UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS MMS MARKETING AND SALES PRACTICES LITIGATION	MDL NO. 2116 2:09-md-2116 SECTION: J
THIS DOCUMENT RELATES TO ALL CASES	JUDGE BARBIER MAGISTRATE JUDGE WILKINSON

DEFENDANT AT&T MOBILITY LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

Defendant AT&T Mobility LLC ("ATTM") respectfully moves under Federal Rule of Civil Procedure 26(c) for a protective order barring plaintiffs from taking the Rule 30(b)(6) deposition currently noticed for October 21, 2010.[1]

There is good cause for a protective order. As the Court observed at its initial conference on January 15, 2010, ATTM's Motions to Compel Arbitration present a "legal issue" requiring little if any discovery. Tr. of Jan. 15, 2010 status conference (Dkt. No. 21) at 21-22. Notwithstanding this fact, plaintiffs have served ATTM with voluminous arbitration discovery requests, including a Notice of Deposition that seeks testimony on eight wide-ranging topics that far exceed the legal issues presented by ATTM's Motions to Compel Arbitration.

[1] Pursuant to Fed. R. Civ. P. 26(c), ATTM's counsel certify that they have conferred in good faith with plaintiffs' counsel to resolve this dispute. Decl. of Richard Pianka ¶ 5.

Plaintiffs do not need to depose an ATTM representative, because ATTM already has provided responses to many of plaintiffs' written discovery requests to the extent they relate to the issues raised by ATTM's Motions to Compel Arbitration. Discovery beyond those issues is premature. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, precludes merits discovery while a motion to compel arbitration is pending. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) ("in passing upon a[n] * * * application for a stay while the parties arbitrate, a federal court may consider *only* issues relating to the making and performance of the agreement to arbitrate") (emphasis added). Moreover, the FAA envisions "an expeditious and summary hearing, with only restricted inquiry into factual issues." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). For that reason, even discovery that purports to relate to arbitration is impermissible if, as is the case here, it is tangential, burdensome, and more in the nature of a fishing expedition than a targeted effort to shed light on the sole issue currently before the Court—the enforceability of the arbitration agreements between plaintiffs and ATTM. Indeed, seeking unnecessary arbitration discovery contravenes the Supreme Court's instruction that the FAA requires arbitrable disputes to be moved "out of court and into arbitration as quickly and easily as possible." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008).

For these reasons, the Court should enter a protective order barring plaintiffs from taking the Rule 30(b)(6) deposition they seek.

BACKGROUND

Plaintiffs allege that ATTM and co-defendant Apple Inc. violated the law of various states in describing the Multimedia Messaging Service capabilities of the iPhone 3G and 3GS. The plaintiffs seek to represent nationwide and statewide classes. But each plaintiff agreed to arbitrate any disputes with ATTM on an individual basis. ATTM accordingly moved to compel

arbitration, submitting with its motions the relevant terms of service governing each plaintiff's relationship with ATTM, including the arbitration provision that is part of the terms of service. In addition, ATTM furnished the arbitration provider's rules and the forms that a customer can use to initiate arbitration. *See* Dkt. Nos. 95-119.

As this Court recognized during a hearing nine months ago, ATTM's motions to compel arbitration present questions of law for which discovery is generally unnecessary:

> What I'm saying, one way or another, you're signing up for some agreement. It's in the agreement. Whatever it is, it is. I just don't understand what kind of discovery you're going to need on that. It seems to me they could tee that up as a legal issue.

Tr. of January 15, 2010 status conference (Dkt. No. 21) at 22 . *See also id.* at 21 (noting that the unconscionability of an arbitration agreement is a legal, not factual, issue); *id.* at 25 (noting that arbitrability is a legal issue).

On August 19, 2010, plaintiffs nonetheless served ATTM with dozens of discovery requests, including 37 requests for production, 20 requests for admission, and 15 interrogatories. *See* Decl. of Richard Pianka ¶ 2 & Exs. 1-3. Although virtually all of the requests are improper and the parties continue to meet and confer about them, ATTM has provided written responses, has produced over 400 pages of documents, and has offered to produce over 750 more pages pending entry of an appropriate protective order to ensure the proper handling of confidential materials. *See id.* ¶ 6.[2]

On September 23, 2010—over a month after issuing their written discovery requests and while the parties were in the process of meeting and conferring on ATTM's discovery responses—plaintiffs sent ATTM the Notice of Deposition in draft form. Pianka Decl. ¶ 4. The

[2] On October 1, 2010, counsel for ATTM sent counsel for plaintiffs a draft of a proposed protective order, but plaintiffs have not yet stated whether they are agreeable to the proposed protective order. Pianka Decl. ¶ 6.

