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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHARLES TILLAGE, et al.,)	Case No. 17-cv-06477-VC
)	
Plaintiffs,)	San Francisco, California
)	Wednesday, March 10, 2021
v.)	
)	
COMCAST CORPORATION, et al.,)	
)	
Defendants.)	
_____)	

TRANSCRIPT OF ZOOM CASE MANAGEMENT CONFERENCE
BEFORE THE HONORABLE VINCE CHHABRIA
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES VIA ZOOM:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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1 SAN FRANCISCO, CALIFORNIA WEDNESDAY, MARCH 10, 2021 2:02 P.M.

2 --oOo--

3 THE CLERK: Calling Case Number 17-cv-6477, Tillage, et
4 al. v. Comcast Corporation, et al. Counsel for the Plaintiff,
5 please state your appearance for the record.

6 MR. HELLER: Good afternoon, Your Honor. Roger Heller
7 for Plaintiffs.

8 THE COURT: Good afternoon.

9 THE CLERK: Attorneys?

10 MR. DUFFY: Good afternoon, Your Honor. Seamus Duffy
11 for the Comcast Defendants.

12 THE COURT: Hello.

13 MR. STORTZ: Mike Stortz, Your Honor, for the Comcast
14 Defendants. Good afternoon.

15 THE COURT: Hi. So I wanted to talk to you about this
16 stipulation. My concern -- hold on just a second. My -- my
17 concern -- I'm pulling up the stip. My concern and my question is
18 how -- how did we get to a point where we were reframing and
19 adjudicating summary judgment and class certification at the same
20 time?

21 MR. HELLER: Well, I guess I'd probably kick that
22 question to Comcast. They decided sort of when they wanted to
23 file their summary judgment motion. We didn't have sort of an
24 agreed schedule on that other than that they could sort of file
25 sometime within the existing schedule, so I think they ultimately

1 decided when they wanted to file that. So I think they can answer
2 that.

3 THE COURT: Okay. And are you planning on filing -- let
4 me ask you, Mr. Heller. Are you planning on filing a cross-motion
5 for summary judgment as to the liability for the -- for the named
6 Plaintiff or not -- or Plaintiffs or not?

7 MR. HELLER: Not at this time. I think our plan at this
8 point is to -- if we're going to move for summary judgment, it
9 would be later on after class certification and after we've
10 completed discovery because discovery is still ongoing. The
11 discovery to date has been focused on class certification, though
12 not bifurcated.

13 THE COURT: Well, what -- so, I mean, usually I have a
14 discussion with the parties towards the beginning of the case in
15 these proposed class actions about whether we're going to do class
16 certification or summary judgment first and, you know, I have a
17 discussion with the Defense about, you know, whether they would
18 like to avoid the expense and difficulty of doing, you know, class
19 certification discovery and just go straight to summary judgment
20 on liability as to the named Plaintiff. You know, the benefit
21 being, if you win, you've gotten rid of the case and you have a
22 district court opinion explaining why you're not liable. The
23 downside, of course, being that you, you know, the other -- the
24 class members aren't out by the ruling.

25 And so did we have that conversation towards the beginning of

1 this case? I mean, I sort of assumed from the schedule that we
2 set that we did have that conversation and we decided to go -- do
3 class certification first.

4 MR. DUFFY: Your Honor, --

5 MR. HELLER: Your Honor, --

6 MR. DUFFY: I'm sorry, Roger.

7 MR. HELLER: Go ahead, Seamus. That's okay.

8 MR. DUFFY: Your Honor, the case has a little bit of an
9 unusual procedural history. At the time that the Tillage, Loomis
10 case began, there was the arbitration issue that was ultimately up
11 in the Ninth Circuit. And when we first talked about case
12 management in this case, I believe the appeal was still sort of
13 live and going on.

