UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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**

REPLY OF ATTM IN SUPPORT OF
OBJECTIONS TO PROPOSED EXEMPLAR COMPLAINT

Plaintiffs' response to the objections of AT&T Mobility LLC ("ATTM") confirms that plaintiffs seek to take this MDL litigation into an aprocedural rabbit hole, abandoning for now the complaints in the 24 individual cases they filed and proceeding on an "exemplar complaint" that is not representative and has no support in procedural rules or case law. Plaintiffs characterize their proposal as affording a "quick peek" into the "factual bases for the pleadings" and "the remainder of the MDL proceedings" (Plaintiffs' Response to Defendants' Objections to Exemplar Complaint ("Pls.' Response") (D.E. 58) at 7, 12 n.10), while blithely acknowledging this would trample ATTM's due process rights, including its right to challenge the legal

adequacy of plaintiffs' claims and to move to compel arbitration as to each and every named plaintiff. See *id.* at 16 (stating that ATTM's rights "may have to be asserted at a later time").

The Court should reject plaintiffs' attempt to side-step the Federal Rules of Civil Procedure, well-settled MDL procedure and Supreme Court case law, all of which establish ATTM's right, at the outset of the litigation, to file threshold pleadings testing the sufficiency of plaintiffs' claims and enforcing its arbitration agreements.

PLAINTIFFS' PROPOSAL

Plaintiffs provide the outline of their proposal for the first time in their response.[1] Plaintiffs propose to abandon this Court's January 22, 2010 Case Management Order and abandon for now the complaints in the 24 cases they filed. They ask to have motions to dismiss and motions to compel arbitration only address the claims asserted under California law by four California plaintiffs in the hybrid "exemplar complaint". *See* Pls.' Response at 13. They also now seek to limit discovery to the "exemplar complaint" (another reversal from their previous request for "unfettered discovery"). They ask the Court to consider class certification only as to the "exemplar complaint" and only under California law. *Id.* at 13. After this detour into California-only rulings, they propose to amend the remainder of the complaints in "phases" or "waves", then conduct discovery as to those amended complaints, followed by "abbreviated briefing" as to whether the claims in the amended complaints are adequately pled and suitable for class treatment. *Id.* at 13-15.

[1] Plaintiffs describe defendants' objections to their "exemplar complaint" as based on "ill-conceived assumptions, articulated without even a phone call to Plaintiffs' counsel to determine what the plan may be." Pls.' Response at 4. Plaintiffs' criticism of defendants is ironic, given that plaintiffs proposed filing an "exemplar complaint" for the first time at the March 12, 2010 court status conference, without raising the concept with defendants beforehand.

Plaintiffs' proposal is an unvarnished attempt to duck the complex legal analysis regarding which states' laws should apply to which named plaintiffs' claims, whether plaintiffs have adequately pled their claims under those laws, and whether a national class action or state-wide class actions can be maintained under those disparate laws.

ARGUMENT

I. Plaintiffs Provide No Legal Support For Proceeding On An "Exemplar Complaint."

When plaintiffs first proposed filing an "exemplar complaint" at the March 12, 2010 court status conference, they cited no legal authority. Nearly two months later and with lengthy briefing, plaintiffs still fail to offer any procedural rule or case law for support.

Plaintiffs mention of Judge Eldon Fallon's article, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323 (2008) (Pls.' Response at 12) provides no legal support; the article is about bellwether trials, not the use of a bellwether or "exemplar" complaint. Moreover, Judge Fallon recommends that bellwether trials "only be utilized in large-scale MDLs. Such MDLs typically consist of thousands of individual cases." *Id.* at 2349. This MDL, by contrast, involves two dozen cases. Also, Judge Fallon says the hallmark of a bellwether trial is that it is representative of the larger population of lawsuits. Id. at 2343 (recommending that "the transferee court and the attorneys select a manageable pool of cases" that "accurately reflect the individual categories of cases that comprise the MDL in toto [and] illustrate the likelihood of success and measure of damages within each respective category"). And, Judge Fallon indicates a true bellwether trial case should be chosen only after careful consideration by the court, the parties, or some combination thereof. *Id.* at 2343-51. Here, by contrast, plaintiffs have simply cherry-picked four named plaintiffs who are not representative in any meaningful way of the other 29 named plaintiffs, eight causes of action that do not reflect the full panoply of claims

asserted in the underlying actions, and a jurisdiction with law they like, without any input from the defendants or the Court.

