

EXHIBIT D

16S5joh1 conference

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 BRIAN JOHNSON,

4 Plaintiff,

5 v.

11 Civ. 3321 (JSR)

6 APPLE, INC.,

7 Defendant.

8 -----x

9 June 28, 2011

9 5:08 p.m.

10 Before:

11 HON. JED S. RAKOFF,

11 District Judge

12 APPEARANCES

13
14 DEREK T. SMITH LAW GROUP
14 Attorneys for Plaintiff
15 BY: JESSE ROSE
15 WILLIAM PHILLIPS

16 SCHIFF HARDIN
17 Attorneys for Defendant Apple, Inc.
17 BY: THOMAS M. CRISPI
18 KELLEN G. RESSMEYER

18
19 LEWIS, JOHS, AVALLONE, AVILES, LLP
19 Attorneys for Defendant Omniscient Investigations
20 BY: DAVID L. METZGER

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1 (Case called)

2 MR. ROSE: Jesse Rose from Derek T. Smith Law Group.

3 MR. PHILLIPS: William Phillips from Derek T. Smith
4 Law Group.

5 MR. CRISPI: Thomas Crispi, Schiff Hardin for Apple
6 Incorporated.

7 MS. RESSMEYER: Kellen Ressmeyer, Schiff Hardin for
8 Apple, Incorporated.

9 MR. METZGER: Dave Metzger from Lewis, Johs, Avallone,
10 Aviles for Omniscent Investigations.

11 THE COURT: Please, be seated.

12 So, we are here on the motion to dismiss of Apple and
13 also for a initial pretrial conference. Have counsel prepared
14 a case management plan.

15 MR. ROSE: We have, your Honor.

16 THE COURT: Let me see it.

17 MR. CRISPI: Is that the one that I've -- you have
18 incorporated the comments I made on it?

19 THE COURT: Excuse me. I didn't ask for counsel to
20 have side bar conversations among themselves.

21 MR. CRISPI: I apologize, Judge.

22 MR. ROSE: If I may, your Honor?

23 THE COURT: Now, did defense counsel have some
24 question about this schedule? It otherwise appears fine to the
25 Court.

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1 MR. ROSE: Yes, your Honor. We provided it to
2 defendants, and given the late add of omniscient as a
3 defendant --

4 THE COURT: I'm sorry. My question was addressed to
5 defense counsel.

6 MR. ROSE: I apologize.

7 MR. CRISPI: Judge, I don't know what was provided to
8 you. The case management --

9 THE COURT: So I will read it to you.

10 MR. CRISPI: Fine.

11 THE COURT: It is a jury trial, joinder after
12 additional parties must be accomplished by July 29th; amended
13 pleadings without leave of Court can be filed up to July 29th.
14 First request for production of documents July 15th.
15 Interrogatories -- and I want to address that the only
16 interrogatories I permit are those permitted by Local Rule
17 33.3A -- must be filed by July 15th. Moving experts, August
18 19th, responding experts August 26. All depositions to be
19 completed by September 9th. Request to omit to be served
20 August 23rd. All discovery to be completed by September 23rd.
21 Moving papers on summary judgment September 30th. Answering
22 papers on October 28th. Reply papers on November 11th.

23 Any problems with any of those dates?

24 MR. CRISPI: Judge, that is what plaintiffs counsel
25 proposed to us and we did counter-propose something to them

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1 which pushed those dates back.

2 THE COURT: I'm not going to take any dates that push
3 that back. I will take earlier dates, if you like. This is,
4 to my mind, a much too extended schedule as it is for a simple
5 case like this.

