**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** | **CIVIL ACTION** |
| | **MDL No. 2116** |
| **THIS DOCUMENT RELATES TO ALL CASES** | **SECTION "J" JUDGE BARBIER** |
| | **MAGISTRATE JUDGE WILKINSON** |

**DEFENDANT APPLE INC.'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO EXEMPLAR COMPLAINT**

Defendant Apple Inc. ("Apple") hereby files its Reply to Plaintiffs' Response to Defendants' Objections to Exemplar Complaint.

**INTRODUCTION**

Plaintiffs' Response to Defendants' Objections to Exemplar Complaint ("Response") merely confirms that Apple's objections are well-founded. There is no MDL precedent for plaintiffs' proposed "bellwether" complaint procedure. No MDL court has ever permitted plaintiffs at the pleading stage to unilaterally cherry pick a group of named plaintiffs from a single state whose law plaintiffs prefer, and to proceed only with that complaint through class certification. The authorities plaintiffs cite do not support their position; rather, they deal with the use of "bellwether" or "exemplar" cases for trial or motions practice immediately before a bellwether trial (such as motions in limine or *Daubert* motions).[1]

There is a reason for the lack of authority supporting plaintiffs' position. Plaintiffs' proposed approach would lead to precisely the inefficiencies identified in Apple's Memorandum in Support of its Objections to Plaintiffs' Proposed "Exemplar" Complaint ("Memorandum"). Despite plaintiffs' suggestion that defendants did not understand plaintiffs' proposal as embodied

[1] In any event, after *Lexecon*, absent agreement of the parties, only a case filed in the MDL transferee jurisdiction can be tried by an MDL court. *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2351 (2008).

in the proposed exemplar complaint, the Response makes clear that plaintiffs intend to do precisely what Apple predicted at the hearing and in its Memorandum. Plaintiffs propose "to move forward on [the exemplar] complaint through class certification," conducting discovery and litigating class certification solely under California law. (Response at 13.) Plaintiffs never explain why they chose to MDL these Actions in the Eastern District of Louisiana if they believe that the litigation should be governed by California law. Plaintiffs suggest that their proposal would permit the Court to take a "quick peek" at their chances of surviving pleadings challenges or certifying a class. (Response at 12 n.10.) But there is nothing quick or efficient about plaintiffs' proposed discovery or the class certification process.

Plaintiffs' proposal turns efficient case management on its head. Plaintiffs concede that if they lose a motion to dismiss the exemplar complaint, they will then tee up the remaining complaints to see if any of those complaints survive pleadings challenges. Such a procedure is obviously inefficient. Moreover, assuming *arguendo* that plaintiffs can survive a motion to dismiss the exemplar complaint, the inefficiencies only multiply. Plaintiffs argue that they should be permitted to proceed with discovery and class certification solely on the "exemplar" California complaint. But if, consistent with every class certification decision to date in this Circuit, the Court denies certification of a nationwide class, the parties and the Court must then return to square one. At that point, plaintiffs propose to recommence with additional waves of amendments, pleadings challenges, discovery, and class certification proceedings directed at the remaining twenty-two complaints. (Response at 15.) Plaintiffs' proposal would cost the Court and the defendants months or years of duplicative discovery and motion practice.

Plaintiffs never explain why complying with established MDL procedure – by either proceeding on a master complaint or on the individual complaints – would be inefficient. Plaintiffs state that the exemplar complaint alleges all the facts common to all the complaints. Assuming plaintiffs are correct, they should readily be able to either amend all the underlying complaints or file a master complaint. Defendants have made clear that they are amenable to either approach. Plaintiffs' objection is based on their desire to avoid confronting the laws pled

by the named plaintiffs in the nineteen non-California actions. But they may not do so: the individual named plaintiffs' claims must be tested under the state laws pled in those complaints.