14 And so I would say this, sir. We never did have that
15 discussion. In -- in the original case management orders and the
16 stipulations that followed beginning, as I recall it, sometime
17 maybe middle of last year or last summer, we -- we had included a
18 provision that said Comcast may have dispositive motions in the
19 interim as discovery proceeds.

20 I would say this, sir. As it turns out, there are some
21 particularized issues as to the named Plaintiffs' claims that
22 really came out of their depositions that occurred in December
23 where the actual facts of what occurred with them we would say
24 don't really match up to the complaint. And so the arguments are
25 very targeted to the named Plaintiffs' claims -- standing issues

1 and the like. The motion itself doesn't seek sort of class-wide
2 liability rulings. More -- it's more focused on the individual
3 Plaintiffs' experience themselves.

4 And so we thought it appropriate. We raised the issue with
5 the Plaintiffs, you know, a couple times through, so I don't think
6 they were surprised by it. And then we took the depositions in
7 December and notified them in early January that we wanted to put
8 this on calendar.

9 And our thought, Your Honor, was that you would either sort
10 of take it first, which is the way we've got it set up in the
11 schedule, or you might take the approach of saying, I want to
12 consider them together -- the certification and the summary
13 judgment -- which of course some courts do.

14 And so that's -- that's the history, sir.

15 THE COURT: Okay. So, I mean -- so, again, I haven't
16 read -- I haven't looked at your summary judgment motion, so --
17 you filed it; right? You filed your summary judgment motion?

18 MR. DUFFY: Yes, sir.

19 THE COURT: Okay. I haven't looked at it, so I don't --
20 you know, I was just -- you know, developed this concern in the
21 abstract but, you know, a lot of times, to the extent that you're
22 doing summary judgments in conjunction -- to the extent that
23 you're doing summary judgment before class certification, the
24 ruling on summary judgment can sometimes inform the analysis on
25 class certification. For example, I mean, just a hypothetical

1 example -- you know, let's say there are four claims and you file
2 a motion for summary judgment and you win on two of the -- the
3 Defendant wins on two of the claims, then the question is: Do we
4 certify a class on the other two claims? And it may be that if
5 you're briefing them at the same time, the parties may have
6 focused primarily on whether it's appropriate to certify a class
7 on the claims that now are out of the case.

8 So from a case management standpoint, you know, I think -- I
9 think it often makes sense to do summary judgment first and then
10 do class certification. It often makes sense to do class
11 certification first and then summary judgment. I think it's
12 probably rare that it makes sense to do both of them at the same
13 time because your ruling on one could, you know, dramatically
14 affect the other. Your ruling on summary judgment could affect
15 the analysis on class certification, or the ruling on class
16 certification could affect the analysis on summary judgment.

17 So I, you know -- I don't know whether this is one of those.
18 I just have a general reluctance to be doing them at the same
19 time. On the other hand, this case is like, you know, from the
20 dark ages. This case has been around forever. I mean, a part of
21 it is nobody's fault. It was just there was an appeal pending in
22 the Ninth Circuit or maybe there were -- you went up a couple
23 times -- I can't even remember. But -- but, you know, given the
24 comments that I've just made, what's -- what is everybody's
25 reaction to what -- what we should do here?

1 MR. HELLER: Your Honor, you know, from our perspective,
2 we're not concerned about the summary judgment motion and so we're
3 not as concerned about the timing of it. I mean, our interest is
4 -- including because the case has been around for so long -- is in
5 getting, you know, to class certification as quickly as we can and
6 getting that -- getting that done.

7 And so where the summary judgment motion falls in that and
8 when it's heard is less of a concern to us, although I certainly
9 understand Your Honor's comments about in many cases, you know, it
10 can clear stuff up or it can make sense to do it after class
11 certification.

12 This may be the type of case where it makes sense to hear
13 that after class certification. From our perspective, I think if
14 it was the choice, we would say, Let's get class certification
15 done and then let's deal with summary judgment.