6 MR. METZGER: Your Honor, may I?

7 THE COURT: Sure.

8 MR. METZGER: I have not yet answered or moved. We
9 were retained last week. I would --

10 THE COURT: When is your answer due?

11 MR. METZGER: My answer is due, I believe, on the 29th
12 or the 30th of this month.

13 THE COURT: So, you will answer on the 29th.

14 MR. METZGER: I would ask if I could have 10 days or a
15 short period of time of an extension to plaintiff --

16 THE COURT: That's fine, but I'm not going to change
17 the case management plan, so you can have until --

18 MR. METZGER: Could I push my luck for 15 days, your
19 Honor?

20 THE COURT: I will give you 15 days. Just so you
21 understand, discovery is already going to begin under this case
22 management plan so if you're moving to dismiss, for example, we
23 will set a schedule for that motion but everything is going to
24 go forward so that the longer you take the more you hurt
25 yourself, but if you want 15 days, that's fine. So, that would

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1 be the time for Omniscient -- it is a great name -- to move or
2 answer is, July 12.

3 All right. Going back to the case management plan, we
4 will have a final pretrial conference as well as oral argument
5 on any summary judgment motion on November 18th at 4:00 p.m.
6 So, I have signed the case management plan, it will be filed
7 electronically and therefore available to counsel for both
8 sides. Now, I give that to my courtroom deputy to file.

9 Turning to the motion to dismiss, it seems to me,
10 based on the papers, that plaintiff's claim for negligence must
11 be dismissed with prejudice but that plaintiff's other claims,
12 to the extent that they would otherwise be dismissed, might
13 benefit from one more round of amended pleadings. So, that's
14 the question I want counsel to address on oral argument. For
15 example, there is this question of whether the alleged
16 miscreants were employees of Omniscient or joint employees of
17 Apple and Omniscient. On the present pleading a joint
18 employment is, at best, alluded to, certainly not pleaded with
19 the adequate specificity to survive a motion to dismiss.
20 However, this issue more or less came up as things went along
21 in the earlier rounds and it seems to me plausible to believe
22 that plaintiff might be able to allege a joint employment
23 relationship. Maybe plaintiff doesn't want to go that route
24 but that's an example of what I'm talking about that we need to
25 discuss this afternoon. So, let me hear first from plaintiff's

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1 counsel as whether he wants to amend or whether he would just
2 have the complaint dismissed in whole or in part and then let
3 me hear from defense counsel.

4 MR. ROSE: Sure, your Honor.

5 When we first filed the pleading in the Supreme Court
6 in New York County we were unaware that there were two entities
7 involved so that's why the pleading that you have in front of
8 you doesn't have any of those factual averments to the joint
9 employer relationship. When we amended the complaint we only
10 amended the complaint to add the additional defendant because
11 we had a pending motion to dismiss. So, at that point we
12 agreed with defendant's counsel that we weren't going to add
13 additional factual allegations so that's why we didn't include
14 additional facts. However, I do believe, based on reading of
15 other documents and speaking to clients that we would be able
16 to allege facts to show a joint employer relationship.

17 THE COURT: Like what?

18 MR. ROSE: Control of the individuals, control of what
19 they were doing, that they answered to, where they were acting,
20 the appearance that they gave when they were there, where
21 they're employed, who had at least appeared, was giving them
22 orders. And then, as far as pay and tax purposes, we wouldn't
23 be able to obtain any of that information without discovery.

24 THE COURT: Well, I'm not sure I'm going to give you
25 very much discovery, maybe a very little before we have a new

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1 round of motion practice if we go that route. But, let me hear
2 from defense counsel.

3 MR. CRISPI: I will start backwards on some of the
4 things that counsel said. That is sort of putting the cart
5 before the horse that he would need discovery in order to make
6 allegations as to --

7 THE COURT: There is a certain plausibility -- I'm
8 using that term not in the Iqbal-Twombly sense -- but in the
9 Webster's sense, to the notion that you go into, as the
10 plaintiffs here alleged, they go into an Apple Store and they
11 are, according to their allegations, the subject of improper,
12 seemingly racially invidious conduct by at least two of the
13 Supreme Court people at the store. And Apple's position is,
14 oh, we don't control. We don't have anything to do with those
15 security people. They just happen to be on our premises
16 protecting our store operating in close proximity to all our
17 employees but, hey, their misconduct -- alleged -- is totally
18 attributable to their company Omniscent and we are just
19 interested bystanders. Maybe that's true but it doesn't
20 exactly seem obvious.

