BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re	)	
	)	MDL Docket No. _____
iPhone 3G Marketing Litigation	)	
	)	
_____	)	

BRIEF OF AT&T MOBILITY LLC IN SUPPORT OF MOTION FOR § 1407 TRANSFER OF ACTIONS

AT&T Mobility LLC respectfully submits that transfer and coordination for pretrial proceedings, pursuant to 28 U.S.C. § 1407, of the twelve putative class action lawsuits pending in five federal district courts against ATTM and Apple, Inc. is warranted. These putative class actions present common questions of fact that are complex, numerous, and most efficiently resolved through coordinated pretrial proceedings.

In these putative class action lawsuits plaintiffs assert nearly identical claims regarding the Apple iPhone 3G, for which ATTM provides wireless service. They allege that Apple and ATTM have engaged in deceptive marketing with respect to the performance of Apple's iPhone 3G on ATTM's wireless network. The complaints are predicated on the theory that Apple and ATTM deceived consumers in marketing the iPhone 3G as operating at 3G speeds; the allegations vary only slightly from case to case. The complaints assert claims for breach of state consumer protection statutes, breach of warranty and contract, common law fraud, and unjust

enrichment. Likewise, plaintiffs seek similar relief in all of these cases, in the form of compensatory and exemplary damages, disgorgement of profits, attorneys' fees, and other forms of relief.

Transferring and coordinating these cases for pretrial proceedings will promote the just and efficient conduct of the actions by avoiding duplicative discovery, preventing inconsistent and repetitive rulings, and conserving the resources of the parties, witnesses, counsel, and courts.

BACKGROUND

Twelve putative class action lawsuits on behalf of purchasers of the iPhone 3G are currently pending in the Northern District of California, the Southern District of Florida, the District of New Jersey, the Eastern District of New York, and the Eastern District of Texas.[1]

[1] In chronological order, the filed cases are: *Smith v. Apple Inc.* (filed August 19, 2008 in the N.D. Ala., transfer pending to the N.D. Cal.); *Gillis v. Apple Computer Inc. and AT&T, Inc.*, 5:09-cv-00122-JW (N.D. Cal.) (Ware, J.) (filed August 29, 2008 in the Cal. Superior Ct., removed October 8, 2008 to the S.D. Cal., transferred January 15, 2009 to the N.D. Cal.); *Tanseco v. Apple Inc.*, 5:09-cv-00275-RS (N.D. Cal.) (Seeborg, M.J.) (filed August 29, 2008 in the D.N.J., transferred January 27, 2009 to the N.D. Cal.); *Walters v. Apple, Inc.*, 5:09-cv-00187-JW (N.D. Cal.) (Ware, J.) (filed in the E.D. Ark. on September 12, 2008, then dismissed and filed January 15, 2009 in the N.D. Cal.); *Koschitzki v. Apple Inc. and AT&T Mobility LLC*, 1:08-cv-04451-JBW-VVP (E.D.N.Y.) (Weinstein, J.) (filed September 29, 2008 in the N.Y. Sup. Ct., removed November 4, 2008 to the E.D.N.Y.); *Keller v. Apple, Inc.*, 5:09-cv-00121-JW (N.D. Cal.) (Ware, J.) (filed November 19, 2008 in the S.D. Cal., transferred January 8, 2009 to the N.D. Cal.); *Pittman v. Apple Inc.*, 5:08-cv-05375-JW (N.D. Cal.) (Ware, J.) (filed November 26, 2008); *Ashikian et al. v. Apple, Inc., Apple Computer Peripherals, Inc. and AT&T Mobility LLC*, 5:08-cv-05810-JW (N.D. Cal.) (Ware, J.) (filed December 31, 2008); *Medway v. Apple, Inc.*, 3:09-cv-00330-JSW (N.D. Cal.) (White, J.) (filed January 26, 2009); *Payne et al. v. Apple Inc. and AT&T Mobility LLC*, 4:09-cv-00042-MHS-DDB (E.D. Tex.) (Schneider, J.) (filed January 29, 2009); *Gonzalez et al. v. Apple Inc. and AT&T Mobility LLC*, 1:09-cv-20258-PAS (S.D. Fl.) (Seitz, J.) (filed January 30, 2009); *Ritchie v. Apple, Inc. and AT&T Mobility LLC*, 2:09-cv-00456-WJM-MF (D.N.J.) (Martini, J.) (filed January 30, 2009).