16 THE COURT: Well, maybe -- Mr. Duffy, maybe you could
17 describe with a little more specificity what your summary judgment
18 motion is.

19 MR. DUFFY: Your Honor, the summary judgment motion
20 is -- these two Plaintiffs, as the complaint was originally
21 pled -- alleged that they -- effectively that they did not
22 contract with Comcast. They were not bound by Comcast uniform
23 customer agreement that it uses with customer accounts. They had
24 individual stories account, their individual experience. They had
25 avoided being bound by those agreements.

1 And through the discovery process, we believe, Your Honor,
2 that it was demonstrated that indeed they did agree to those
3 agreements. And their stories -- I won't go into detail, but
4 their -- the actual experiences they had really don't match up in
5 some fundamental ways to the way the complaint was pled.

6 And so the arguments are really -- then there's a *Sonner* (ph)
7 issue, Your Honor, the argument about their standing --

8 THE COURT: What issue?

9 MR. DUFFY: Pardon me?

10 THE COURT: What issue?

11 MR. DUFFY: The issue of whether they're in a position
12 to seek equitable relief in light of the fact that they have a
13 damages remedy that's adequate. And so that's another legal issue
14 that's presented in the motion.

15 So the motion is very focused on the individual named
16 Plaintiffs' claims and the liability of those claims. It doesn't
17 ask Your Honor to pronounce, for example, Comcast advertising is
18 not misleading as a general matter. It's really focused on the
19 individual Plaintiffs' experience.

20 I do think, Your Honor, that adjudicating that motion
21 first -- first of all, we think it's important that it be
22 adjudicated first, number one.

23 Number two, I think it's the kind of motion, Your Honor, that
24 even if Your Honor were to deny the motion on one claim, let's
25 say, for whatever reason, I think the exercise itself will cast a

1 lot of light on the viability of the certification motion in this
2 case because by adjudicating the summary judgment motion, I think
3 Your Honor will see that the process of going through the
4 purchasing process with this kind of service doesn't lend itself
5 to certification.

6 So I do think there will be -- even if some claims survive,
7 the exercise will be useful. And we feel strongly, Your Honor,
8 that the motion should be adjudicated first --

9 THE COURT: Well, that last point I don't think really
10 matters because, to the extent that any of the stuff from the
11 summary judgment motion is useful to the decision of whether it's
12 amenable to class certification, you just could have -- you could
13 have just put it in your opposition to the class certification
14 motion.

15 MR. DUFFY: True, Your Honor. I mean, we have and we
16 probably will, you know, on issues like typicality and adequacy
17 and the like. I think that some of the same points would be made
18 and I think would be important. But given the way discovery
19 proceeded, the Plaintiffs' depositions occurred, you know, in the
20 fourth quarter of last year, in the December time frame, and the
21 motion very much comes out of that testimony. And so from a
22 timing standpoint, the Plaintiffs -- it was clear to us that the
23 Plaintiffs were not going to be amenable to deferring
24 certification at that point. We didn't even really have that
25 discussion. It was just a question of fitting in the summary

1 judgment motion into the existing schedule, which we did.

2 THE COURT: Okay. So now that we've -- now that we've
3 had this discussion, let me look back at your stip. And did --
4 the Plaintiffs, ultimately did you file your opposition?

5 MR. HELLER: We -- yes, we did, Your Honor. We filed
6 our opposition to the summary judgment motion. And let me just
7 say -- I think kind of what you're hearing from Comcast I think at
8 most would support hearing the motions at the same time.

9 I mean, it's not a summary motion that's going to clear stuff
10 out of the way for class -- that's going to really affect how
11 class certification gets resolved. I mean, we obviously just --
12 I should say we obviously disagree with the characterization of
13 their testimony somehow undermining would be different from, you
14 know, the way that their allegations and claims were pled in the
15 first place.