21 (Continued on next page)

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1 MR. CRISPI: I would respectfully refer to the
2 allegations. Really the only factual allegation in the
3 complaint that would provide the Court or anyone with the
4 thought that there might have been the requisite racial animus
5 involved came from words of the security guard. I don't know
6 how they're going to be able to, it would have to come out of
7 whole cloth to come up with some scenario where they can show
8 the requisite animus on the parts of persons that they did not
9 interact with.

10 THE COURT: I'm not sure what you're saying. I
11 thought that one of your grounds for moving to dismiss was that
12 the actions of the security guards could not be imputed to you,
13 Apple, because they weren't your employees.

14 MR. CRISPI: That is one of the grounds.

15 THE COURT: If they were your employees, why could
16 their actions not be imputed to you?

17 MR. CRISPI: They were not my employees.

18 THE COURT: I hear you.

19 MR. CRISPI: I understand.

20 THE COURT: That's the issue.

21 MR. CRISPI: Sure.

22 THE COURT: But in response to that, you're saying you
23 don't see how the actions of these employees could be imputed
24 to their employer. I thought that was called agency.

25 MR. CRISPI: Sure, Judge.

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1 THE COURT: Including animus.

2 MR. CRISPI: But the allegations as they are in the
3 complaint do not, again, working backwards from what plaintiffs
4 are saying, if they want to go and take discovery to see if
5 there's any sort of pay and insurance, etc., things like that,
6 that's putting the cart before the horse. But then dealing
7 with what you first said, which is alleging the requisite
8 control that would establish the agency theory as your Honor
9 pointed out is not alleged there, and the only way they would
10 be able to establish that, based upon the factual allegations
11 now is to make them up because they were not present, based
12 upon the allegations, in any interaction between Apple and its
13 security personnel.

14 THE COURT: Yes. I understand what you're saying. I
15 guess the question I was posing to you is: Isn't there a, if
16 you will, common sense inference that a store owner has some
17 meaningful control over the security guards in his store?
18 Supposing, for example, and this would not be legally
19 responsive, but supposing the owner of the store didn't like
20 the way the security guards were behaving and said, Stop that.
21 He could do that, and that might be because he was exercising
22 his contractual relationship with Omniscent, but it might be
23 because he had de facto control over the people in his store
24 who happen to be security guards. So I don't think it's so
25 self-evident that they will not be able to make meaningful

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1 allegations in this situation.

2 MR. CRISPI: I respectfully disagree as to the racial
3 animus point, which is the whole --

4 THE COURT: But I'm not following your argument then.

5 MR. CRISPI: In essence --

6 THE COURT: If employees act with a racial animus,
7 that can be imputed under agency law to their employer, yes?

8 MR. CRISPI: Yes.

9 THE COURT: So, if Apple turns out to be the joint
10 employer, which is the issue, then it would be imputed to them.

11 MR. CRISPI: Perhaps I'm not stating it eloquently,
12 but what I'm attempting to state is first I'm being asked to
13 address things that I don't know what the allegations will be
14 to establish that joint employer relationship because there is
15 nothing alleged within the complaint, as your Honor pointed out
16 when we began this, that alleges the joint employer other than
17 their assertion to that.

18 THE COURT: I agree. I agree.

19 MR. CRISPI: So I'm only responding to things
20 plaintiffs's counsel said, which is control, and I don't know
21 how they're going to establish control that they wouldn't have
22 already put in their complaint, and then we talked about
23 payroll, and I'll represent to you that they're not on the
24 Apple payroll, and they are not -- but we're dealing with on
25 the pleadings, they're not going to be able to allege that

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1 without discovery, and that's just putting the cart before the
2 horse.