In six of the cases plaintiffs seek certification of a nationwide class (*Pittman*, *Keller*, *Walters*, *Tanseco*, *Ashikian*, and *Smith*). In the remaining cases plaintiffs request certification of statewide classes in five different states.[2]

All of these cases are in the preliminary stage of litigation. No court has set a discovery schedule. No discovery has been conducted. There has been minimal activity on threshold motions. While *Smith* was pending in Alabama, the court ruled on a motion to dismiss by Apple. In *Koschitzki*, the court is currently considering a motion to compel arbitration by ATTM and motions to dismiss by ATTM and Apple.

Seven of these cases were originally filed in the eastern half of the United States: *Koschitzki* (E.D.N.Y.), *Tanseco*, (D.N.J.), *Ritchie* (D.N.J.), *Walters* (E.D. Ark.), *Smith* (N.D. Ala.), *Payne* (E.D. Tex.), and *Gonzalez* (S.D. Fla.). The majority of the parties in those cases, and their attorneys, are located in the eastern part of the country. ATTM is headquartered in Atlanta, Georgia, and the majority of its relevant witnesses and documents are located there.

Three of these seven cases are now pending in the Northern District of California following a series of procedural maneuvers. To begin, *Gillis* and a copycat action *Keller* were filed by the same plaintiffs' counsel in the Southern District of California. *Pittman* and *Ashikian* were then filed by other lawyers in the Northern District of California. What then followed was a wave of transfer activity by counsel for certain plaintiffs and Apple. ATTM was not part of this transfer activity. Cases filed outside of California – *Tanseco* (D.N.J.), *Smith* (N.D. Ala.), and *Walters* (E.D. Ark.) – were transferred by plaintiffs and Apple to the Northern District after various procedural maneuvers to eliminate ATTM from those cases. The maneuvers included

[2] The named plaintiffs in these cases purport to represent classes in the following states: *Gillis* (CA), *Medway* (CA), *Koschitzki* (NY), *Payne* (TX), *Gonzalez* (FL), and *Ritchie* (NJ).

(1) voluntarily dismissing the entire action against both ATTM and Apple and then refiling it in the Northern District only against Apple in *Tanseco*, (2) voluntarily dismissing ATTM from the case, proceeding only against Apple, and then moving for transfer to the Northern District in *Walters,* and (3) dropping a proposed amendment to add ATTM to the case and then moving to transfer to the Northern District in *Smith.*

To date, ATTM has not been served in any of the actions now pending in the Northern District of California. ATTM was originally named in *Ashikian* and AT&T, Inc. was originally named in *Gillis*, both now pending in the Northern District of California. In connection with those cases, ATTM received and responded to letters purporting to give ATTM notice of claims under California law. No service of those lawsuits followed.

At plaintiffs' request, the cases pending in the Northern District of California have been deemed related by the court, except for *Medway* and *Tanseco*. Plaintiffs and Apple recently requested consolidation of the cases pending in the Northern District of California, including *Medway* and *Tanseco*. Plaintiffs' request indicated they will file an amended consolidated complaint, but did not indicate whether ATTM will be a defendant in any amended consolidated complaint.

Both ATTM and Apple are named as defendants and have been served in the cases pending in the other four jurisdictions, the Southern District of Florida, the District of New Jersey, the Eastern District of New York, and the Eastern District of Texas.

ARGUMENT

I. The Panel Should Transfer the iPhone 3G Putative Class Actions to a Single District for Coordinated Pretrial Proceedings.

This Panel is authorized to transfer civil actions "involving one or more common questions of fact [that] are pending in different districts" if the transfer furthers "the convenience

of the parties and witnesses" and "promotes[s] the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The iPhone 3G putative class actions satisfy these three statutory requirements.

