UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

MDL NO. 2116
NEW ORLEANS, LOUISIANA
JANUARY 15, 2010, 9:30 A.M.

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TRANSCRIPT OF STATUS CONFERENCE
HEARD BEFORE THE HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

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I N D E X

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M O R N I N G S E S S I O N

TUESDAY, JANUARY 15, 2101

(COURT CALLED TO ORDER)

THE DEPUTY CLERK: All rise.

THE COURT: Good morning, everyone.

VOICES: Good morning, Your Honor.

THE COURT: Please be seated.

Eileen, call this case.

THE DEPUTY CLERK: Multidistrict Litigation Number 2116, *In Re: Apple iPhone 3G and 3GS MMS Marketing and Sales Practices Litigation*.

THE COURT: Let me ask, first of all, is everyone who needs to sign in already signed in on this sign-in sheet? If not, make sure you do so before you leave here today.

I have received and read the submissions that each side has filed in the joint proposed Case Management Order, to which there are obviously some disagreements to several aspects, so let's take up some initial matters first.

Mr. Bickford, you appear to be the consensus choice for liaison counsel on the plaintiff's side.

Who is going to speak for the defense side? Who is it going to be?

MR. URQUHART: Your Honor, I think both -- Quentin Urquhart, myself, and Gary Russo on behalf of At&T, I speak on behalf of Apple, we will be initially speaking on behalf of our respective parties.

MR. RUSSO: Correct, Your Honor.

MR. BICKFORD: And, Your Honor, I would suggest to the Court that the plaintiffs have met and unanimously come to a consensus in terms of an executive management committee to shepherd this litigation along, and I would like to propose that to the Court initially as we go along this morning.

THE COURT: Well, I'm going to ask you to do that and submit that in writing. We can talk about it this morning, if you would like. You could just say something about it, but I'm not going to make any decision on that until I get something in writing.

MR. BICKFORD: Would you like me to do that right now, sir?

THE COURT: You can, if you would like.

MR. BICKFORD: The plaintiffs have collectively met, with the exception of one case which is in the Southern District of Texas named *Allman v. Apple* . That individual attorney representing Mr. Allman was not present at the meeting.

Collectively, the plaintiffs are going to unanimously recommend myself as liaison counsel, and as an executive committee, Mr. Penton, Ronnie Penton; Steve Murray,

Sr.; and John Climaco as an executive committee.

We further have decided that since there are a limited number of law firms involved, that a Plaintiffs Steering Committee of everyone who is willing to financially commit to the litigation and is willing to work would be welcome on to the steering committee and would give their applications to the executive committee which would then just pass them on to the Court.

We'll certainly put the executive committee recommendations in writing to the Court, as well as the procedure we put in place. I think that the only person that -- the Court is very familiar with Mr. Penton and Mr. Murray. Mr. Climaco is from Cleveland. He's right here. If you want to say a word to the Court.

THE COURT: Good morning.

MR. CLIMACO: Good morning, Your Honor.

Your Honor, just very briefly, Mr. Bickford just asked me to introduce myself. I've been practicing law in Cleveland and throughout the United States since '67. I know I was first introduced to the New Orleans Bar in 1994, when, bless his sole, Wendell Gautier asked me to become involved in the *Castano* litigation. Since then, I have had other major mass torts or class actions, certainly with Mr. Murray, Mr. Penton, Mr. Becnel, and other members of the New Orleans Bar.

I currently serve as the national liaison counsel

in the welding fume litigation in Cleveland. I was co-lead in the *Sulzer* litigation in Cleveland for the 10 or -- well, actually, 16 years of my career. I've mainly participated in mass tort and class actions. Recently, I tried the first major welding fume litigation in Cleveland and obtained one of only five verdicts so far, and ours was for $20,500,000. I appreciate the opportunity to ask you to consider me for appointment as this leadership.

Thank you, Your Honor.

THE COURT: Very well. Like I said, I'll make a final decision on that once I get the written submission from Mr. Bickford. Okay? Thank you.

The next thing that's on the agenda suggested by counsel is to discuss the filing of additional complaints.

Do you all want to --

MR. BICKFORD: Yes. Your Honor, that's a topic that the defendants wanted to raise. I'm certainly willing to respond to that.

MR. URQUHART: Yes. Your Honor, Quentin Urquhart, Jr., on behalf of Apple. Our understanding, based on prior representations that have been made by plaintiffs' counsel at the MDL hearing, is that there was, at least at that time, an intention on the part of either this group of plaintiff lawyers or others to file 50 individual complaints in 50 different jurisdictions around the country. We know as of this time that

complaints have been filed, I believe, in 23 actions covering about 12 states.

Our only request to Your Honor is we can't force anyone to file any more complaints, nor are we asking for them to file any more complaints. What we're asking, that the Court simply set a cutoff date by which at least the lawyers who are here now should be requested to file any additional complaints that they are going to file so that we get them in front of Your Honor and move forward in that manner.

So our simple request is a reasonable deadline by which additional complaints can be filed.

Thank you, Your Honor.

THE COURT: Thank you.

MR. BICKFORD: Your Honor, the position of the plaintiffs collectively in the case is that the deadline for filing additional complaints is the statute of limitations, and we can't control who files complaints around the country. If, in fact, someone approaches us in a jurisdiction and wants to file a complaint, I don't think that we can ethically tie our hands here and say, "We're not going to file any more complaints," Judge.