Plaintiffs also cite to bellwether cases with facts that bear no relation to the facts in this case. Five of the cases plaintiffs cite stand for the proposition that a court may employ bellwether trials, not bellwether complaints. *See In re Fosamax Prods. Liab. Litig.*, No. 1:06-cv-5087 (JFK), MDL No. 1789, 2009 WL 3398930, at *1, 7 (S.D.N.Y. Oct. 21, 2009)[2]; *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, No. 09-2892, MDL No. 07-1873, 2009 WL 2599142, at *1 (E.D. La. Aug. 19, 2009), and No. 09-2977, MDL07-1973, 2009 WL 3834126, at *1 (E.D. La. Nov. 16, 2009); *Adams v. United States*, No. CV-03-49-E-BLW, 2009 WL 2590202, at *1 (D. Idaho Aug. 16, 2009); *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, No., 09-6050, MDL No. 2047, 2010 WL 1006719, at *3 (E.D. La. Mar. 15, 2010). These cases have no bearing here where plaintiffs explicitly state that they are not proposing "bellwether trials at this juncture." Pls.' Response at 13. And in at least two of those cases, the court employed a master complaint – a procedural device that plaintiffs have resoundingly rejected. *See, e.g., In re Chinese Manufactured Drywall*, 2010 WL 1006719, at *3; *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 1873, Pretrial Order No. 2 (E.D. La. Jan. 30, 2008) (attached as Ex. E to ATTM's Objections to Proposed Exemplar Complaint).

The remaining two bellwether cases plaintiffs rely upon are distinguishable. In *In re WellNx Mktg. and Sales Practices Litig.*, the parties *agreed* to use of bellwether complaints and related procedure. *See id.*, MDL No. 1851, First Case Management Order (D. Mass. Apr. 17,

[2] *See also id.*, 2007 WL 2687625, at *1 (Sept. 12, 2007) (noting that 270 individual complaints had been "successfully filed and answered").

2008) (Ex. A). In *Jacobson v. Cohen*, there were no complex choice of law issues because the cases were all under federal securities law and RICO. 151 F.R.D. 526, 527 (S.D.N.Y. 1993).

Likewise there is no legal support in the case where plaintiffs say "a similar tack was taken." Pls.' Response at 14. In *In re FedEx Ground Package System, Inc. Employment Practices Litig.*, No. 3:05-MD-527 RM, MDL No. 1700 (N.D. Ind.), the MDL court issued an initial scheduling order which required the plaintiffs to amend the complaints in the individual actions and permitted the defendants to move separately to dismiss each of the amended complaints. *See* Initial Scheduling Order (Nov. 15, 2005) (Ex. B). The *FedEx* court then proceeded to decide each of the motions to dismiss the individual complaints. *See, e.g.*, Opinion and Order (June 2, 2006) (Ex. C); Opinion and Order (Aug. 8, 2006) (Ex. D). The *FedEx* court further ordered that the class certification motions be filed as to each case, in three waves separated by only three weeks. *See* Supplemental Scheduling Order (Nov. 29, 2005) (Ex. E). Rather than supporting the proposal of plaintiffs here, the procedure used by the *FedEx* court follows the procedure adopted by this Court and ATTM.

II. Plaintiffs' Proposal Will Prejudice ATTM's Arbitration Rights.

A. Plaintiffs' Proposal Violates ATTM's Right Under The FAA To Seek To Compel Arbitration Without Delay.

A fundamental defect in plaintiffs' proposal to relegate the non-California actions to limbo is that it would violate the Federal Arbitration Act ("FAA"). Under the FAA, ATTM has the right to compel arbitration as to each and every named plaintiff. And ATTM has the right to do so now, at the outset of the case, in accordance with the FAA's objective of "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983); *see also Hall St.*

Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008) ("arbitration's essential virtue [is] resolving disputes straightaway").

The Supreme Court has clearly stated that the FAA prohibits deferring sending the named plaintiffs' disputes to arbitration immediately. In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the district court denied arbitration because some of the plaintiff's claims were inarbitrable and the court was persuaded that it would be more efficient to litigate all claims together. Id. at 215. The Supreme Court rejected those case-management considerations, explaining that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration" of arbitrable claims, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217-18 (citing 9 U.S.C. §§ 3-4). The Court added that "there is no reason" to "manipulate the ordering of the resulting bifurcated proceedings"—i.e., to stay arbitration until the inarbitrable claims were litigated. *Id.* at 223; *see also id.* at 225 (White, J., concurring) ("The Court's opinion makes clear that a district court should not stay arbitration" because "[b]elated enforcement of the arbitration clause [ ] significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement.").

The Supreme Court reaffirmed the principle that arbitration may not be stayed in *Preston v. Ferrer*, 552 U.S. 346 (2008). In that case, the respondent had argued that arbitration should be stayed pending a hearing before the California Labor Commissioner – not merely on efficiency grounds, but because state law mandated that the administrative hearing come first. *Id.* at 356-59. The fact that arbitration was being delayed by operation of state law rather than the trial court's view of how best to order its docket did not sway the Supreme Court. Holding that the FAA preempted the state statute, the Court explained that "[r]equiring initial reference of the

parties' dispute to the Labor Commissioner would, at the very least, hinder speedy resolution of the controversy" and thereby frustrate the purposes of the FAA. *Id.* at 358.

Plaintiffs' suggestion here that any arbitration of the claims of the non-"exemplar complaint" named plaintiffs be sidetracked for an undefined period of time while the parties focus exclusively on the "exemplar complaint" would "hinder speedy resolution of the controversy" between ATTM and the non-California plaintiffs, *id.,* and therefore violate FAA and Supreme Court precedent.