3 I would also point out on the causes of action,
4 regardless, on the 1981 cause of action, regardless of the
5 joint employer, there is no contractual relationship here. So
6 even if we were to go down this road under the hypothetical,
7 that cause of action could not be maintained.

8 THE COURT: That is a different question. We'll talk
9 about that in a moment.

10 MR. CRISPI: Okay.

11 THE COURT: I agree with you that's a different legal
12 issue.

13 MR. CRISPI: I apologize for jumping around.

14 THE COURT: No, no. That's fine.

15 Let me go back to plaintiffs's counsel. So the
16 problem you face here is the problem that all plaintiffs's
17 counsel face these days, which is that the Supreme Court has,
18 in effect, said you've got to meet certain basic pleading
19 requirements before you get discovery, and no plaintiffs's
20 counsel thinks that's fair, but that's the law.

21 So how are you going to show joint employer
22 relationship here?

23 MR. ROSE: Your Honor, I'm not certain that making the
24 allegation that they do have an employment relationship isn't
25 plausible on its face without amplifying that.

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1 THE COURT: So you're saying, in effect, your
2 complaint initially alleged an employment relationship with
3 Apple.

4 MR. ROSE: Yes, your Honor.

5 THE COURT: And the fact that they've now come
6 forward, in effect, and said, Well, that's not correct, means
7 that you should now be able to get at least some modest
8 discovery, but that new relationship which no reasonable
9 plaintiffs could have thought otherwise than that the security
10 people were employees of Apple, or at least that was a
11 reasonable inference at the time you filed your complaint, and
12 if they were, then the control and all the other things follow
13 automatically.

14 MR. ROSE: Yes, your Honor.

15 THE COURT: So what I think makes sense, and we'll
16 turn to the 1981 matter in a second. But what I think makes
17 sense is that you should be given a very short time frame to
18 file an amended complaint and should be given some very limited
19 either special interrogatories or document requests, no
20 depositions, during that very short time frame to see if you
21 can make out the joint ownership, joint employment
22 relationship.

23 So I think what we should do is you should propound no
24 later than a week from today either interrogatories that you
25 and your adversary agree to or that have been specially

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1 approved by the Court, which you can do by calling me jointly
2 on the telephone before the week is out, or, if you prefer,
3 document requests limited to things that bear directly on the
4 joint employment issue, like payroll. Counsel's already told
5 you that they don't pay them, but that doesn't mean you can't
6 propound a request. It's an either/or. I recommend in this
7 special situation the interrogatory approach.

8 MR. ROSE: Your Honor.

9 THE COURT: Yes?

10 MR. ROSE: Under Local Rule 33(a), we wouldn't be able
11 to ask for anything other than identification.

12 THE COURT: That's why I'm saying special
13 interrogatories.

14 MR. ROSE: Okay.

15 Additionally, under the New York City charter claim
16 that we do have and that they've only challenged under the
17 employment theory, we specifically could hold them liable for
18 actions of independent contractors.

19 THE COURT: Actually, that's a good point. I want to
20 talk about that claim in a minute.

21 MR. ROSE: Okay.

22 THE COURT: If I were to dismiss on the federal
23 claims, I might not hold on to the rest of the claims.

24 MR. ROSE: But we would still have claims against
25 Omniscient.

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1 THE COURT: True. But let's go back to the schedule.
2 So either interrogatories that you can agree to or that the
3 Court approves to be served no later than one week from today.
4 These are not 33.3(a). These are special interrogatories, and
5 I would recommend no more than about five, directed strictly to
6 this joint employment issue, or, if you prefer, document
7 requests limited to things bearing on the joint employment
8 issue.

9 If they are interrogatories, they must be responded to
10 within one week after service. If they are document requests,
11 they must be responded within two weeks after service. You
12 then need to file under either scenario your final amended
13 complaint, and this will be your last shot, by no later than
14 four weeks from today. At that time, counsel can jointly call
15 and figure out what motion practice, if any, we want at that
16 time.