This is an ongoing multidistrict litigation, and to somehow cap the filing of complaints into it, I don't know what authority there is for that proposition or authority for the Court to order the collective attorneys here, that they can't file any more complaints into the MDL nor any other jurisdiction.

THE COURT: Well, the proposed Case Management Order language doesn't limit anyone's ability to file additional lawsuits. I'm reading. It just sets a deadline for amendment of the complaints that have already have been filed.

MR. BICKFORD: Yes. That's a second issue that we're going to get to, Your Honor, but I think what I understand the defense requests in this case to be is that there be some deadline -- be it November 1st; be it December 1st -- where anyone that presently has an MDL case filed has to file whatever cases they are going to file, and potentially prohibit anyone else from filing a matter into the MDL. I don't think that's a proper ruling that this Court can make.

THE COURT: I don't think that's what Mr. Urquhart intended, but I'll let him speak for himself.

MR. URQUHART: Sure, Your Honor. Just to be clear, we completely agree with Mr. Bickford. We can't force anyone, who especially is not before this Court now, to file complaints now. This Court doesn't have the jurisdiction to do it, and we wouldn't put Mr. Bickford and his steering committee in that position.

All we're simply asking is that with respect to the lawyers who are here today, that if any of them are presently intending to file those complaints, that we establish a reasonable time period. We are in no way attempting to force anyone to file complaints. We're attempting in no way to block

anyone out of the --

THE COURT: Are you talking about amending complaints?

MR. URQUHART: No, Your Honor.

THE COURT: Are you talking about filing new complaints?

MR. URQUHART: New complaints, Your Honor.

THE COURT: How can I force anybody to file a complaint if they file within the statute of limitations? What authority would I have to do that?

MR. URQUHART: Your Honor, I don't think you necessarily have authority --

THE COURT: Just because a lawyer is in front of me, it doesn't mean he can't get a new case down the line.

MR. URQUHART: Correct, Your Honor. But for example, if one of the counsel was currently, say, going to file a case in the state of Utah where I don't think we have one at this time, I don't think it's unreasonable for the Court to say, "If you're thinking about doing that, could you do it within the next 60 days so at least we have an idea of all the cases" --

THE COURT: I agree with you, it would make sense, and I don't know what motive they would have to just hold it back if they are already aware of the case and have the case in their office. I would certainly encourage them to file it so we can get all of these things, as you said, consolidated, but again, I don't know that I have authority to order anybody to file a lawsuit that's not already filed, a lawsuit that may be filed

later, if it's within the statute of limitations. I don't know how we could prevent that.

MR. URQUHART: Your Honor, I agree, and we're not asking for an order, but we're asking for a request.

THE COURT: Well, I just made the request or the suggestion.

MR. URQUHART: Thank you, Your Honor.

THE COURT: Now, what about a deadline for amendments of complaints that have been filed? I don't know --

MR. BICKFORD: Your Honor, this actually -- I think that from the plaintiffs' standpoint, we have suggested with regard to the issues -- and this is one of the issues outlined in the CMO -- we have suggested that because there are various issues that are a bit complicated and, I think, defy argument right now before the Court and need to be fleshed out a little bit more, we've asked for a briefing period to cover both the amendments, the pleadings and this issue of master complaint, and issues of the scope of discovery, and whether discovery can go forward or not.

The reason we've done so is because AT&T, at least, has raised the issue of arbitration. There are choice of law issues that, because of the various complaints out of various states in this consumer product case arise, there are issues as to whether we can do class certification discovery, whether the discovery is going to go beyond the class certification.

As to when, whether or not we get discovery before we can amend individual pleadings, whether it makes sense to have a master complaint or not, for instance, Judge Fallon rejected the master complaint yesterday in the *Chinese Drywall* because after having gone through six months of the case, it didn't serve the administrative purposes of the Court to have a master complaint, but they arrived at that decision having done some discovery, having fleshed out some issues in the case.

We are certainly willing to entertain filing a master administrative complaint to clarify certain things if, in fact, it needs to be done, but we don't think collectively that we are there yet because both sides are in the position of posturing, as you can see by the statements that have been made to the Court, both on the plaintiffs' side and from the defense side.

I think that the period of briefing that the plaintiff has suggested, which is essentially, you know, a 30-day briefing period of us filing briefs, I think, within 15 or 20 days and reply briefs, and then coming before the Court, and then answering whatever questions, fleshes out both sides' full positions in this case. It gives the Court an opportunity to make a reasoned decision as to how the course of this case ought to go and to fashion a CMO, I think that will really guide us better in the course of the litigation.

Further, I think that we are willing to talk, and

I've talked to Mr. Urquhart yesterday, -- and Mr. Russo, as well -- about continuing an ongoing dialogue as we're briefing this to see if we can together resolve some of the outstanding issues that we have not been able to resolve in the course of the CMO. I'll tell you that the CMO was a little bit difficult to draft from the plaintiffs' standpoint because there was really no management structure in place, and it became a ragtag issue of trying to get people across the country to agree to certain issues.

With a management structure in place, with a briefing schedule of 30 days, and some further discussions between the parties, I think it would facilitate this Court in terms of reaching a reasonable CMO that can govern this case, that can move the litigation quickly and dispose of the issues that the Court needs to dispose of early on and do whatever discovery, lasting long-term discovery we needed to do toward resolution of the matter.

MR. URQUHART: Yes, Your Honor, Quentin Urquhart again. If I could take maybe the issues more specifically first before we lump them all together.

