

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANDREW COHEN, TIMOTHY  
HORNICK, KALEAH C. ALLEN,  
KIMBERLY BENJAMIN, MARK  
WEILER, MATT KOPPIN, SCOTT  
CISCHKE, ALBERT COLLINS, PAUL  
COLETTI, KRYSTLE FAERN, RODOLFO  
CABRERA, BRANDY DAVIS, WILLIAM  
ZIDE, DAVID HEDICKER, NANCY  
MAEKAWA, CATHERINE GOODWIN,  
KATHLEEN BOGGS, KIMBERLY  
MODESITT, MARK KUNZE, ARIANA  
RYAN, BECKY WELLINGTON, M. GAIL  
SUNDELL, VICTOR PERLMAN, and  
ZACHARY GOMOLEKOFF, individually  
and on behalf of all other similarly situated,

No. C 19-05322 WHA

**ORDER ON MOTION FOR  
SUMMARY JUDGMENT**

Plaintiffs,

v.

APPLE INC.,

Defendant.

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**INTRODUCTION**

In this putative class action, this order holds that the FCC’s radio frequency radiation exposure regulations preempt plaintiffs’ tort and consumer-fraud claims.

**STATEMENT**

At all material times, defendant Apple, Inc., manufactured and sold a series of

1 additional functions based on advanced computing capability, large storage capacity, and  
2 internet connectivity. Like other forms of wireless communication, these smartphones relied  
3 on radiofrequency electromagnetic waves (RF radiation) to send and receive signals. The  
4 oscillation of electrical charges in the phone antennas would generate RF radiation emanating  
5 from those antennas. The closer to the body the phone remained while in use, the more RF  
6 radiation a user would get.

7 For at least the last forty years, scientists have weighed in on the health risks associated  
8 with RF radiation exposure from radio transmitters. Unlike ionizing radiation (such as  
9 X-rays), which is always potentially harmful to human tissue, non-ionizing radiation, such as  
10 phones emit, is incapable of breaking the chemical bonds so as to damage DNA. High levels  
11 of RF radiation, however, can cause adverse thermal effects, like a burn. More controverted  
12 is the purported existence of non-thermal effects caused by lower levels of RF radiation.  
13 Such effects, if they exist, may include an increased risk of cancer, cellular stress, structural  
14 and functional changes to the reproductive system, learning and memory deficits, genetic  
15 damage, and neurological disorders.

16 Based on its review of the science, the Federal Communications Commission has  
17 promulgated RF exposure standards that all cellphones must comply with before being sold  
18 in the United States. *Guidelines for Evaluating the Environmental Effects of Radiofrequency  
19 Radiation*, 11 F.C.C.R. 15123 ¶ 171 (1996) (*1996 RF Order*). Plaintiffs, purchasers of nine  
20 different iPhone models, seek to hold Apple to account for selling iPhones that allegedly do not  
21 comply with the Commission's RF emissions standards.

22 Plaintiffs filed this action in September 2019, seeking to represent “[a]ll persons who  
23 have owned or leased an iPhone for personal or household use in the United States.” A few  
24 weeks later, plaintiffs' counsel filed a nearly identical complaint, also in our district, on behalf  
25 of different named plaintiffs. Prior orders related and consolidated the two actions. Following  
26 an initial case management conference, plaintiffs filed their consolidated amended class action  
27 complaint, now our operative complaint (Dkt. Nos. 47, 51, 53).

1 The operative complaint alleged seven disclosure-related claims and one negligence  
2 claim for medical monitoring. Plaintiffs based the latter on an allegedly increased risk of harm  
3 they may face due to their use of iPhones as advertised. The disclosure-related claims alleged  
4 that Apple marketed its phones for use on or in close proximity to the body, but failed to  
5 disclose that such use would allegedly expose consumers to RF radiation levels above the  
6 federal standards, and failed to disclose the alleged risk attendant to such exposure.<sup>1</sup>

7 Apple sought dismissal under a litany of theories, including preemption, lack of standing,  
8 and various pleading deficiencies. Following a hearing, an order found that matters outside the  
9 pleadings had been presented in Apple's briefs without sufficient justification. Apple's motion  
10 became one for summary judgment under Rule 56 and discovery opened immediately (Dkt.  
11 Nos. 62, 75, 89).

12 Given the necessary application of FCC regulations and guidance, and particularly the  
13 extent to which its regulations could preempt plaintiffs' claims, the Court invited the  
14 Commission to participate as an amicus curiae. The Commission accepted, filing a statement  
15 of interest addressing the application of its regulations and guidance to plaintiffs' claims.

16 After some discovery ensued, Apple moved again for summary judgment on the  
17 dispositive issues of preemption and jurisdiction.

18 Following a hearing, the undersigned judge ordered Apple to produce all  
19 communications between Apple and the FCC prior to and related to any certification involved  
20 in this action and all communications regarding the *Chicago Tribune* story. Plaintiffs were  
21 allowed a supplemental brief to explain the significance of the produced communications to  
22 the pending motion, and Apple an opportunity to respond. Promptly, Apple filed an  
23 emergency motion for clarification and an extension of time to produce the communications.  
24 A prior order granted the motion, and extended the briefing deadlines as well.