17 In the meantime, the general case management proceeds
18 but on the schedule that we've just done. It will be mostly
19 just propounding things and not responding, so it won't be
20 prejudicial to defendant.

21 With respect to the 1981 issue, what gives me pause
22 about dismissing that claim is Judge Berman's decision in
23 *Drayton v. Toys R Us*, 645 F.Supp.2d 149 (S.D.N.Y. 2009), in
24 which he talked about a Section 1981 right to contract claim
25 and a Section 1981 equal benefit claim. He denied the motion

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1 for summary judgment under the latter approach because
2 plaintiffs had alleged that defendant's racial discriminatory
3 conduct deprived them of the full and equal benefit of New York
4 State Executive Law, Section 296, a state civil rights law
5 which protects the security of persons and property.

6 Here, plaintiffs have brought claims under that very
7 same provision, and, therefore, there may be a 1981 claim that
8 survives not on the contract approach but under the equal
9 benefit approach.

10 Let me hear from defense counsel on that.

11 MR. CRISPI: 1981 requires one of the enumerated
12 benefits in the statute, and here, presumably, as plaintiffs
13 allege, it's the right to contract. The allegations set forth
14 in the complaint specifically factually identify that the
15 contractual relationship, which is the purchase of product,
16 ended.

17 THE COURT: If that's all that's encompassed, you win.
18 What I'm suggesting is that there's at least one case out
19 there, the case I've cited, which suggests that there's a
20 separate 1981 approach that relates to being deprived of the
21 benefits of, in this case, as in Judge Berman's case, the
22 benefits of a state law, namely, New York State Executive Law.
23 I'm not sure I agree with that theory. I'm flagging it.
24 That's all I'm doing at this time. But it's separate, at least
25 as Judge Berman viewed it, from the contractual approach.

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1 MR. CRISPI: As I had read, and perhaps I'm mistaken,
2 but as I had read Drayton v. Toys R Us, in the context of
3 retail transactions, which is similar to what we have here,
4 after the purchase is complete, there is no continuing
5 contractual relationship.

6 THE COURT: In Drayton, the plaintiffs allege the
7 defendants discriminated against them on a racial basis by
8 asking to inspect their sales receipts after they made the
9 purchases while not inspecting the sales receipts of white
10 shoppers and also by setting up a receipt inspection checkpoint
11 only at stores that were primarily where the customers were
12 primarily African-Americans. Those were the allegations. As I
13 say, Judge Berman denied summary judgment notwithstanding that
14 the contract for the purchase was complete on this equal
15 benefit theory that I've just tried to articulate.

16 MR. CRISPI: The plaintiffs' theory is not that in
17 this case in their allegations. Their allegations are that
18 they purchased something and that they were deprived the right
19 to purchase other things despite the fact that, factually
20 speaking, if you take plaintiffs' allegations, the security
21 guard stated, You're either here to buy something or see a
22 specialist. If not, you have to leave. That's their
23 allegations.

24 So based on their own allegations, there is no
25 interference with any right that they may have otherwise had.

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1 No matter how bad we want to assume the facts and assume the
2 conduct of the individuals involved, plaintiffs' facts
3 establish that they were not deprived of any right.

4 THE COURT: All right. Let me hear from plaintiffs'
5 counsel.

6 MR. ROSE: Yes, your Honor.

7 I think that in addition to the right to purchase,
8 which is a contract of sale, but also the right to enforce the
9 contracts that they enter into with Apple every time they
10 purchase one of their items, every time they buy headphones,
11 there's a warranty in there that's redeemable at the store. So
12 if they're not allowed in the store, they wouldn't be allowed
13 the rights under that contract that they've entered into with
14 Apple.