parties unsuccessfully met and conferred about the draft Notice of Deposition on September 28, 2010 (*id.* ¶ 5). On October 1, 2010 plaintiffs served ATTM with the Notice of Deposition, scheduling the deposition for October 21, 2010.[3] The Notice of Deposition demands that ATTM designate a witness to testify on the following eight topics (Pianka Decl. Ex. 4):

> 1. The policies and procedures for sale of iPhone and presentation to buyers of the AT&T service contract contract [sic] at AT&T and Apple retail stores;[4]
>
> 2. The policies and procedures for sale of iPhone and presentation to buyers of the AT&T service contract on the internet;
>
> 3. Information concerning the names of customers, locations, and outcomes of arbitrations between iPhone customers and AT&T that have taken place pursuant to the AT&T service contract within the last 3 years[;]
>
> 4. The drafting, evolution, and content of AT&T arbitration clause over the last five years, whether for AT&T Wireless or AT&T Mobility, including the locations where the clauses were drafted[;]
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> 5. Discussions between AT&T and Apple regarding the exclusive arrangement of using AT&T as the sole service provider for iPhones[;]
>
> 6. Discussions between AT&T and Apple regarding AT&T's arbitration clause[;]
>
> 7. The policies and procedures for activation of buyers' iPhones and agreement to AT&T's service agreement via either computer, telephone, or both[; and]
>
> 8. The number of class action complaints filed against AT&T, the number of customers alleged to be represented in those class actions, in response to which AT&T has argued arbitration should be compelled, and the number of class actions AT&T has filed against its customers.

On October 11, 2010, ATTM served its objections to the Notice of Deposition. Pianka Decl. ¶ 8 & Ex. 5.

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[3] Plaintiffs have indicated that they are willing to move the date of the deposition to a date that is convenient for ATTM.

[4] In the deposition topics, plaintiffs refer simply to the "iPhone" without differentiating among the different models of iPhones that have been offered over the years. Because the allegations in the various lawsuits in this MDL focus on only the iPhone 3G and iPhone 3G-S, ATTM's position is that discovery regarding other iPhone models (such as the original iPhone, also known as the iPhone 2G), is irrelevant and improper.

ARGUMENT

Federal Rule of Civil Procedure 26(c) authorizes this Court to issue a protective order to relieve ATTM of the "undue burden" of submitting to discovery that plaintiffs are not legally entitled to obtain. When a motion to compel arbitration is pending, the FAA permits only an expeditious and summary inquiry into arbitrability, and therefore limits discovery to the making of the arbitration agreement between the parties. The Notice of Deposition flouts these limitations because plaintiffs already have all the information they need to challenge enforcement of their arbitration agreements and because the topics on which they seek testimony delve into purely collateral issues. This Court therefore should issue a protective order barring plaintiffs from taking the Rule 30(b)(6) deposition.

A. The Notice Of Deposition Is Unduly Burdensome And Violates The FAA's Limitations On Discovery.

In seeking a deposition on broad and far-reaching topics that have nothing to do with the issues raised in ATTM's Motions to Compel Arbitration, plaintiffs are not only improperly subjecting ATTM to unduly burdensome discovery, but are also disregarding the FAA's restrictions on discovery. The FAA embodies a strong federal policy favoring the enforcement of arbitration agreements. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Because the purpose of these agreements is to avoid the expense and delay of judicial proceedings, when a motion to compel arbitration has been filed, the FAA "call[s] for an expeditious and summary hearing, with only ***restricted inquiry*** into factual issues." *Moses H. Cone*, 460 U.S. at 22 (emphasis added). Otherwise, the expense of litigating the enforceability of the arbitration agreement threatens to eliminate the "simplicity, informality, and expedition" of arbitration (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)), and thereby undermine the point of agreeing to arbitrate in the first place.

As the Supreme Court has held, once a motion to compel arbitration has been filed, "a

federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404 (citing 9 U.S.C. §§ 3-4). Accordingly, a court may not permit discovery into the merits of the underlying claims. *See, e.g.*, *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002) (permitting "discovery on the merits" before "the issue of [the] arbitrability [of the dispute] is resolved puts the cart before the horse"). Discovery into arbitrability also is strictly limited: The "FAA provides for discovery * * * in connection with a motion to compel arbitration ***only if*** 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.'" *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (quoting 9 U.S.C. § 4) (emphasis added). This rule follows from "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404; *see also Moses H. Cone*, 460 U.S. at 22 ("Congress's clear intent, in the [FAA], [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.").

In accordance with these principles, the Fifth Circuit has repeatedly made clear that a party opposing a motion to compel arbitration is ***not*** automatically entitled to "an opportunity to pursue discovery related to [an] issue" on which he or she "bears the burden of proof" in order to "defeat arbitration." *Bell v. Koch Foods of Miss., LLC*, 358 F. App'x 498, 501 (5th Cir. 2009) (internal quotation marks omitted). Rather, because the FAA requires "an expeditious and summary hearing, with only ***restricted inquiry*** into factual issues," the party seeking discovery to oppose arbitration on grounds of "unconscionability" must show how the "evidence" that is "suspected to [be] f[oun]d through discovery" would serve to prove that defense. *Ameriprise Fin. Servs., Inc. v. Etheredge*, 277 F. App'x 447, 449-50 (5th Cir. 2008) (emphasis added; internal quotation marks omitted).