The first issue that we believe needs to be addressed by the Court is one of amendment of the pleadings. This is not routine -- I mean, excuse me, this is not unique. Excuse me. It is routine. It is something that is generally required in every civil action that is filed by Your Honor that

at some point relatively early in the litigation a time period be allowed by which amendment to pleadings should be accomplished.

In this particular case, I believe Apple and AT&T both believe there are a number of factual inaccuracies that are simply outright wrong contained in a number of the complaints that we want to give the plaintiffs, quite frankly, the opportunity to fix before we move forward with motion practice.

Further, we believe that a number of the complaints are subject to motions under Rules 8 and 9 of the Federal Rules. All we're simply asking, like Your Honor orders in almost every civil action, is a time period by which we think the pleadings are essentially established so that we can commence initial motion practice.

THE COURT: What's your suggested time frame? Is that your suggested date? September 15th?

MR. URQUHART: No, Your Honor. That was the plaintiffs' suggested date. Our suggested date was 14 days following the filing of a master complaint, if Your Honor orders one.

THE COURT: Well, you're putting the cart before the horse there. We haven't ordered a master complaint.

MR. URQUHART: Correct, Your Honor. We're willing, though, to allow --

THE COURT: I, frankly, at this point don't see the need to order a master complaint in a case where we have only 20 cases. It's not like we've got thousands of cases here. So

at this point, I don't see any need for a master complaint.

So what would be your suggestion for the proposal for amendments?

MR. URQUHART: I believe 60 days, Your Honor, I think would be a fair time period.

THE COURT: Mr. Bickford, do you propose September 15th? That's nine months. It's eight months, technically.

MR. BICKFORD: I understand that. The reason for that being, Your Honor, is that we believe that we're entitled to some discovery as we go along. They are asking us to conform pleadings to facts that we don't even have.

THE COURT: Well, you're supposed to have facts when you file a lawsuit. That's the whole idea. You can't do discovery before you file a lawsuit.

MR. BICKFORD: Well, in fact, I'm dealing with notice pleading in the federal court system, but put that aside, we are entitled to some discovery in terms of conforming our pleadings to the facts. If, in fact, Mr. Urquhart wants us to conform our pleadings to the facts, then we're happy to do that after some limited discovery which we want to address within this briefing period that I mentioned earlier.

MR. URQUHART: Your Honor, to use your words, they are putting the cart before the horse. They are supposed to have their facts before they file the lawsuit, and all we're simply saying is, give them 60 days within which to amend their

pleadings. We would then file whatever initial motions we have. At the time that we file our motions, we will meet and confer with counsel and discuss with them what discovery is needed at that time, and we believe we can come to a consensus on that discovery. We are not in any way attempting to prohibit plaintiffs' counsel from doing that discovery that is needed on that motion practice at the commencement of the litigation.

THE COURT: I'm going to set a deadline for filing of amended pleadings to 120 days and following which we'll have to talk about a timeline for filing motions. I guess that's where we are now on your agenda.

MR. URQUHART: Yes, Your Honor. Well, Your Honor has already spoken about Your Honor's feelings about the master complaint.

If I might, Your Honor, I wanted to introduce to the Court Penny Preovolos, who is here from San Francisco. She is enrolling as counsel *pro hac vice* or has been enrolled as counsel *pro hac vice* on behalf of Apple. I know she would like to at least address Your Honor briefly on the master complaint issue.

THE COURT: You can do that in writing. I'm not going to order it now, so she can submit that in writing and maybe I'll reconsider. I'm not saying it won't become reasonable to do that, but at this point, I'm not going to do it. Okay?

MR. URQUHART: So would Your Honor ask that within,

what, the next two weeks, the parties submit a briefing on the issue of whether a master complaint is needed or not?

THE COURT: That's fine. But there is no point in filing something at this point. I just don't see the need for it at this point.

MR. URQUHART: I'm sorry. What's that, Your Honor?

THE COURT: I don't see the need for it at this point.

MR. URQUHART: Fine, Your Honor. Thank you.

MS. PREOVOLOS: Your Honor, Penny Preovolos. I just wanted to say I agree with you. I don't think we need to pursue it. I do think we have to get motions on track for the complaints that you ordered, and I think we should all devote our resources to that. I would like to make that clear at this time.

MR. URQUHART: Thank you, Penny.

THE COURT: Thank you very much.

Let's talk about filing responsive pleadings or initial motions.

MR. URQUHART: Your Honor, if you're ordering that amendments be completed within 120 days, I would think that rationally, within 30 days after that date, we should file motions. 60? I've been told to ask for 60, Your Honor, because we don't know how many complaints we're going to have, Judge, so that's our concern. We could have many more than the 23 we presently have before us.

THE COURT: 60 days after the 120-day period, after the

deadline for amending pleadings.

MR. URQUHART: Thank you, Your Honor.

Scott, do you have anything else on that?

THE COURT: Mr. Bickford, do you want to weigh in on that at all?

MR. BICKFORD: I'm sorry, Your Honor wanted 60 days after the 120 days?

THE COURT: After your 120 days to amend pleadings ends, the defendants would have 60 days to file their, I guess we're talking about Rule 12 motions.

MR. URQUHART: Rule 12 or Rule 9 motions, Your Honor.

MR. BICKFORD. That's fine. That deadline is fine, Your Honor. I think that we would ask that the Court entertain direct filing, of course, into the MDL of all new proceedings and all new cases.

MS. PREOVOLOS: Oh, yes, I see. I think that's fine.

MR. URQUHART: Some things that haven't been transferred can be filed here.

