully moves that this Court continue the present schedule for briefing and hearing on Apple's pending Motions to Dismiss. Apple asks that the Court put Apple's Motions to Dismiss on the same amended schedule that plaintiffs have now proposed for the essentially identical motions to dismiss filed by defendant AT&T Mobility LLC ("ATTM").

Under a proposed Stipulation and Order filed by plaintiffs, briefing on Apple's motions to dismiss would be completed and the motions would be heard several months before the completion of briefing on ATTM's motions. Because the two defendants' motions to dismiss are based on the same grounds and involve overlapping factual and legal issues, this proposal is inefficient. Moreover, one of the grounds for ATTM's motions to dismiss—preemption—would be dispositive of all claims as to both defendants and would eliminate the need for the Court to consider the remaining grounds for dismissal for sixteen separate complaints under twelve different state laws. For both these reasons, as set forth in greater detail below, proceeding with Apple's motions before ATTM's would be an inefficient waste of the Court's resources.

I.

Currently pending before this Court are multiple Motions to Dismiss filed by Apple Inc. as well as multiple Motions to Dismiss filed by ATTM. Under the present briefing schedule set forth in Pretrial Order #10, which plaintiffs requested and is applicable ***to all of the pending motions***, plaintiffs are required to file their responses on or before October 1, 2010, defendants' replies are due on October 15, 2010, and a hearing is set for October 28, 2010. Ten days after Pretrial Order #10 was issued, plaintiffs filed a "Joint Motion to Continue Briefing Schedule Regarding AT&T Mobility LLC's Preliminary Motions," with the consent of defendant ATTM,

in which they seek to continue the response date for ***ATTM's motions only***. The joint motion is currently pending and requests an extension of plaintiffs' response date to ATTM's motions until November 16, 2010 and the date for ATTM's reply briefing until December 7, 2010. The proposed delay stems from the additional time plaintiffs require for discovery regarding ATTM's motions to compel arbitration. To accommodate that discovery while permitting ATTM's arbitration motion and motion to dismiss to be heard at the same time, plaintiffs propose to continue the briefing and hearing schedule on both ATTM's motions. Apple does not oppose adjusting the briefing schedule to accommodate plaintiffs' desire for arbitration discovery, nor does Apple disagree that all ATTM's motions should be heard together. Apple does believe, however, that both defendants' motions to dismiss must be briefed and heard on the same schedule.

Plaintiffs' proposal to maintain the existing, earlier schedule for Apple's motions to dismiss makes no sense. Doing so means that this Court must consider briefing regarding, and hear, sixteen overlapping motions to dismiss *twice*: once on October 28 as to Apple and again after December 7 as to ATTM. There is no reason for such an inefficient "do over" and plaintiffs have offered none to Apple's counsel. As set forth in more detail in Section III below, Apple has proposed that plaintiffs' counsel agree to the same dates for Apple's motions to dismiss, but plaintiffs' counsel refused without any explanation as to how this is an efficient procedure for the Court or the parties. Plaintiffs' apparent desire to move forward with Apple's motions for the sake of appearing to move forward cannot justify such inefficiency. In reality, the litigation cannot proceed until the Court has decided all motions to dismiss and resolved which, if any, claims remain to be litigated.

II.

Plaintiffs' proposal to move forward first with Apple's motions to dismiss is particularly inappropriate because ATTM raised a preemption defense that is potentially dispositive of all claims as to both defendants. As Apple pointed out in its motions to dismiss, ATTM moved to dismiss the complaints on the ground that plaintiffs' claims are preempted by the Federal Communications Act ("FCA"). (Apple's Motions to Dismiss, fn. 3.) Such an argument is potentially dispositive of all claims against both Apple and ATTM.

Plaintiffs in the present case make a series of allegations respecting the purported inadequacies of ATTM's network. For example, plaintiffs allege that "AT&T needed to build up its network to support" MMS. (FAC ¶¶ 4-6.) Moreover, plaintiffs allege that ATTM overcharged for service on the iPhone. (FAC ¶¶ 10, 58, 90 ("[e]ven though the [MMS] function was disabled, AT&T charged Class members the same price as customers with different phones which support MMS service").)

