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United States District Court, N.D. California,
San Jose Division.

In re APPLE IPHONE 3G PRODUCTS LIABILITY LITIGATION.

No. C 09-02045 JW.May 25, 2010.

Attorneys and Law Firms

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Opinion

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION; GRANTING DEFENDANTS' MOTIONS FOR EXTENSION OF TIME TO FILE RESPONSE

JAMES WARE, District Judge.

*1 Presently before the Court are (1) Plaintiffs' Motion for Leave to File a Motion for Reconsideration of the Court's April 2, 2010 Order[1] and (2) Defendants' Motions for Extension of time to File Response.[2] The Court considers each Motion in turn.

A. *Plaintiffs' Motion for Reconsideration*

Plaintiffs seek reconsideration of the Court's Order Granting Defendant AT & T Mobility, LLC's Motion to Dismiss Master Consolidated Complaint[3] on the grounds, *inter alia,* that (1) under a recent decision of the D.C. Circuit, Defendant Apple's conduct is not subject to FCC regulation and thus the FCA does not preempt claims against Apple; (2) the parties did not have an opportunity to brief the issue of whether either Defendant is an indispensable party; and (3) the Court's finding that the FCA preempts Plaintiffs' state law claims was in error. (*See* Motion, Ex. A.)

Civil Local Rule 7-9(a) provides as follows:

> Before the entry of a judgment adjudicating all of the claims and the rights and liabilities of all the parties in the case, any

> party may make a motion before a Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any interlocutory order made by that Judge on any ground set forth in Civil L.R. 7-9(b). No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion.

In doing so, the moving party must specifically show the following:

> (1) At the time of the filing the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civ. L.R. 7-9(b). A motion for leave to file a motion for reconsideration may not repeat any oral or written argument previously made with respect to the interlocutory order that the party now seeks to have reconsidered. Civ. L.R. 7-9(c). "A party who violates this restriction shall be subject to appropriate sanctions." *Id.*

In its April 2 Order, the Court found that Plaintiffs' claims are based on the core allegation that Defendants knew that ATTM's 3G network was not sufficiently developed to accommodate the number of iPhone 3G users, and thus implicated the reasonableness of ATTM's rates in relation to the level of service provided. (April 2 Order at 9.) The Court found that Plaintiffs' claims amounted to an attack on ATTM's rates and 3G market entry, and are preempted by the FCA on that ground. (*Id.*) The Court further found that Plaintiffs' claims are based on allegations that Defendants acted together to deceive Plaintiffs despite both knowing that the iPhone 3G operating in ATTM's 3G network could not perform as promised. (*Id.* at 14.) Moreover, the Court found that ATTM is an indispensable party, and thus the case cannot proceed against Apple alone, because any adjudication of the claims as to Defendant Apple would necessarily require a determination fo the sufficiency of ATTM's 3G network infrastructure. (*Id.* at 15.)
***2** Here, Plaintiffs present only one case that was decided after the Court issued its April 2 Order and could therefore conceivably constitute a change in law subsequent to that Order. In *Comcast Corporation v. Federal Communications Commission,*[4] which was decided on April 6, 2010, two advocacy groups filed an FCC complaint challenging Comcast's practice of interfering with subscribers' use of peer-to-peer networking applications, which allow users to share large files directly without going through a central server. *Id.* at 644. Ultimately, the D.C. Circuit held that the FCC did not have jurisdiction over Comcast's network management practices. *Id.* at 661.

The Court finds that *Comcast* is inapposite to the Court's analysis of FCA preemption in the April 2 Order. *Comcast* addressed the FCC's jurisdiction to regulate a company's management of its own high-speed internet network. In contrast here, the Court found that Plaintiffs' claims amounted to a challenge to ATTM's entry into a new commercial mobile service market and the rates it charged in relation to the level of service, both of which are areas over which the FCC has exclusive jurisdiction under an express provision of the FCA. Thus, the D.C. Circuit's decision in *Comcast* does not provide an adequate basis for reconsideration of the April 2 Order.

As to Plaintiffs' contention that they did not have an opportunity to brief the issue of whether either Defendant is an indispensable party,[5] the Court finds that it fully considered the record and applicable law before deciding the matter, and thus reconsideration is not justified. Given that there are two Defendants in this matter, Plaintiffs were on notice that the situation could arise that claims could be dismissed against one Defendant, leaving the Court to determine the impact of that determination on the other Defendant's status in the case. Moreover, while the parties did not address the issue of indispensability in their briefing, the issue was raised in oral argument and Plaintiffs had an opportunity to respond, although they chose not to. (*See* Transcript of Proceedings at 44:12-17, Docket Item No. 183.) Since Plaintiffs present no material facts or change in law with respect to the indispensability of either party that occurred since the Court issued its April 2 Order, the Court does not find adequate grounds for reconsideration on that basis.

Finally, Plaintiffs devote ten pages of their Proposed Motion for Consideration essentially rearguing the Court's finding that Plaintiffs' state law claims are preempted by the FCA. (*See* Motion, Ex. A at 11-20.) None of the cases Plaintiffs rely on to

support their contention that the Court's holding with respect to FCA preemption was in error were issued subsequent to the Court's April 2 Order, and thus there was ample opportunity to present the Court with those cases in briefing or at oral argument. Furthermore, the Court addressed at length in the April 2 Order several of the cases Plaintiffs cite in their Proposed Motion. Plaintiffs' contention that the Court committed "manifest error" in relying on *Bastien* to find their claims preempted is not a grounds for reconsideration under Civil L.R. 7-9(b). Plaintiffs have not made any showing that the Court manifestly failed to consider material facts or dispositive legal arguments that were presented to it in Plaintiffs' extensive briefing of the matter.

***3** Accordingly, the Court DENIES Plaintiffs' Motion for Leave to File a Motion for Reconsideration of the Court's April 2, 2010 Order.

B. ***Motion for Extension of Time to File a Response***

Apple and ATTM both filed Motions to Enlarge Time to Respond to Master Administrative Consolidated Second Amended Complaint. (Extension at 1.) In light of Plaintiffs' filing of the Motion for Leave, the Court finds good cause to GRANT Defendants' Motions to Enlarge. Defendants shall file their Amended Answer or dispositive motion within thirty days on or before **June 24, 2010.**

The parties' Stipulation re: extending time for Plaintiffs time to file their Response is DENIED as moot. (Docket Item No. 196.)

Footnotes

1 (hereafter, "Motion," Docket Item No. 187.)

2 (*See* Docket Item Nos. 191, 194.)

3 (hereafter, "April 2 Order," Docket Item No. 184.)

4 600 F.3d 642 (D.C.Cir.2010).

5 (*See* Motion, Ex. A at 8-11.)

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