B. Plaintiffs' Proposal Does Not Simplify Consideration Of ATTM's Arbitration Rights.

Plaintiffs suggest that their proposal would simplify the determination of whether ATTM's arbitration provision is enforceable by allowing the Court to consider only California law before turning to the laws of other states. *See* Pls.' Response at 13. Even if the four named plaintiffs in the "exemplar complaint" could avoid arbitration of their own claims – and ATTM will demonstrate that they cannot – then ATTM would move to strike the nationwide class allegations in the "exemplar complaint" on the ground that all other putative class members are required to arbitrate. Resolving that motion at the outset would be necessary to define the scope of any putative class at issue and make any discovery or other pre-trial determinations within the constraints of that far more limited class. But undertaking that task would require analysis of the law of all 50 states plus the District of Columbia. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007) (affirming district court's holding that "predominance was defeated because AWS's intent to seek arbitration of the class would necessitate a state-by-state review of contract conscionability jurisprudence"). By contrast, under the approach set up in the Court's Case Management Order, this Court need only resolve the enforceability of the named plaintiffs' own agreements, which calls for more streamlined consideration of the law of fewer states.

Thus, proceeding under the Case Management Order would actually be more efficient than proceeding under plaintiffs' proposed approach.

III. Ruling On The Adequacy Of California Claims Will Not Determine The Adequacy of Non-California Claims.

Plaintiffs are wrong when they argue that the Court's ruling on whether the four named plaintiffs in the "exemplar complaint" have adequately pled their California state law claims will provide "meaningful information" about whether the other 29 named plaintiffs have adequately pled facts specific to them to satisfy the pleading requirements of the various state laws under which they bring their claims. *See* Pls.' Response at 13. For example, they do not explain how a determination as to whether named plaintiff Tim Williams has adequately pled a violation of § 17200 of the California Business and Professions Code in the "exemplar complaint" will aid the Court in determining whether named plaintiff Matthew Sullivan has adequately pled a violation of the Ohio Consumer Sales Practices Act in the *Sullivan* complaint. ATTM has a due process right, as the threshold of the litigation, to test the adequacy of the facts alleged by each named plaintiff under Federal Rules of Civil Procedure 8, 9(b) and 12.

Plaintiffs are also wrong when they say the Court does not need to consider whether the claims pled in each of the individual underlying complaints are adequately pled because Rules 8 and 9(b) do "not invoke state law" or "deal with state law." *See* Pls.' Response at 6. Every single one of the complaints asserts exclusively state law claims. The Court cannot analyze the adequacy of those claims under Rules 8 and 9(b) in a vacuum; it can only analyze them with reference to the substantive elements of the state laws under which they are brought. *See, e.g.*, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (noting that under Rule 9(b), federal courts "examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action") (internal quotations and citation omitted). For this

reason, considering first the adequacy of the claims pled in the "exemplar complaint" under California law, as plaintiffs propose, will not lead to any efficiencies in determining whether claims asserted by the other named plaintiffs under other states' laws are adequately pled, and will actually lead to more delay.

IV. Ruling On Class Certification Under The "Exemplar Complaint" Will Not Inform Class Certification Under The Other Complaints.

Likewise, plaintiffs wrongly argue that a ruling on whether a nationwide class can be asserted as to the "exemplar complaint" will provide "meaningful information and experience" for the other cases. Pls.' Response at 13.[3] Rather, the Court must conduct a separate Rule 23 analysis as to each proposed class, be it a nationwide or state-wide class.

For example, Rule 23(a)(4) requires the Court to examine the adequacy of each named plaintiff. Thus, the Court's ruling on the adequacy of the four named plaintiffs in the "exemplar complaint" will tell the Court and parties nothing about whether the 29 other named plaintiffs are adequate representatives of the state-wide classes they seek to represent. Instead, the Court will need to consider the factual circumstances unique to every single one of the 33 named plaintiffs. For that reason, ATTM is entitled to take discovery of each individual named plaintiff, including, for example, where, when and how he or she purchased an iPhone, what advertisements he or

[3] Plaintiffs misstate the law when they say California law applies to the nationwide class alleged in the "exemplar complaint" merely because Apple is a California corporation. Applying the law of a single state to a nationwide class is inappropriate. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016-18 (7th Cir. 2002) (refusing to apply "a uniform place-of-the-defendant's-headquarters rule" to product liability, breach of warranty, and consumer fraud claims arising in different states); *see also In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458 (E.D. La. 2006) (applying substantive law of each plaintiff's home jurisdiction rather than that of state where defendant resided); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 143 (E.D. La. 2002) (same).

she saw or heard, what representations regarding the availability of MMS were made to him or her, and what factors he or she relied upon in deciding to purchase an iPhone. Consideration of the issue of adequacy cannot be addressed by beginning with a non-representative "exemplar complaint."

CONCLUSION

The Court should strike the "First Amended Complaint" from the docket and direct plaintiffs to the adhere to the procedure and schedule previously established by the Court and well grounded in the procedural rules and case law.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2010, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing.

/s/ Tracy A. Roman
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