These are not matters of "procedural dogma." (Response at 3.) Plaintiffs' proposal is at odds with the core of the Supreme Court's holding in *Lexecon*: the MDL procedure may not be used to alter applicable law or the substantive rights of the parties.[2]

## I. THERE IS NO AUTHORITY FOR A "BELLWETHER" COMPLAINT AT THE PLEADINGS STAGE

There is no authority for use of a single bellwether complaint under the law of a single state at the pleadings stage of an MDL, and plaintiffs' Response points to none. (Response at 8-10.) Indeed, plaintiffs' authorities confirm that "bellwether" is a concept for trial, not the pleadings stage. Five of the six cases plaintiffs cite involved a bellwether case solely for the purpose of *trial* and/or trial-related motions.[3]

Judge Fallon's article, cited by plaintiffs, similarly discusses bellwether complaints solely in the context of a bellwether trial. (Response at 12 (citing *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323 (2008)). Critically, the article concludes that even a bellwether

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[2] *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

[3] (Response at 8-10 (citing *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, No. 09-6050, 2010 WL 1006719 (E.D. La. March 15, 2010) (bellwether complaint used for trial and related *Daubert* and *in limine* motions); *In re Fosamax Prod. Liab. Litig.,* 1:06-cv-5087, 2009 WL 3398930 (S.D.N.Y. Oct. 21, 2009) (bellwether trial); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, No. 09-2892, 2009 WL 2599142 (E.D. La. Aug. 19, 2009) (bellwether complaint for trial and summary judgment shortly before trial; motions to dismiss litigated regarding master complaint); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, No. 09-2977, 2009 WL 3834126 (E.D. La. Nov. 16, 2009) (same); *Adams v. U.S.*, No. CV-03-49-E, 2009 WL 2590202 (D. Idaho Aug. 16, 2009) (bellwether trial); *Jacobson v. Cohen*, 151 F.R.D. 526 (S.D.N.Y. 1993) (consolidated bellwether complaint for purpose of proceeding to trial).)

The single case plaintiffs cite that involved use of bellwether complaints prior to trial, *In re WellNx Mktg. and Sales Practices Litig,*, 673 F. Supp. 2d 43 (D. Mass. 2009), supports defendants' position. There, the court conducted motion practice on multiple complaints under applicable state laws, and ruled based on those varying laws. Moreover, all parties agreed to proceed on four complaints "representative" of the claims in the underlying cases. (Case Management Order #1, May 28, 2008, at 5, attached hereto as Exhibit A.) Here, there is no such agreement; moreover, the exemplar complaint is not representative of all claims. Instead, plaintiffs attempt to unilaterally proceed under only one state's law because they believe it is favorable to them.

trial is constrained by the principles of *Lexecon* and thus is rarely either useful or appropriate in an MDL proceeding. *Id*. at 2354. As Judge Fallon notes, under *Lexecon*, "only cases [that are] filed directly into the MDL by residents of the state in which the transferee court sits… are amenable to trial without the consent of the parties." *Id.* 2351. Judge Fallon concludes that "from a realistic standpoint, this typically will not suffice to warrant the cost and effort necessary to conduct fruitful bellwether trials." *Id.* at 2357. For this reason as well, the bellwether concept has no application here and cannot justify proceeding under California law in contravention of *Lexecon*.

Plaintiffs here thus must proceed either on all the underlying complaints or on a proper master complaint. Contrary to plaintiffs' suggestion, Apple's Memorandum in no way insists on use of a master complaint. Apple's point was and is simply that *if* plaintiffs desire to proceed on a single complaint, they must do so based upon a master complaint consistent with established MDL principles. As explained in Apple's Memorandum, those principles require that a master complaint embrace all plaintiffs and claims; that it not alter choice-of-law; and that it not merge one or more of the underlying complaints without agreement of all parties. (Memorandum at 8-9.) As set forth in the Memorandum, the exemplar complaint violates all of these principles. (*Id*. at 9-10.) Plaintiffs cannot use an "exemplar" complaint to avoid these principles or to ignore *Lexecon*, from which these principles flow.