The United States District Court for the Northern District of California recently held in the iPhone 3G MDL that state-law claims based upon allegations challenging the sufficiency of ATTM's network and rates were preempted by the FCA. *See In re Apple iPhone 3G Prods. Liab. Litig.*, ___ F. Supp. 3d ___, No. C 09-02045 JW, 2010 WL 3059417 (N.D. Cal. Apr. 2, 2010).[1] The court dismissed plaintiffs' claims with prejudice as to ATTM on preemption grounds and also dismissed the claims with prejudice as to Apple on the ground that ATTM is an indispensable party to claims that implicate its network. *Id*. at *9. The court found that "the case could not proceed without ATTM in equity and good conscience because any adjudication of

[1] The court held that plaintiffs' claims were "based on the core allegation that Defendants knew that ATTM's 3G network was not sufficiently developed to accommodate the number of iPhone 3G users, and that Defendants deceived Plaintiffs into paying higher rates for a service that Defendants knew they could not deliver." *Id*. at *6. Therefore, plaintiffs' state law claims were preempted in their entirety against ATTM. *Id.*

claims as to Defendant Apple would necessarily require a determination of the sufficiency of ATTM's 3G network infrastructure." *Id*. As a result, the court did not reach the merits of the state-law claims challenged in Apple's and ATTM's motions to dismiss.

The sixteen state-law complaints could be similarly preempted here and result in complete dismissal without the need to reach the merits of the pending motions to dismiss under twelve different state laws. Apple does not suggest that this Court should decide the preemption issue in the context of setting a briefing and hearing schedule. But it is evident that if the holding of *In re Apple iPhone 3G Prods. Liab. Litig.*, is applied here, the claims against ATTM are preempted by the FCA. Such a dismissal of ATTM would mandate dismissal of Apple. *See Bry-Man's, Inc. v. Stute*, 312 F.2d 585, 586 (5th Cir. 1963). Accordingly, to brief and argue Apple's motions while continuing ATTM's briefing schedule and deferring this potentially dispositive issue until months later is illogical and inefficient.

III.

On September 23, 2010, undersigned counsel for Apple contacted Liaison Counsel for the Plaintiffs' Steering Committee (PSC) and requested that, in the event the PSC decided to file a motion to continue ATTM's briefing schedule, that said motion include Apple's briefing schedule in the interest of cooperation and efficiency. The next day, however, the PSC filed its "Joint Motion to Continue Briefing Schedule Regarding AT&T Mobility LLC's Preliminary Motions" but failed to make any mention whatsoever of Apple's request for a similar change in the briefing schedule on its motions.

When undersigned counsel for Apple received a copy of the "Joint Motion to Continue Briefing Schedule Regarding AT&T Mobility LLC's Preliminary Motions" through electronic service on September 24, 2010, he immediately contacted Liaison Counsel for the PSC to inquire

as to whether the PSC would have any objection to a continuance of the hearing schedule on Apple's pending motions. At that time, he was advised by Liaison Counsel that the PSC would not agree to such a change. No substantive reason was articulated for this opposition.

Undersigned counsel for Apple has contacted counsel for ATTM who has advised that their client has no opposition to placing the pending motions of both defendants on the same briefing schedule.

IV.

Plaintiffs have not and cannot offer a rational basis for separate briefing and hearing on Apple's and ATTM's motions to dismiss – motions that are predicated on essentially identical grounds. Indeed, the major difference in the motions –ATTM's argument on the basis of FCA preemption – is potentially dispositive, and thus underscores the impropriety of hearing Apple's motion before ATTM's motion. Accordingly, Apple's motions should be placed on the same briefing schedule now proposed for ATTM's.

WHEREFORE, defendant, Apple Inc., respectfully requests that this Court grant its Motion to Continue and Re-Set Briefing Schedule On Apple's Preliminary Motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been electronically filed on September 27, 2010, with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing.

/s/ Quentin F. Urquhart