16 And on the sort of other aspect of the summary judgment
17 motion, which is *Sonner*, I mean, I think it's relatively clear
18 that we are pursuing equitable relief that's -- you know, that's
19 different from, you know, relief that's available under the legal
20 claims. And even if that were not the case, I don't think it
21 affects -- you know, at most it affects sort of what officially --
22 what the claims are that we are pursuing, but it doesn't really
23 affect really the story either side of the teller (ph) class
24 certification or ultimately the class certification decision. It
25 just would impact which specific claims got certified.

1 You know, whether it's just a CLRA claim, for example, or is
2 a CLRA claim and a false advertising law claim, you know, that's
3 sort of the kind of thing that, you know, I guess in theory could
4 be affected by the summary judgment motion, but no reason why
5 those two -- why those two motions couldn't be heard together.

6 And I do think there's value in hearing them both at the same
7 time.

8 THE COURT: Okay. And then -- now I'm looking at the
9 schedule you're contemplating for class certification. I mean, as
10 it stands now, the deadline for the reply is due on March 25th,
11 right, the summary judgment reply.

12 And the hearing would be April 8th, so that's coming up quite
13 -- quite soon. And you're contemplating for class certification,
14 you're contemplating filing your motion the end of this month and
15 then you're contemplating an opposition being filed about two
16 months later to class certification?

17 MR. HELLER: Correct.

18 THE COURT: And you're contemplating a reply being filed
19 another month-plus later and a hearing happening another month
20 later after that.

21 And I gather the reason you've created such an elongated
22 schedule is that you're planning on doing a bunch of discovery as
23 the briefs are being filed?

24 MR. HELLER: Yeah. I think it's really expert
25 discovery, so we've got a couple of experts and we've actually --

1 that part of the process -- that part of the schedule is actually
2 after we've served our expert reports in support of class
3 certification motion. And after we file our class certification
4 motion, there's time built in for Comcast to depose our experts
5 and for them to designate their own experts.

6 And then after they file their opposition brief, there is
7 time built in for us to take our expert discovery. And so that's
8 why we have -- you know, it's a little bit longer than normal
9 briefing schedule.

10 THE COURT: Okay. By the way, before I forget, so we're
11 going to need to do a few things with this stipulation. One thing
12 is that any *Daubert* challenges to experts that are put up in
13 support of or in opposition to class certification will need to be
14 embedded in the actual brief in support of or in opposition to
15 class certification.

16 MR. DUFFY: Understood.

17 THE COURT: And my experience is that usually you can do
18 that within page limits. If there's some gargantuan problem with
19 that, you can request an extension of the page limits. I'll
20 probably deny it, but you can -- you can request it.

21 MR. DUFFY: Understood.

22 THE COURT: You know, because when you file separate
23 *Daubert* motions, it's just a repeat of all -- it's just a bunch of
24 repeat, and I actually try to read all the papers, and so it's a
25 waste of my time to get multiple papers.

1 So -- so that's number one is that, you know, your challenges
2 -- any challenges, *Daubert* challenges, need to be embedded in the
3 briefs that you're filing on class certification.

4 I -- you know, my -- I don't have strong feelings about
5 whether to hear the summary judgment motion sooner or later. It
6 sounds like it's not a complicated matter or a heavy lift. And it
7 sounds like it, you know -- from the way you all are describing
8 it, it sounds like a ruling -- I mean, obviously, if the motion is
9 granted, that is going to affect the class certification
10 proceedings.

11 Is it as to all the Plaintiffs?

12 MR. DUFFY: Yes, sir.

13 THE COURT: And how many Plaintiffs are there again?

14 MR. DUFFY: There is two, sir.

15 THE COURT: Okay. And, you know -- and then -- yeah, it
16 doesn't sound like there is much heavy lifting. And short of --
17 short of granting of the motion outright, it probably isn't going
18 to dramatically affect the way you present your class
19 certification argument. So maybe in this case -- I mean, I don't
20 like to do it and I think it tends to be a waste of time and tends
21 to create inefficiencies, but maybe in this case, since that's
22 where we find ourselves, maybe we should just do that and maybe I
23 should -- I should -- well, here's what I would like to do,
24 though. I would like to have a hearing so we have -- the only
25 thing we have left on summary judgment is the reply from Comcast;

1 correct?