Alternatively, if plaintiffs do not wish to proceed on a master complaint, they can amend the underlying complaints. If plaintiffs are correct that the exemplar complaint "incorporates all facts common to all the cases" (Response at 6),[4] plaintiffs should readily be able to amend each of the underlying complaints in a way that does not do contravene *Lexecon* and ignore the laws

[4] In fact, the proposed exemplar complaint contains new facts and legal theories that are not contained in the underlying complaints. Plaintiffs purport to rely on statements allegedly made by defendants during proceedings before the MDL Panel that the complaints in the underlying actions here allege common facts. At that time, however, the majority of the complaints were word-for-word copies of each other. The factual allegations of the proposed exemplar complaint are quite different from those in the underlying complaints. Moreover, plaintiffs ignore the manifold differences created by variations in applicable law.

plaintiffs themselves pled. There is nothing "inefficient" in litigating motions to dismiss the claims of the named plaintiffs under the laws plaintiffs themselves allege. The application of multiple states law to class actions filed in multiple states is dictated by bedrock principles of diversity jurisdiction which the MDL procedure may not abrogate. Plaintiffs cannot ignore diversity or choice-of-law principles because it would be convenient to do so, or because they believe the law of a single state is more favorable to them.

At the January 15, 2010 hearing, the Court adopted plaintiffs' position that it was appropriate to proceed on the multiple underlying complaints. The Court noted that, unlike a mass tort case with thousands of underlying complaints, proceeding on the underlying complaints would not be a problem. Significantly, that discussion was in the context of discussing motions to dismiss or to compel arbitration. Apple initially had argued for a master complaint, but agreed with the Court's ruling that the plaintiffs could choose to proceed on the underlying complaints. Apple then urged that that the parties should "get motions on track for the [underlying] complaints that [the Court] ordered" and that the parties should "all devote our resources to that." (January 15, 2010 Transcript at 17:9-13.) The Court concurred, and plaintiffs consented to a schedule for the motions.

The primary reason plaintiffs now cite for proceeding on an exemplar complaint is the supposed "burdens, inefficiencies and waste" of proceeding on the individual complaints. (Response at 14.) But any "inefficiency" flows from the requirement that an MDL transfer may not alter the law that would otherwise apply and that the MDL court must "step into the shoes" of the transferor courts. *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 693 (N.D. Ga. 2008). The essence of an MDL proceeding is that the Court and the parties must deal with multiple actions during pretrial proceedings. As this Court has recognized, in the context of an MDL proceeding, the number of underlying actions here is relatively small. There is no reason that pleadings motions cannot be adjudicated as to the underlying complaints. To do otherwise is inefficient, because it results in redundant serial litigation of pleadings motions.

If plaintiffs wish to proceed on a single complaint, they may do so using a proper master complaint. Plaintiffs' sole ground for opposing a master complaint is their unsupported assertion that motions to dismiss cannot be directed to a master complaint. (Response at 2 n.2.) Plaintiffs are incorrect. Apple's Memorandum cites well-established authority that a master complaint is subject to Rule 12 motions (Memorandum at 9), and plaintiffs cite no authority to the contrary. Plaintiffs simply believe that it is to their strategic benefit to focus motions practice solely on California law. But such "cherry picking" of one state's law is precisely what MDL principles preclude.

## II. PLAINTIFFS' PROPOSED PROCEDURE IS INEFFICIENT.

Plaintiffs' primary argument for their proposal is the conclusory assertion that it is "more efficient" and that litigation of the exemplar complaint will somehow resolve all the others, but they never demonstrate how that is actually going to happen. In fact, their proposal results in gross *inefficiencies*. If plaintiffs lose a motion to dismiss or class certification ruling with respect to the exemplar complaint, they will simply proceed to relitigate these issues in serial fashion as to "waves" of the remaining complaints.[5] Such serial litigation is the antithesis of efficiency.