MS. PREOVOLOS: We think that would better for everybody if it's acceptable to the Court.

THE COURT: Okay.

MR. RUSSO: Your Honor, Gary Russo on behalf of ATTM. I think the other issue we've talked about and I think we've agreed to is exceeding the general page limit. I think we put a 50-page limit on these briefs. Is that acceptable?

THE COURT: I have no problem with that.

MR. BICKFORD: I promise I won't take 50 pages.

Just in general, there seems to be this "I gotcha" issue on the motions and pleadings, and if, in fact, there is some mischaracterization that you believe is on the pleading, I hope you share that with us, Mr. Urquhart, in terms of --

MR. URQUHART: Absolutely. I think that our joint position statement already sets forth what some of those concerns are. So I will be happy to meet with you and elaborate on that in greater detail.

MR. BICKFORD: Thank you.

MR. URQUHART: And, Your Honor, as far as the response to our motions when they are filed, should that be handled in the standard manner that Your Honor would normally follow in the Eastern District or do you want more time?

THE COURT: That probably wouldn't be fair to the other side.

MR. URQUHART: That's why I raised the issue.

THE COURT: You could dump these motions on them, and they would have seven or eight days to respond.

MR. URQUHART: Which I don't think is right.

MR. BICKFORD: I assume that the Court will have a status conference prior to that, and the Court can set a briefing schedule.

THE COURT: Yes, I was going to suggest file your

motions, and what I'm planning to do is have regular monthly in-court status conferences like we're doing today, and then we can set a hearing date.

Well, let's just think. Would 30 days be enough time for you to respond to their motions?

MR. BICKFORD: If there is not five thousand of them, yeah, I think that would be probably fine.

THE COURT: Let's set 30 days for plaintiffs' opposition to your motions, and then we'll set a hearing date, and, of course, if there is a need for supplemental briefing or whatever, we can deal with that at that time.

MR. URQUHART: I think Your Honor is correct, if we're going to have monthly conferences, this issue can be addressed again sometime down the line.

THE COURT: Right.

MR. URQUHART: Thank you, Your Honor.

THE COURT: Timing and scope of discovery. Who wants to talk about that?

MR. BICKFORD: We would like to begin discovery immediately, Your Honor. We would like the scope of the discovery to be toward the merits of the case. The problem being is that discovery that is completely limited to class certification issues, having been down that road before, the line becomes so skewed as to what's a class certification issue versus what's another issue. If, in fact, AT&T brings into arbitration,

this question, there will be discovery on the arbitration issue as well.

THE COURT: What kind of discovery would you have an arbitration issue?

MR. BICKFORD: Well, if, in fact, the arbitration --

THE COURT: Wouldn't that be a --

MR. BICKFORD: -- is unconscionable under the terms of the law; in other words, if, in fact, where the arbitration --

THE COURT: Wouldn't that be a legal issue, not a factual issue? I'm trying to get some understanding of what kind of discovery you would need on that.

MR. BICKFORD: For instance, I don't know what agreements -- AT&T and Apple have a monopoly with regard to the iPhone. I don't know what kind of joint agreements they have between themselves which may abrogate the arbitration, itself. I don't know what kind of agreements they have or memos that go back and forth with regard to arbitration. I don't know how they communicated in the arbitration clause to individual consumers, whether or not that was done electronically, whether or not it was done five days after people bought the phone already. A lot of the agreements --

THE COURT: I don't know enough about this, but you buy one of these phones, you sign some sort of agreement? Do you get an agreement?

MR. BICKFORD: No, it's done electronically.

THE COURT: Every time I go on the Internet to do anything, I've got to say "I accept," and you accept, and God knows what you're accepting when you accept something, but everybody just says "I accept" now, I guess, if you want to get through the web page.

MR. BICKFORD: But I can buy the phone at an Apple store and then go and sign up with AT&T separately.

THE COURT: What I'm saying, one way or another, you're signing up for some agreement. It's in the agreement. Whatever it is, it is. I just don't understand what kind of discovery you're going to need on that. It seems to me they could tee that up as a legal issue. Once they tee it up and you file your opposition, you'll show there is a need for some limited discovery. I can't envision it now, but maybe you're right.

MR. BICKFORD: There has been extensive discovery, for instance, in the Eleventh Circuit in a similar AT&T arbitration issue granted by the Court there because there are conscionability issues with regard to the arbitration clause, how it's communicated to people, where it is, how it affects people, whether they have the opportunity, whether or not it's binding, whether or not it is, in fact, an agreement that they have in place that I have a choice of, given the consumer product I'm buying.

So there is a variety of issues that need to be discovered with regard to the case. As I said, whether or not

there are other legal agreements that go between the two companies in terms of the way they set this up -- because Apple does not have an arbitration agreement contained in their contracts. AT&T claims they do, in certain cases. Do they have it for all the people here? Do they not? It is something that is going to raise a number of factual issues in order to brief.

I've looked at the law. The laws that the courts have looked at in arbitration cases are heavily fact-dependent in terms of whether or not the arbitration agreement is unconscionable in terms of how it's applied to individual consumers.

That's part of the track of discovery. The other part of the track of discovery becomes, you know, in terms of -- so that we're not wasting a half a year and not doing any discovery is going forward in terms of class certification issues as well as issues on the merits.

THE COURT: Let me hear from the other side.