2 MR. HELLER: That's correct.

3 MR. DUFFY: Yes, sir.

4 THE COURT: What I'd like to do is have -- and you're
5 going to create a stipulation where you're going to memorialize
6 this and submit it to us so that we can just sign it.

7 But what I'd like to do is I would like to have Comcast's
8 reply due, you know, like around the first week of April and then
9 I would like to have the hearing -- summary judgment hearing
10 around the 30th of April. Because we actually -- looking like
11 we're going to have our first trial since the pandemic started the
12 week of -- the week of May 3rd -- at least there's a reasonable
13 possibility that we will.

14 So I want to not have the hearing on May 6th. I'm not sure
15 we'll need a hearing, but -- so hearing in -- let's figure out
16 that date right now. So let's do the hearing on the 22nd of April
17 and have you file your reply by, you know, April 7th.

18 So that's the summary judgment motion.

19 And then as far as the class certification hearing, I think
20 that it needs -- I think the hearing should stay on July 15th for
21 our own scheduling purposes. Let me just double-check. And I
22 don't want -- it's time for this case to start moving, so we're
23 going to -- I'm setting dates that I'm anticipating will not be
24 changed and that are going to hold, and I'm thinking about things
25 like the law clerk transition, and I think that we're going to

1 need to keep the class certification hearing on for July 15th.
2 And you guys are going to need to figure out a new schedule that
3 accommodates your needs and accommodates my need to have the --
4 any *Daubert* challenges be part of the class certification phase.

5 MR. DUFFY: Understood.

6 THE COURT: And that involves the final brief being
7 filed two weeks before the hearing.

8 MR. HELLER: Understood, Your Honor. And I think we
9 actually -- the changes that we've made and that we proposed to
10 the class certification schedule were mostly I think about pushing
11 -- we were trying to push all of the dates out a couple of weeks
12 because we have a mediation scheduled and some of the dates --
13 we're getting pretty close to that mediation date, and so we just
14 wanted to build a little bit of padding, which we may be able to
15 do within the --

16 THE COURT: I understand what you're saying, but it's
17 time to walk and chew gum at the same time in this case because --

18 MR. HELLER: Understood. Yeah.

19 THE COURT: And, you know, I don't -- do you have a date
20 scheduled for mediation yet?

21 MR. DUFFY: We do, sir.

22 THE COURT: It says tentatively scheduled to occur on
23 April 13th?

24 MR. DUFFY: Yes, Your Honor. That's been -- that has
25 been fixed.

1 THE COURT: Okay. I think that all sounds perfect.
 2 It's time to -- time to get rolling on all fronts. So that -- so
 3 why don't you submit a new stipulation in accordance with the
 4 guidance that I just gave you, and -- is there anything else we
 5 can do for you right now?

6 MR. STORTZ: Nothing, Your Honor.

7 MR. HELLER: No.

8 THE COURT: Okay. Great. Thank you.

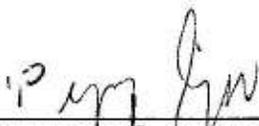
9 MR. DUFFY: Thank you, sir.

10 MR. HELLER: Thank you.

11 (Proceedings adjourned at 2:25 p.m.)

12

13 I, Peggy Schuerger, certify that the foregoing is a
 14 correct transcript from the official electronic sound recording
 15 provided to me of the proceedings in the above-entitled matter.

16
 17 
 18 _____
 Signature of Approved Transcriber

March 16, 2021

 Date

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 20 **Ad Hoc Reporting**
 21 Approved Transcription Provider
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 Northern District of California

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