### A. Litigating Pleadings Motions Under The Law Of A Single State Is Inefficient.

Plaintiffs' proposed "quick peek" at a motion to dismiss an exemplar complaint that is based solely on California law is neither useful nor efficient. Plaintiffs concede that the Court

[5] Plaintiffs cite *In re FedEx Ground Package System, Inc., Employment Practices Litig.,* No. 05-MD-527, for the proposition that class certification may be conducted in "waves." *FedEx* does not support plaintiffs' position. In *FedEx*, plaintiffs sought to certify statewide classes, not a nationwide class, with respect to their state law claims. *In re FedEx Ground Package System, Inc., Employment Practices Litig.,* No. 3:05-MD-527 RM (MDL-1700), 2007 WL 3027405, at *14 (N.D. Ind. Oct. 15, 2007). (There was also a nationwide class under federal ERISA law, but that federal law class is irrelevant here.) The parties agreed to a procedure to stagger the statewide class certification motions over a period of two months, which the Court allowed. (Supplemental Scheduling Order, November 29, 2005, at 2-3.) Nothing in *FedEx* supports a procedure whereby plaintiffs first seek to certify a nationwide class under a single state's law unilaterally selected by them, with statewide certification motions to follow as a back-up plan months or years later after additional amendments, pleadings challenges, and discovery. Moreover, the *FedEx* court gave defendants an opportunity to file motions to dismiss each of the underlying complaints prior to proceeding with class certification. (Initial Scheduling Order, November 15, 2005, at 13; *see also* Supplemental Scheduling Order at 1.) (True and correct copies of the relevant orders are attached hereto as Exhibits B-C.)

must ultimately address the sufficiency of all the plaintiffs' claims in each of the underlying lawsuits. (Response at 9 n.6.) To do so, the Court must apply the state laws pled in each of the complaints to the allegations of the complaints to determine if they state a claim. Thirty-three plaintiffs have pled claims under the laws of thirteen states; each plaintiff's claim must be tested under the state law alleged. There is no way to short circuit this process.

Similarly, plaintiffs' assertion that the proposed "exemplar" complaint addresses 90% of the issues in the underlying actions is baseless. (Response at 5.) The proposed "exemplar" complaint includes only four of the thirty-three named plaintiffs (12%) and pleads only one of thirteen state laws (7.7%) pled by those plaintiffs. Resolution of the pleadings as to a small fraction of the individuals and state laws at issue does nothing to advance the litigation in an efficient manner.

Plaintiffs concede that California is not the "nexus" of this controversy (Response at 12 n. 10) and cannot deny that the Majority Plaintiffs *opposed* transfer of the underlying actions to California. They argue instead that looking solely to California law for pleading and arbitration motions, discovery and class certification is appropriate because California is the "most populous state" and makes up 11.95% of the nation's population. (Response at 11.) But that cannot justify conducting months if not years of proceedings based upon law that does *not* apply to the remaining 88.05% of the population (or of the purported class) nor to twenty-nine of the thirty-three named plaintiffs.[6]

Apple's Memorandum addressed in detail the variations in the state consumer protection, fraud, misrepresentation, common law tort and contract claims. (Memorandum at 11-12.) Plaintiffs do not express disagreement or cite contrary authority. (Response at 8-9.) Given these unavoidable variations, it makes no sense to litigate an "exemplar" complaint under the law of a single state, ignoring differences in state law that would dictate widely varying results. In light

[6] Plaintiffs also imply that because of California's technology demographics, it may have more than 11.5% of iPhone users. Whether or not that speculation is accurate, it is clear that the overwhelming majority of iPhone users do *not* reside in California.

of the substantial differences in the applicable state laws, a "quick peek" at California law is not a useful exercise.

### B. Proceeding With Discovery and Class Certification Under The Law Of A Single State Is Inefficient, Not Efficient.

Plaintiffs next suggest that that it would be "efficient" for the parties to proceed with discovery and class certification based solely on the exemplar complaint and California law. To the contrary, plaintiffs' proposal would result in gross inefficiency. Plaintiffs' argument that their proposed procedure would be "efficient" requires the Court to simply *assume* that California law will apply to the claims of a nationwide class. As demonstrated in Apple's Memorandum, plaintiffs cannot certify a nationwide class under California law. But even if there were a remote possibility that they could do so, that remote possibility would not justify devoting months if not years of discovery and class certification litigation to a California complaint, only to begin all over again if a nationwide class is not certified.