MR. RUSSO: Your Honor, on behalf of ATTM, you have actually articulated our position in what we've suggested to Scott earlier. We actually thought we had made some progress in that regard. Our suggestion, Your Honor, is allow us to file our motion to enforce the arbitration clause. We'll meet and confer with the plaintiffs to talk about discovery. Because we're not suggesting right now that there is absolutely no way any discovery is going to be conducted, but we'd like to hear what

they have to say. They'll see our briefs. They can review them. We'll meet and confer, and if we can't agree, we'll come back to Your Honor for some direction on that point.

Rather than have that discussion now, we would like to get our motion filed, have our discussion with them and see if there really is an issue. There may not be one.

MR. BICKFORD: Which is why we asked the Court for the briefing schedule on these issues with regard to the scope and need for discovery, because I think that there are several complicated issues that we would like to apprise the Court of more fully. We think we can do --

THE COURT: How much time do you want to do that? That's probably a good suggestion.

MR. BICKFORD: I think there is a suggested time schedule that we put in the our brief, which is essentially mid-February basis, we both file briefs simultaneously with the Court and then some time shortly thereafter, we file replies to each side's brief so that the issue is laid out before the Court, and then at a monthly status conference, the Court, having had a chance to review it, we can either argue our positions or the Court could ask us questions with regards to its concerns about them.

MR. RUSSO: Your Honor, our only concern with that is we have not suggested there is not going to be any discovery, but we hope to get the pleadings amended, see what the issues are,

determine what motions we need to file. At which point, we sit down and confer with plaintiffs on what discovery is necessary.

THE COURT: I kind of sense that you all know what the issues are now from what's been filed. This is not that complicated a case in terms of what's alleged here. It's a pretty simple, straightforward case. It's alleged that the defendants misrepresented some feature of this phone when they marketed it.

I think you know what the issues are. You said it was all fully disclosed. It's not a complicated case to me. We've got all of these lawyers here, but it boils down to, it seems to me, a pretty simple, straightforward -- there may be some difficult legal issues, like arbitration and some of these other issues, but the case, itself, seems pretty basic and simple to me.

MR. URQUHART: Your Honor, if I could just be heard just briefly at this point, and I'm going to have Ms. Preovolos address it specifically. I believe there are some factual issues that are worth getting clarified early before we go down the discovery path, and I'll let Ms. Preovolos --

THE COURT: Well, then, it seems to fit with what Mr. Bickford is suggesting is that each side get, I think he's asking for about 30 days from now to file briefs on these various issues, to lay out your positions, and certainly I would encourage you all to meet and talk to each other, to see to what

extent you can agree on this during that time, during that 30-day period.

MR. BICKFORD: And that was --

THE COURT: You don't have to wait until you file in 30 days and then meet. You can meet and then file.

MR. URQUHART: Just to be clear, Your Honor, this briefing is on the question of the scope and timing of discovery.

THE COURT: On the availability, scope and timing of discovery. I guess if the defendants -- it sounded like you all have -- Ms. Preovolos, am I pronouncing your name right?

MS. PREOVOLOS: Actually, it's Preovolos, Your Honor. Thank you. But no one can pronounce it.

THE COURT: Well, it's probably easier than my name. Ms. Preovolos has kind of, I think, acknowledged that maybe there is no need to talk about the master complaint issue at this time.

MS. PREOVOLOS: No, I agree, Your Honor. I think the only point that I wanted to raise, and I know Ms. Sooy and Mr. Russo agree, is although the general scope of the issues is clear, we think in terms of discovery, it would be helpful to talk about those issues after the motions are filed. We were fairly concrete, I think, in our position statement. For example, one issue is, our view is that no representations were made about MMS during the 2008 time period that's addressed in some of the complaints.

So we think there may be some fairly

straightforward motions. They may be very simple, limited summary judgment motions. I don't know yet until I see what amendments are going to happen to these pleadings. My only thought, and I know Ms. Sooy shares that thought, is we could have a more useful dialogue about discovery and might never have to engage this Court in briefing an argument when we have really focused those motions and filed them.

At this point, I think we're briefing something quite in the abstract. For example, you know, arbitration is ATTM's issue, but it seems to me that until the plaintiffs see the motion, it's hard for them to know what discovery they're going to want.

THE COURT: Let me ask Mr. Bickford to respond to that.

Mr. Bickford, what would be the problem? Maybe that makes sense. What would be the problem or the detriment to your side if the defendants were allowed to tee up their motions, then you all look at them, and then we talk about what discovery do you need, whether it's on arbitration or 12(b) motions or whatever, and then you know what you need to target your discovery towards, what the issues are?

MR. BICKFORD: I don't think that we collectively have a problem with that. Although I will note that, you know, when you come up and say, "We're going to file motions for summary judgment" to me, it's like, okay, if you're filing a motion for summary judgment at this stage of a litigation without discovery,

I don't see how you get there.

MS. PREOVOLOS: Let me be clear about what I'm saying, all right, just so I'm not misleading the Court. When I say "a motion for summary judgment," I'm just talking about the fact that there are probably some documents outside the pleadings we would want to introduce, we certainly would. For example, if we got there, I would say to Mr. Bickford -- or Mr. Urquhart would -- "What discovery do you need? Let's agree on that."

So I'm not trying to play games. This is one of those situations where I think there may be early dispositive motions that are technically outside the pleadings because they involve, you know, 20 documents, and if that calls for discovery, it calls for discovery, but it doesn't call for a wide-open discovery. So I'm just suggesting some rational case management.