25  
26  
27 <sup>1</sup> The complaint also alleged claims for relief against another smartphone manufacturer, Samsung Electronic  
28 America, Inc. When both parties moved to dismiss, Samsung also moved to compel arbitration. A week later,  
plaintiffs voluntarily dismissed their claims against Samsung.

1 Now, plaintiffs all but abandon any reliance on what communications Apple did produce  
2 and instead rehash arguments made in their briefs. The single document plaintiffs found  
3 relevant demonstrated, in that instance, that Apple, not the FCC, bore responsibility for its  
4 disclosures to consumers in their user manuals.

5 This order follows full briefing, a telephonic hearing (due to the ongoing public health  
6 emergency), and supplemental briefing.

### 7 ANALYSIS

8 Plaintiffs seek to hold Apple liable for selling iPhones that allegedly exceeded the  
9 Commission's RF radiation exposure limits, making the phones unsafe. All agree, however,  
10 that the Commission certified each and every iPhone model as compliant with its RF  
11 regulations. And, the Commission has determined that all certified cellphones pose no health  
12 risks. Plaintiffs nevertheless insist that a jury should decide whether the iPhones exceed the  
13 federal RF exposure standards here, not the administrative agency tasked with developing and  
14 administering the safety program. Under ordinary conflict preemption principles, a state law  
15 that "stands as an obstacle to the accomplishment and execution of the full purposes and  
16 objectives" of a federal law is pre-empted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).  
17 The basic question, then, is whether plaintiffs' tort and consumer-fraud claims that would have  
18 juries administer the Commission's regulations would stand as an obstacle to the regulations'  
19 own objectives. This order answers yes, and holds that the claims must be deemed preempted.

20 Before reaching the preemption determination, however, three threshold issues regarding  
21 the statutory basis for the RF regulations must be addressed, following a review of the statutory  
22 and regulatory background.

23 The Communications Act of 1934 established the Federal Communications Commission  
24 as the centralized authority for regulating wire and radio communication, charging the  
25 Commission with making available

26 a rapid, efficient, Nation-wide, and world-wide wire and radio  
27 communication service with adequate facilities at reasonable  
28 charges, for the purpose of the national defense, for the purpose of  
29 promoting safety of life and property through the use of wire and

1 effective execution of this policy by centralizing authority  
 2 heretofore granted by law to several agencies and by granting  
 3 additional authority with respect to interstate and foreign  
 4 commerce in wire and radio communication . . . .

5 47 U.S.C. § 151. To achieve its broad objectives, Congress endowed the Commission “with  
 6 comprehensive powers to promote and realize the vast potentialities of radio.” *Nat’l Broad.*  
 7 *Co. v. FCC*, 319 U.S. 190, 217 (1943). One such power included the authority “to regulate  
 8 ‘the kind of apparatus to be used’ for wireless radio communications and ‘the emissions’ that  
 9 such equipment may produce” (Dkt. No. 101-1, FCC Statement at 3, quoting 47 U.S.C.  
 10 § 303(e)).<sup>2</sup>

11 The Commission has played a central role in the development of cellular radio  
 12 technology since its inception, establishing the basic regulatory structure for the cellular  
 13 mobile radio service in 1981. *Cellular Communications Systems*, 86 F.C.C.2d 469, 470  
 14 (1981). At the service’s regulatory core is the Commission’s sole jurisdiction over radio  
 15 licensing pursuant to Section 301 of the 1934 Act. On the equipment side, the rules required  
 16 compliance with minimum technical standards to ensure efficient and effective use of the radio  
 17 spectrum licensed for cellular service. The regulations and guidance expressly asserted federal  
 18 primacy over the area of technical standards, finding that “any state licensing requirements  
 19 adding to or conflicting with them could frustrate federal policy.” *Id.* ¶¶ 79–83.

20 In establishing technical standards for all radio communications, the Commission also  
 21 took into account its obligations under the National Environmental Policy Act of 1969.  
 22 These standards required environmental assessment of proposed transmitting facilities and  
 23 operations that exceeded applicable health and safety standards for RF radiation exposure.  
 24 Although NEPA imposed only procedural requirements, the Commission adopted substantive  
 25 technical requirements as well, out of “concern that any significant impact on the human  
 26 environment caused by excessive exposure to RF radiation should be considered as part of

27 <sup>2</sup> The Communications Act is located at Chapter 5 of Title 47 of the United States Code. 47 U.S.C. §§ 151  
 28 *et seq.* The “short title” of the chapter is “Communications Act of 1934.” 47 U.S.C. § 609. The Telecommunications  
 29 Act of 1996 contained provisions that amended the Communications Act of 1934 and provisions that did not.  
 30 Somewhat haphazard use of the Telecommunications Act to refer to the codified Communications Act has led to some

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