15 Aside from that, while we don't claim the right under
16 the state statute, under 1981, as you said, under Drayton, we
17 would believe that we would be able to establish that that was
18 another right.

19 THE COURT: Of course, as defense counsel quite
20 correctly states, you didn't allege any of this. This is
21 something I'm throwing into the hopper based on Drayton. But
22 it wasn't the theory you alleged.

23 Now, with respect to your claims under New York State
24 Executive Law 296 and New York City Administrative Code 8-107,
25 I'm not sure I fully understand defense counsel's argument on

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1 those claims, so let me go back to defense counsel.

2 MR. CRISPI: I guess our argument somewhat evolved
3 after the amended complaint, Judge. At first, admittedly the
4 initial motion dealt with that leaning toward the 12(d) motion,
5 after establishing that the conduct was done by another person.
6 I understand what counsel said and what your Honor said, that
7 you can, under certain scenarios, be liable for the acts of
8 independent contractors. But you are not liable for the acts
9 of independent contractors absent a showing of some or at least
10 an allegation, which there's none here, of control and other
11 requirements that are recited in the cases.

12 Without that, the liability for anyone would never
13 end. If you're simply a store owner, you could be liable for
14 anything that occurs in your store. There would have to be a
15 notice aspect to it or a control aspect to it. None of this is
16 alleged.

17 THE COURT: All right. So, in effect, you think it's
18 a variation on the control issue that is part of what we've
19 already discussed.

20 MR. CRISPI: I do, Judge.

21 THE COURT: All right. Let me ask plaintiffs' counsel
22 something totally different. Why should I not dismiss the
23 punitive damages claim?

24 MR. ROSE: In this instance, because we haven't had
25 discovery, and because we allege --

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1 THE COURT: Tell me where the law is that I don't have
2 to apply the same preliminary gatekeeping role with respect to
3 a punitive damages claim as I do to any other aspect of the
4 initial pleading.

5 MR. ROSE: In the pleadings, we do allege that all of
6 this was purposeful and knowing and that it was a willful
7 disregard for the law by intentionally discriminating against
8 clients.

9 THE COURT: The only facts you allege that suggest
10 that are the two persons who you say took these acts. You
11 don't remotely suggest any basis for believing that either
12 defendant had anything to do with this. Now, they may be
13 liable on a compensatory basis by the nature of respondeat
14 superior, but for punitive damages it has to be something much
15 closer to this is their policy and practice and evidences a
16 wanton disregard for the rights of customers or
17 African-American customers, or something like that. You don't
18 allege any of that other than in conclusory fashion.

19 MR. ROSE: No, your Honor, at this point, because we
20 haven't had discovery. All we know is plaintiffs have had
21 experience. To define a policy and practice you would
22 necessarily need to know what other complaints have been made,
23 and that's something we would be able to obtain through
24 discovery to try to show the policy and practice. At this
25 point, given the treatment, intentional treatment which we've

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1 alleged in the complaint, it's very plausible that there is a
2 policy and practice that they were not the only people subject
3 to that policy and practice and that through discovery we'd be
4 able to show that.

5 THE COURT: All right. Just so we're on the same
6 wavelength, you will be filing your amended complaint four
7 weeks from today. The only discovery you're going to have to
8 which you'll get responses, you can propound in accordance with
9 the case management plan other discovery requests, but they
10 won't be due to be responded to during this period. The only
11 responses you're going to get are either the interrogatories or
12 limited document requests we talked about.

13 MR. METZGER: Your Honor, can I make one statement?

14 THE COURT: Yes.

15 MR. METZGER: Just with respect to the interrogatories
16 and the documents, and I have not been obviously involved in
17 the motion practice as it pertains to the pleadings. I haven't
18 had an opportunity, and I confess I don't know the specific
19 facts yet in this particular matter. But there may be
20 discovery that would be necessary beyond these documents or
21 interrogatories. I mean, from what I understand, even though
22 we are a possibly third-party security company, whether or not
23 there's a relationship with the managers of the store, or
24 things of that nature, I think would need to come out through
25 maybe more detail in discovery before any determination could

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1 be made on the motion.