A. These cases have common questions of fact.

The iPhone 3G putative class actions involve common facts regarding the marketing and performance of the iPhone 3G. The complaints in these actions contend that: 1) defendants made claims in their marketing campaign that the iPhone 3G would operate at 3G speeds that were much faster than previous models; 2) plaintiffs purchased an iPhone 3G; 3) the iPhone 3G operates at speeds much slower than advertised and expected; and 4) plaintiffs have been injured and suffered damages as a result of the iPhone 3G's failure to operate as advertised.

In analogous settings, where plaintiffs' allegations focus on a single product, the Panel has routinely held that common questions of fact exist. *See, e.g.*, *In re Kugel Mesh Hernia Patch Prods. Liab. Litig.*, 493 F. Supp. 2d 1371, 1373 (J.P.M.L. 2007) (finding common questions when each case would involve issues of the "design, manufacture, safety, testing, marketing and performance" of the hernia patches); *In re Baycol Prods. Liab. Litig.*, 180 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001) (transferring and consolidating actions when all actions concerned the safety of the prescription drug Baycol).

B. Transfer of these cases furthers convenience and efficiency.

In considering transfer, the Panel also evaluates whether centralization will serve judicial economy by avoiding duplication of discovery, preventing inconsistent or repetitive pretrial rulings, and conserving the resources of the parties, their counsel and the judiciary. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH § 22.33 (2004); *In re Baycol Prods. Liabl. Litig.*, 180 F. Supp. 2d at 1380. These concerns are particularly applicable to putative class actions, in which it

is "desirable to have a single judge oversee the class action issues . . . to avoid duplicative efforts in this area." *In re First Nat'l Bank*, 451 F. Supp. 995, 997 (J.P.M.L. 1978); *see also In re Natural Res. Fund, Inc. Secs. Litig.*, 372 F. Supp. 1403, 1404 (J.P.M.L. 1974) (stating that the "potential for conflicting class determinations by the transferor courts" is a "highly persuasive if not compelling reason for transfer of all actions to a single judge"); *In re Res. Exploration, Inc., Secs. Litig.*, 483 F. Supp. 817, 821 (J.P.M.L 1980) ("An additional justification for transfer is the fact that most of the actions before us have been brought on behalf of similar or overlapping classes . . . . It is desirable to have a single judge oversee the class action issues . . . to avoid duplicative efforts and inconsistent rulings in this area."); *In re Allstate Ins. Co. Underwriting and Rating Practices Litig.*, 206 F. Supp. 2d 1371, 1372 (J.P.M.L. 2002) ("Centralization under Section 1407 is . . . necessary in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings, particularly with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary.").

All twelve of the iPhone 3G consumer cases are brought as putative class actions. The classes purportedly represented in each case are either identical or overlapping, with six cases seeking nationwide classes and the other six cases seeking statewide classes. If these actions are transferred and coordinated for pretrial proceedings, resolution of common issues regarding defendants' alleged conduct in marketing and selling the iPhone 3G on ATTM's network will be consistent, and duplicative efforts by the courts, the class, and counsel will be avoided.

Furthermore, consolidation and transfer will yield significant time and cost savings to all parties by protecting the witnesses involved in these lawsuits from multiple depositions and facilitating a coordinated approach to discovery.

Finally, each of the iPhone 3G putative class action cases is in the preliminary phase of litigation. No court has entered an order setting a discovery schedule. Therefore, transfer and coordination will achieve the goal of judicial economy without disrupting ongoing litigation.

II. The iPhone 3G Putative Class Actions Should be Transferred to the District of New Jersey.

In choosing an appropriate transferee court, this Panel considers a range of factors taking into account the convenience of the parties and the capacity and experience of the courts to manage complex multidistrict proceedings. These factors, taken as a whole, indicate that the District of New Jersey would be the best forum for transfer in these cases.

The District of New Jersey, Newark Division is a convenient forum for all parties and is easily accessible. Two cases have been filed in the District of New Jersey.[3] Five other cases were originally filed in the eastern United States, and plaintiffs in those cases are located in the eastern United States. ATTM is headquartered in the eastern United States (Georgia) as well, and the evidence and witnesses for the iPhone 3G putative class actions are located there.