To be clear, I'm not even taking, nor is ATTM, the traditional defense position and, actually, the traditional federal court position, which is close the pleadings before you start discovery. I'm not trying to say that. I'm just trying to say, let's see where the pleadings are going to take us before we start talking about discovery. That's all.

MR. BICKFORD: The problem I have, Your Honor, is, yeah, well, there are 20 documents of discovery, and we're going to give you which 20 documents you think you can look at, and those are the 20 documents that control this.

THE COURT: No, that's not --

MR. BICKFORD: And --

THE COURT: Wait, Mr. Bickford. That's not what anybody is saying. What she said was, they would file their motion and support it with whatever, whether it's a motion dealing with arbitration, Rule 12 motion or Rule 56 motion. You would get to look at it, we would have a status conference, you would get to talk to them, and then you would say, "Okay. We need this discovery in this amount of time to do the discovery and respond to those motions." That may be a logical way to proceed here. I'm just throwing that out.

MR. BICKFORD: If we can confer for just one second.

THE COURT: We wouldn't even be setting their motions for hearing when they file them, you know.

MR. URQUHART: Just tell them to file their motions now, Judge.

THE COURT: Yes. How much time do you all need to proceed in that direction? The defendants?

MR. RUSSO: Your Honor, we were thinking to follow the same schedule that we had laid out a moment ago.

THE COURT: Which was?

MR. BICKFORD: What about tomorrow?

MR. URQUHART: We don't know what the pleadings are.

MR. BICKFORD: The pleadings are filed.

MS. PREOVOLOS: Just to be clear, Your Honor, there are a group of complaints that are close to identical. There are

some complaints that have additional allegations. I think the purpose of amending the pleadings, if they are going to be amended, is to see if the plaintiffs are going to have a consistent set of pleadings we can plead to. So it's not a technicality.

THE COURT: So you're not ready to file your motions until after they have had a period to amend?

MR. URQUHART: Correct, Your Honor.

THE COURT: Then we're back where we were.

Mr. Murray?

MR. MURRAY: Your Honor, Stephen Murray for the plaintiffs.

Your Honor, you're correct that this is a simple case, but it's also true that it potentially has a lot of complexities that are caused by questions of choice of law and class certification. This is a consumer action that is composed of negative value cases. If the claims of the class or the consumers are to be vindicated, it has to be through class action practice.

On the plaintiffs' side, we obviously would prefer a single action in a single court that can vindicate the rights of all of the consumers nationwide. We're not convinced that can be accomplished. In order for us to know how to proceed and, candidly, how to plead this case, whether we plead it as a potential national class action or we have to plead it

alternatively as a series of state class actions, we need some facts.

We represent consumers who purchased a simple product, and we know from interviewing our consumers how they feel about what happened to them. What we don't know is how the defendants marketed this product. We don't know the arrangement between the defendants. We don't know whether that arrangement would constitute a partnership or a joint venture, such that their independent arbitration rights and their independent contractual rights are somehow merged into a single action.

So what we really need to know in order to adequately amend and have sensible pleadings is the defendants' side of these transactions. We need to know the contractual relationship between AT&T and Apple. We need to know the conditions under which the arbitration rights were granted by the individual consumers.

So it's just a matter of basic limited but -- and we're not asking for protracted discovery, but we need basic information as to what happened on the defendants' side of this transaction. We can't get that from individual consumers. They are not privy to that information.

THE COURT: I'm going to stick with my original plan, then, in light of the defendants stating that they want the amendments to be completed before -- at least the amendments to the current lawsuits to be completed, which we've set a period of

120 days, 60 days thereafter would be the deadline for responsive pleadings or motions, and 30 days after that for plaintiffs to file oppositions. Following which, at the next status conference after that date, we'll talk about setting a hearing date on those motions and any supplemental briefing or any discovery that's needed directed to those issues. Okay?

Meanwhile, I think Mr. Bickford's suggestion of briefing, as we were talking about a few minutes ago, the parties shall submit briefing on the availability, scope and timing of discovery, initial briefs from all parties not to exceed 30 pages, to be filed no later than February 19, 2010; reply briefs from the parties not to exceed 15 pages, to be filed no later than February 26th, following receipt of which, the Court will decide whether any oral argument is necessary and set a date for that, if so.

MR. BICKFORD: Judge, I would note that -- and when I picked those dates, I didn't look. I would suggest maybe the 23rd, which is the Tuesday following --

THE COURT: When is Mardi Gras?

MR. BICKFORD: The 19th is Mardi Gras week, and Washington's birthday is the 22nd, which is that Monday, so maybe doing it February 23rd and then the reply briefs being due the following Tuesday, which is the 2nd of March.

THE COURT: March 2nd. February 23rd and March 2nd for those two dates.

MR. BICKFORD: Penny, for your benefit, we don't work around Mardi Gras here.

MS. PREOVOLOS: We celebrate federal holidays too, though.

THE COURT: The lawyers from San Francisco could be doing the briefs at that time. There is nothing going on in San Francisco at that time, right?

After I read each side's position papers, in light of what Mr. Murray said about these being negative, a large number of negative valued cases, maybe Mr. Bickford, I would just like to get some sense of what the plaintiffs see as the elements or types of damages that you claim you have in this case. Because from what I've read, I'm not that familiar with the iPhone and all, but apparently what the plaintiffs are contending is that -- and this is why I said it sounded like a relatively simple case, is that this new iPhone that's the 3G --

MR. BICKFORD: Any iPhone.

THE COURT -- was marketed as being capable of having this MMS function when it was marketed and sold and, in fact, it did not, but now it does.