2 THE COURT: You're saying you want to be on the
3 plaintiffs' side? You want to split the liability with Apple?

4 MR. METZGER: I'm not saying that Apple would have
5 liability, your Honor. I'm just saying that based on, I don't
6 know if these limited interrogatories, I assume I'm going to be
7 given the opportunity to serve interrogatories as well on this,
8 but if that's sufficient --

9 MR. CRISPI: May I, Judge.

10 THE COURT: I'm completely at a loss to really know
11 what you're saying. Do you want to file interrogatories?

12 MR. METZGER: I may, yes.

13 THE COURT: And other than Local Rule 33.3(a)
14 interrogatories?

15 MR. METZGER: Just with respect to these special
16 interrogatories, I don't know if that was not being directed
17 towards me.

18 THE COURT: I'm sorry. You're saying you think or
19 that you have reason to believe that these employees, who are
20 at least on their face your employees, may be jointly employees
21 of Apple? That's what you want to pursue, yes?

22 MR. METZGER: Not necessarily jointly employees, but
23 just as to the facts of this particular --

24 THE COURT: Then I don't understand what you're
25 saying. If you have some claim over or against Apple, you can,

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1 of course, name them. You can make a cross-claim or
2 counterclaim, depending where they are in this lawsuit. I'm
3 sure that would do wonders for your relationship with Apple.

4 MR. METZGER: Yeah.

5 THE COURT: But nothing stops you from doing that when
6 you file your answer.

7 All right. Getting back to the schedule, after the
8 new complaint is filed, assuming, as I think is inevitable that
9 Apple will want to renew its motion, the parties should jointly
10 call, and we'll set a schedule. We may or may not put
11 discovery on hold during that; I'll think about that after I
12 see the new complaint.

13 The one claim I will dismiss right now with prejudice
14 is the negligence claim. I am extremely skeptical that the
15 punitive damages claim will survive, and I urge plaintiffs'
16 counsel to think about whether they want to include that in
17 their amended pleading. But initially, that's up to you. And
18 I think the Section 1951 claim is also unlikely to survive,
19 though Drayton gives me some pause. So the real heart of this
20 issue is going to be the joint employee issue. But there will
21 be other issues undoubtedly. Okay? So I'll just reserve on
22 everything until that's done.

23 What I'm doing is I'm dismissing the negligence claim
24 with prejudice. I'm denying the rest of the motion without
25 prejudice to its being renewed promptly after the amended

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1 complaint is filed.

2 Anything else we need to discuss?

3 MR. ROSE: Yes, your Honor. Just so I'm clear, are we
4 allowed to serve the special interrogatories on both
5 defendants, or is that restricted to Apple?

6 THE COURT: No. I think it's restricted to Apple.

7 Let me ask you this, and I throw this out to all three
8 parties. Would you prefer, I'm willing to have, in place of
9 document discovery and interrogatories, two 30(b)(6) witnesses
10 to be deposed each limited to three hours on this issue of
11 joint employment. I don't know if you would prefer that or
12 not. Let me first find out from plaintiffs before I ask anyone
13 else.

14 MR. ROSE: I suppose we would be interested in that as
15 long as we could have a choice.

16 THE COURT: You've got to fish or cut bait right now.

17 MR. ROSE: If we could choose which individual we were
18 deposing and not simply --

19 THE COURT: It's a 30(b)(6) witness. They can have
20 anyone they want. It would be someone who could speak with
21 authority and bind the respective parties on the issue of joint
22 employment, and that means the elements you listed earlier,
23 control, payment, etc.

