

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

GREGORY McKENNA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:09cv1113 CDP
)	
THE ST. LOUIS POLICE DEPARTMENT, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANT APPLE INC.’S RESPONSE TO
PLAINTIFF’S MOTION TO AMEND COMPLAINT**

Defendant Apple Inc. (“Apple”) has moved this Court to dismiss the original Complaint filed by Plaintiff Gregory McKenna (“Plaintiff”). In addition to filing an opposition to Apple’s Motion, Plaintiff seeks leave of Court to file an amended complaint. Plaintiff has a right to amend his Complaint once as a matter of course before a “responsive pleading” is filed. *See* Fed.R.Civ.P. 15(a). Here, neither Apple nor any other Defendant has filed a “responsive pleading.” *See, e.g., Winfrey v. Brewer*, 570 F.2d 761, 764 fn.4 (8th Cir. 1978) (noting that “[a] motion to dismiss is not a ‘responsive pleading’ for purposes of” Rule 15(a)). Thus, Plaintiff has a right to file his proffered amended complaint. However, Apple respectfully requests that this Court exercise its discretion to hold in abeyance the pending Motion to Dismiss filed by Apple, and to consider that Motion as it relates to the Amended Complaint. *See, e.g., Harmon v. St. Louis County*, 2008 WL 4547187, *2 (E.D.Mo. 2008). Apple contends that the arguments made in its pending Motion to Dismiss apply with equal force to the proposed amended complaint filed by Plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of November, 2009, Defendant Apple Inc.'s Response to Plaintiff's Motion to Amend Complaint was filed electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record properly registered for electronic notification, and that a true and accurate copy of Defendant Apple Inc.'s Response to Plaintiff's Motion to Amend Complaint was forwarded, via first-class mail, postage prepaid, to:

Gregory McKenna
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Beverly Hills, CA 90212

/s/ Kathy A. Wisniewski