MR. BICKFORD: That's correct.

THE COURT: Everybody agrees with that.

So we're talking about some closed or limited period of time, assuming you're right, that they marketed an iPhone that said it could do something that it couldn't do.

MR. BICKFORD: Anywhere from two years to four to six months.

THE COURT: Although the other side, first of all, says that's totally wrong, but beyond that, they say the phone could send and receive video and pictures, just by a different method.

I'm just trying to understand, if I'm a consumer that has an iPhone, how big a deal is this and what are your damages here? That's what I'm trying to understand.

MR. BICKFORD: For a certain class of consumers --

THE COURT: I've got a Blackberry, for example. I've never used MMS. I didn't even know what the hell it was until I got this case.

So how many people even know what that is and use it? A lot of people just use their cell phones as phones or to send and receive e-mail and all, like me.

MR. BICKFORD: Okay. Judge, and this is in no way to be disrespectful, but it's a generational issue.

THE COURT: I do know what a text message is, because that's the only way I can communicate with my granddaughter. She doesn't even respond to e-mail.

MR. BICKFORD: I think that if the discovery goes to the marketing documents of AT&T and Apple, you will find that there is a generational group between the ages of 10 and 30, particularly, who utilize MMS to an extent that you couldn't even imagine.

THE COURT: Is that going to be your class, between 10 and 30?

MR. BICKFORD: People rely on it extensively. In truth and in fact, every AT&T phone, except for the iPhone, had MMS capacity.

THE COURT: What I'm trying to understand is, are there some kind of damages under some statute or consumer law or some statutory damages here, or are you going to claim that they owe a rebate because they charged too much for the phone because they couldn't do something that it was alleged to have done? What are the damages and how can you quantify that?

MR. BICKFORD: There are several. The question is, did AT&T -- and let me address one thing that you raised earlier, is that the phone could already send messages. Well, the phone -- pictures. Well, the phone could send pictures by e-mail.

THE COURT: By e-mail.

MR. BICKFORD: But the problem with e-mail is that A, I had to sign up for a data account with AT&T in order to do that; B, I would have to have a service provider to do the -- to send the e-mail out; or I had to be hooked to a Wi-Fi site otherwise. When you send it out, it would send it out in some cryptic deal, which I think there will be adequate testimony that most people could never open. So that aside, realistically, it couldn't, from a consumer standpoint, and it didn't operate like any other AT&T phone.

From the standpoint of the damage, itself, the question is what additional monies was AT&T charging that went to MMS capacities on the phone? I don't know that. That's a discovery issue. What marketing did Apple and AT&T do in terms of discovering what the value of having an MMS package or with that capacity on a particular phone to attract a group of consumers? What portion of the price of that phone was allocated in terms of the profit center that was going to be created by having that service on that phone? Those are all discovery issues which will set economically the damage that the consumer, by not having a service that they purchased the phone for.

I think that you'll find that there is an entire generation of people that utilize just text messaging and MMS on the phone much more than they would ever talk on the phone. And, you know, although you call it a "phone," at this point, it's really, you know, almost a laptop computer in a hand that they are utilizing for data streams and not as phones.

So it does have a very large intrinsic value to a very large group of consumers, and that intrinsic value, I can guarantee, has been measured through their marketing practices, their marketing studies, and we believe that we can put a quantity on the damage.

THE COURT: So is it going to be something like --

MR. BICKFORD: It might be $20 per phone.

THE COURT: A device with this is worth $20 more than

one without it, is that kind of what you envision?

MR. BICKFORD: Yes. I think so.

THE COURT: I was just trying to get some sense of where this was heading.

MS. PREOVOLOS: Your Honor, this is obviously all way premature, so we're not going to take up the facts.

THE COURT: I understand. We're not trying the case. It was just for my own benefit, to get a sense of what the case is about.

MS. PREOVOLOS: I think the couple things AT&T and Apple have no interest, we understand, we don't want to get into this now. The one point we wanted to make was just so -- it's just to clarify that Your Honor is right. This feature was never advertised or even mentioned until mid 2009. So the damages --

THE COURT: I didn't say I was right. I said that's what you're claiming. I don't know if that's right or not.

MS. PREOVOLOS: That is what we're claiming and it's one of the issues we think is going to be fairly simple to establish. You know, there either was advertising or there wasn't. There wasn't, I can say --

THE COURT: So your position is there was no marketing of this feature until shortly before it was available?

MS. PREOVOLOS: Yeah. I mean, I can be very precise. There was a worldwide developer conference just for software developers in which some statements were made in March. There

was a disclaimer --

THE COURT: March of '09?

MS. PREOVOLOS: March of '09. But that wasn't to the public. Although it was publicly available, it wasn't publicly directed. But there was a press release. It has a disclaimer we talked about in it.

THE COURT: The disclaimer being that it's not available until later in '09?

MS. PREOVOLOS: Correct. Then the advertising about the 3.0 bundle for the 3G phone, the phone that was released in '08, June of '08, and about the new 3GS began in June of '09. So the maximum time period anybody -- and the phones were released and the software bundle was released in July of '09. So the only time period anybody could ever have been, quote, "deprived of MMS," was three months, and our position would be the advertising at the beginning of that time period told people that was going to be the case.

Now, the plaintiffs may disagree, but I just -- you know, that's our side of the story. Now you've heard everybody.

THE COURT: You're sticking to it?

MS. PREOVOLOS: I am sticking to it, as will my documents.

THE COURT: Where are we? What else do we need to talk about?