24 MR. ROSE: Would we be able to object if we were
25 dissatisfied with the individual chosen?

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1 THE COURT: No. 30(b)(6) witnesses, they can call the
2 janitor and still meet 30(b)(6). Their obligation is to make
3 sure that the person they choose has the knowledge, gets the
4 knowledge in advance, from any and all relevant company people
5 to be able to respond meaningfully to any reasonable questions
6 you put within the scope of a 30(b)(6) notice. And it doesn't
7 matter who that person is as long as he or she fulfills that
8 obligation.

9 MR. ROSE: I think that would work for us, your Honor.

10 THE COURT: Do you prefer that to the interrogatories
11 and documents, or not?

12 MR. ROSE: Yes, I believe so.

13 THE COURT: Let me now find out from defense counsel.

14 MR. CRISPI: Judge, no. We would not agree to that or
15 we would not wish that. We're again putting discovery out
16 there so that they can try --

17 THE COURT: The reason I thought it might be useful
18 from your side as well as from their side is it probably
19 requires less work in terms of expense and so forth.

20 MR. CRISPI: From our side?

21 THE COURT: Yes, because although you have to educate
22 this person, etc., etc., supposing there are documents
23 requested. That always takes a lot of searching to find all
24 the relevant documents. Interrogatories may be less so, but
25 interrogatories typically have ambiguities in wording that you

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1 can straighten out in a 30(b)(6) deposition that you can't
2 straighten out in a more paper response. But this is an
3 option. If you don't want it, that's fine with me.
4 MR. CRISPI: No, Judge, we don't.
5 THE COURT: Fine. You don't have to give me a reason.
6 MR. CRISPI: I would point out to your Honor, it's
7 under seal, we have already provided plaintiffs' counsel with
8 the contract, which I believe explicitly states there is no
9 employment relationship between --
10 THE COURT: That's not binding in any way.
11 MR. CRISPI: But it presumably would be one of the
12 documents that they would seek.
13 THE COURT: Great. They got it.
14 By the way, why is that under seal?
15 MR. CRISPI: Because there is a confidentiality
16 clause. Omniscient was not part of it yet, so rather than
17 delay everything, we provided it to plaintiffs' counsel and we
18 filed it under seal at that time rather than hold everything
19 up.
20 THE COURT: So is there any reason that should be
21 under seal?
22 MR. CRISPI: There is a confidentiality clause.
23 THE COURT: Excuse me?
24 MR. CRISPI: I didn't know you were --
25 THE COURT: That confidentiality clause is not binding

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1 on this Court.

2 MR. CRISPI: No, it's not.

3 THE COURT: So my question to Omniscient is: Why
4 should that be sealed?

5 MR. METZGER: At this point, your Honor, I have to see
6 the contract, but I don't think that -- it may be something
7 that would not be subject to a confidentiality agreement. I
8 would like to speak with my client about that.

9 THE COURT: Let me say this. The chances are 99.9
10 percent that if either defendant wants to rely on that contract
11 at any point in these proceedings, the Court will order it not
12 be under seal.

13 MR. CRISPI: I understand that, Judge.

14 THE COURT: And I understand your caution in
15 proceeding the way you did. So now, you and Omniscient should
16 talk together and see if you want to remove it from under seal
17 or whether you want me to remove it from under seal.

18 MR. CRISPI: Judge, we will talk. And I would imagine
19 we would agree, and plaintiffs' counsel has had it, there might
20 be some pricing information that would be redacted.

21 THE COURT: That, of course, would make sense.

22 MR. CRISPI: Right.

23 THE COURT: That's the real reason for any --

24 MR. CRISPI: Agreed. That was the reason on our end.
25 But the other end was we couldn't get consent and as Omniscient

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1 would have to disclose a consent --

2 THE COURT: You'll figure it out and let me know your
3 decision and I'll let you know mine.

4 MR. CRISPI: That's fine, Judge.

5 THE COURT: Anything else we need to discuss?

6 MR. ROSE: No, your Honor.

7 THE COURT: Very good. Thanks so much.

8 (Proceedings adjourned)

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