Plaintiffs ask this Court to conclude that their proposed procedure is "efficient" based on the assumption that California law will apply to a nationwide class. But plaintiffs themselves concede that "insufficient discovery has taken place to determine *any* choice of law issue" (Response at 4 n.3 (emphasis in original)), and state that they "will address choice of law issues at the appropriate time and in the appropriate context" (*id*. at 9 n.6). "Deferring" choice of law issues cannot mean that plaintiffs may justify their proposed procedure based upon their most optimistic assumption: that California law will apply to the claims of a nationwide class.

Plaintiffs seek to recant their numerous prior concessions (collected at page 13 of the Memorandum) that the law of multiple states will apply to the actions in this MDL and that a nationwide class cannot be certified. Plaintiffs now argue that California law can be applied to a nationwide class of consumers proceeding against Apple, and that this will moot "at least" the underlying class actions as to Apple. That assertion is squarely contrary to plaintiffs' own contention that choice-of-law issues are not ripe for adjudication.

Plaintiffs purport to rest their choice-of-law analysis on the argument that Apple "has a California choice of law clause in its contracts." (Response at 10.) Plaintiffs presumably are referring to Apple's Software License Agreement and its "Controlling Law" provision (attached hereto as Exhibit D). Plaintiffs' reliance is misplaced. By its terms, the "Controlling Law" provision applies only to disputes regarding the software license itself. (Ex. A at 15, 20 (stating this "[l]icense [is] governed by and construed in accordance with the laws of the State of California").) Neither the proposed Exemplar Complaint nor the complaints in the underlying actions plead any dispute regarding the Software License Agreement or, indeed, even refer to that agreement. Nor could they: MMS functionality has nothing to do with the licensing agreement. Plaintiffs' assertion, without citation of any authority, that a nationwide class can be certified against Apple "because Apple is a California resident" is not only incorrect, it is contrary to plaintiffs' assertion that any choice of law determination at this point is premature.

Most significantly, plaintiffs do not even discuss, let alone contradict, the authority cited in Apple's Memorandum which establishes that plaintiffs will not be able to certify a nationwide class. (Memorandum at 13.) As the Memorandum notes, every court in this Circuit that has considered the application of a single state's law to a nationwide class has concluded that such application is inappropriate, and has denied certification of the purported nationwide class. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *Vioxx*, 239 F.R.D. at 454; *Propulsid*, 208 F.R.D. at 141.[7]

As Apple argued in its Memorandum, the consequence of plaintiffs' proposal if a nationwide class cannot be certified is months if not years of wasted discovery and class certification proceedings. At the end of that process, when certification is denied, the whole exercise will then commence anew to determine whether a statewide class can be certified under

[7] Where certification of a nationwide class has been sought under the laws of multiple states, certification has similarly been denied. As the Fifth Circuit concluded in *Castano*, "variations in state law may swamp any common issues and defeat predominance." 84 F.3d at 741. *Accord, Cole v. GMC*, 484 F.3d 717, 724 (5th Cir. 2007); *Ancar v. Murphy Oil, U.S.A., Inc.*, No. 06-3246, 2008 U.S. Dist. LEXIS 68490 (E.D. La. July 25, 2008).

the state laws applicable to any of the non-California actions. Further, these proceedings would have to recommence at square one: resolving pleading challenges to the complaints in all the underlying Actions. These are not efficient results.

## CONCLUSION

There is no precedent for plaintiffs' proposed procedure. It would not result in efficiencies; it would be grossly inefficient and would result in months if not years of wasted effort. Plaintiffs may either file a proper master complaint or amend the underlying complaints; that is their choice. But they should be ordered to do one or the other so that this litigation can move forward in an orderly and appropriate manner.

Respectfully submitted,

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*/s/ David W. O'Quinn*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading has been electronically filed and served upon all known counsel of record by electronic service and/or U. S. mail, properly addressed, this the 11th day of May, 2010.

*/s/ David W. O'Quinn*