Mr. Bickford?

MR. BICKFORD: I don't think we have any other topics.

MR. RUSSO: I think that's it, Your Honor, from our side. I have been a little remise in not introducing Ms. Cathy Sooy.

MS. SOOY: Good morning, Your Honor. Kathleen Sooy.

MR. RUSSO: And Tracy Roman from Washington who have become avid New Orleans Saints fans over the last --

MS. ROMAN: Good morning, Your Honor.

THE COURT: Today is black and gold day, you see?

MR. RUSSO: I didn't give them advance notice, but I'll take care of that next time.

THE COURT: I got as close as I could to a gold shirt.

MR. BICKFORD: That's all, Your Honor.

THE COURT: Anything else from the defense side?

Do you want to talk about designating liaison counsel on the defense side?

MR. RUSSO: Your Honor, we felt with just two defendants, both local counsel, that it was really not necessary, and we'll hopefully dispense with that if Your Honor --

THE COURT: That's fine with me. That's kind of what my thoughts were too. That's why I guess I didn't raise it earlier.

MR. URQUHART: We've got all these communication channels. Everyone is here who needs to be here, Your Honor. We've got both myself and Mr. Russo as local connections.

THE COURT: Defense lawyers always get along better than

plaintiffs lawyers.

MR. RUSSO: We love plaintiffs lawyers, Your Honor, actually.

THE COURT: You get along well with each other eventually. These guys always, at the end, fight amongst themselves for some reason. I don't know why that is, but it always seems to work out that way.

MR. BICKFORD: Judge, one point of clarification, and I should ask the defendants, if, in fact, we do manage to amend the pleadings sooner than 120 days, are you willing to step up the briefing schedule?

MR. URQUHART: Sure.

MR. RUSSO: As long as we have that same --

MR. BICKFORD: Same window.

MR. RUSSO: We're fine with that.

THE COURT: That's something, again, I would encourage counsel to discuss amongst yourself, if that's something you want to do.

I think I mentioned at the beginning, Mr. Bickford, on the plaintiff side, you're going to submit in writing the proposals or requested designation of lead or executive counsel.

MR. BICKFORD: Executive committee.

THE COURT: In terms of a Plaintiffs Steering Committee, if we do the executive committee, and you, as liaison, what you're suggesting is we don't have a large number of lawyers in

the case.

MR. BICKFORD: No, I think there is only about 12 or 13.

THE COURT: 12 or 13 law firms.

MR. BICKFORD: Law firms.

THE COURT: We could consider that everybody is -- at least as far as I'm concerned, at this point, everybody would be able to do common benefit work, but it needs to be coordinated, obviously, through the executive committee and liaison counsel. I don't want people out there, free agents doing their own things because we have people doing duplicative work is what my concern is.

MR. BICKFORD: Which is why the executive committee had asked me to ask the Court if they could just submit the names of the people on the steering committee to the Court saying, "Here are the people who have stepped up with the financial commitment to the case."

THE COURT: That's fine. You can do that. How much time do you want to do that?

MR. BICKFORD: I can do it this week.

THE COURT: 10 days?

MR. BICKFORD: That's fine.

THE COURT: Let's set a date for our next meeting. Should we meet in 30 days or should we go a little further out for the first one?

MR. BICKFORD: Probably a little further. The 26th

would be the Friday following, the Friday after Mardi Gras, which would be a month. And that would --

THE COURT: Is that a good day for everyone, the 26th?

MR. BICKFORD: Do you think March 5th?

MR. URQUHART: Scott, it would probably make more sense to do it after the briefs that we're all going to be filing are filed.

THE COURT: March 5th?

MS. PREOVOLOS: Could we go into the next week, if possible?

MR. URQUHART: The week of the 8th?

THE COURT: You mean March 12th is what you're asking?

MS. PREOVOLOS: That would be great.

THE COURT: We don't have to do these on a Friday, but it works well for me to do this kind of thing on a Friday morning, because if I've got a trial, they are usually over by Wednesday, and Thursdays I do my criminal motions and sentencings and all on Thursdays.

MR. BICKFORD: The 12th is fine with the plaintiffs.

MR. URQUHART: The 12th is fine for the defense.

MR. BICKFORD: At 9:30, Judge?

THE COURT: Hold on just a second. Friday, March 12th, Eileen. They can use another courtroom. That's not a problem. We'll do it for Friday, March 12th, at 9:30.

MR. BICKFORD: That's fine.

MR. URQUHART: That's perfect, Your Honor. Thank you.

THE COURT: Unless there's anything else, everyone have a good day.

MR. BECNEL: I do. Judge, one thing, the direct filing order, could we get that in to you since it was stipulated basically by both sides today or this week?

THE COURT: Get it in as quickly as you can.

MR. BECNEL: So somebody can go to the web site and pick it up.

THE COURT: Everybody is familiar, we do have a web site established, and I intend to post our case management orders. Actually, we're going to eventually post transcripts of the conferences in court. Basically anything we do is going to end up on the web site.

Have a good day, folks.

MR. RUSSO: Thank you, Your Honor.

(WHEREUPON, at 10:33 a.m., the proceedings were concluded.)

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REPORTER'S CERTIFICATE

I, Cathy Pepper, Certified Realtime Reporter, Registered Merit Reporter, Registered Professional Reporter, Certified Court Reporter of the State of Louisiana, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

s/Cathy Pepper

Cathy Pepper, CRR, RMR, CCR
Official Court Reporter
United States District Court

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