By contrast, the Northern District of California is not a convenient location for defendant ATTM or the plaintiffs in the seven cases filed in the eastern United States. Plaintiffs in all seven of these cases do not reside in California: (1) the named plaintiff in *Smith* is a resident of and purchased her iPhone 3G in Alabama (*Smith* Compl. ¶¶ 2, 17); (2) the named plaintiff in *Walters* is a resident of Arkansas (*Walters* Compl. ¶ 2); (3) the named plaintiff in *Tanseco* is a resident of and purchased his iPhone in New Jersey (*Tanseco* Compl. ¶ 10); (4) the named plaintiff in *Koschitzki* is a resident of New York (*Koschitzki* Compl. ¶ 5); (5) the named plaintiffs

[3] *Tanseco* was filed in the District of New Jersey, but subsequently transferred to the Northern District of California, after plaintiffs voluntarily dismissed ATTM.

in *Gonzalez* are residents of Florida (*Gonzalez* Compl. ¶ 5); (6) the named plaintiffs in *Payne* are residents of Texas (*Payne* Compl. ¶ 5); and (7) the named plaintiff in *Ritchie* is a resident of New Jersey (*Ritchie* Compl. ¶ 5).[4]

No case is more advanced in its progress than any other case. The Northern District of Alabama addressed a motion to dismiss by Apple in *Smith* before transfer of the case to the Northern District of California. The only case in which threshold motions to dismiss by ATTM and Apple and a motion to compel arbitration by ATTM are scheduled to be heard is *Koschitzki* in the Eastern District of New York. No dispositive motions have been filed in any other case. No discovery schedules have been established. No discovery has been conducted.

In considering the docket volume and workload of the courts, the District of New Jersey is also the preferable choice. In 2008, the District of New Jersey had 7,101 pending cases distributed among 17 judges, for an average of 417 cases per judge. *See* Federal Court Management Statistics 2008, *available at* http://www.uscourts.gov/cgi-bin/cmsd2008.pl. In contrast, the Northern District of California had 8,882 pending cases, distributed among 14 judges, for an average of 634 cases per judge. *Id.* In particular, the Honorable Judge James Ware to whom the cases are assigned has a substantial calendar. *See* Judges James Ware Calendar, http://www.cand.uscourts.gov/cand/calendar.nsf/Calendars?OpenView (follow "Ware, Judge James" hyperlink).

In considering the experience of the courts in handling complex multidistrict proceedings, the District of New Jersey, Newark Division, has the experience and resources necessary for efficient and successful multidistrict litigation. The *Ritchie* action is currently pending in the

---

[4] In addition, the named plaintiff in *Pittman* is a resident of Washington (*Pittman* Compl. ¶ 6).

District of New Jersey before the Honorable Judge William J. Martini. Judge Martini has successfully handled other complex litigation, including the current MDL proceeding *In re Human Tissue Products Liability Litigation.* As the Panel noted in its decision to assign the *In re Human Tissues Products Liability Litigation* to Judge Martini, Judge Martini is "a jurist who has the experience necessary to steer the litigation on a prudent course." *In re Human Tissue Prods. Liab. Litig.*, 435 F. Supp. 2d 1352, 1354 (J.P.M.L. 2006). Further, the District of New Jersey has "the capacity to handle" complex litigation. *In re: Boscov's Department Store, LLC, Fair and Accurate Credit Transactions Act Litig.*, 528 F. Supp. 2d 1341, 1342 (J.P.M.L. 2007).

Further, the District of New Jersey is an easily accessible forum, given its close proximity to several large, national airports. *See In re Gator Corp. Software Trademark & Copyright Litig.*, 259 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003) (noting the importance of an accessible, metropolitan location).

CONCLUSION

For the foregoing reasons, ATTM respectfully requests that this Panel enter an order transferring the iPhone 3G putative class action lawsuits to the United States District Court for the District of New Jersey for coordinated pretrial proceedings.

Dated: March 4, 2009

Respectfully submitted,

Kathleen Taylor Sooy
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500

Counsel for Defendant AT&T Mobility LLC