Other courts also routinely recognize that the FAA bars discovery unless the party opposing arbitration "present[s] ***a factually based predicate*** that establishes what the party knows, what it expects to discover, and ***why that information matters***." *Ex parte Horton Family Hous., Inc.*, 882 So. 2d 838, 841 (Ala. 2003) (emphasis added; internal quotation marks omitted); *see also, e.g.*, *Kulpa v. OM Fin. Life Ins. Co.*, 2008 WL 351689, at *1 (S.D. Miss. Feb. 6, 2008) (barring discovery to oppose motion to compel arbitration for lack of "a sufficiently compelling reason to conduct discovery"); *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1283-84 & n.3 (N.D. Ga. 2008) (barring discovery as an attempt to "contravene the policy of the FAA that issues of arbitrability should be determined promptly," because the plaintiff "has not proffered any evidence" of his own and "fail[ed] to demonstrate that this discovery is necessary"); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 828-29 (S.D. Miss. 2001) ("it does not follow from the fact that [the opposing party] takes the position that he did not agree to arbitration that discovery is needed to determine whether" there was an arbitration agreement), *aff'd*, 34 F. App'x 964 (5th Cir. 2002); *Hawkins v. Aid Ass'n for Lutherans*, 2001 WL 34388865, at *7 (E.D. Wis. Oct. 31, 2001), *aff'd*, 338 F.3d 801 (7th Cir. 2003) (barring discovery because "[p]laintiffs have not raised any matters relevant to the existence of an agreement to arbitrate that requires discovery"); *Gold v. Deutsche A.G.*, 1998 WL 126058, at *3 (S.D.N.Y. Mar. 19, 1998) (refusing request for discovery to oppose motion to compel arbitration because plaintiff made no allegations concerning how he agreed to arbitrate that would necessitate further discovery), *appeal dismissed*, 199 F.3d 1322 (2d Cir. 1999).

The Notice of Deposition runs afoul of these principles. Indeed, as the Fifth Circuit observed in affirming a district court's rejection of similarly open-ended discovery, such discovery "would the defeat the FAA's requirement of summary and speedy disposition of motions and petitions to enforce arbitration clauses." *Bell*, 358 F. App'x at 501. As noted

above, this Court already has recognized that plaintiffs' contention that their arbitration agreements are unconscionable presents a narrow question of law for which little, if any, discovery is required. *See* page 2, *supra*; *see also* 8 Richard A. Lord, *Williston on Contracts* § 18:11 (4th ed. 2000) (noting that "the question of unconscionability is one of law"). As ATTM has explained (*see* Mem. of Points and Authorities in Support of Motions to Compel Arbitration, Dkt. No. 111), under the laws of the states relevant to the named plaintiffs, unconscionability involves an assessment of (1) substantive unconscionability, which examines the fairness of the arbitration procedures; and (2) procedural unconscionability, which considers the manner in which the parties agreed to arbitrate. But ATTM has provided all of the evidence necessary to resolve these issues by submitting with its Motions to Compel Arbitration (i) the relevant wireless service agreements, including the governing arbitration provisions; (ii) evidence that the plaintiffs (or the customers on whose accounts the plaintiffs receive service) accepted ATTM's arbitration provision; and (iii) copies of the American Arbitration Association's rules. Moreover, the circumstances under which the plaintiffs agreed to arbitrate "are matters only [they themselves] could know" (*Coates*, 125 F. Supp. 2d at 828), rather than matters that are known by an ATTM a corporate designee. For these reasons, a Rule 30(b)(6) deposition is not necessary to evaluate the enforceability of the plaintiffs' arbitration agreements.

B. The Notice of Deposition Seeks Testimony On Irrelevant Topics.

Even if plaintiffs could establish a need for a Rule 30(b)(6) deposition, the eight topics on which plaintiffs seek testimony sweep far beyond any appropriate bound. Plaintiffs demand—among other things—an inquisition into how ATTM formed contracts with ***all*** of its iPhone customers nationwide, a file-by-file account of all disputes under ATTM's dispute-resolution program in the last three years, and information regarding every single class-action lawsuit in which ATTM has ever been involved. The law is clear that such wide-ranging discovery is

entirely improper. In plaintiffs' efforts to leave no rock unturned, they have lost sight of the only factual issues actually raised by ATTM's motion to compel arbitration: how the plaintiffs' own arbitration agreements were formed and what the terms of those agreements are. Resolving those issues does not require a deposition on plaintiffs' irrelevant and overly burdensome topics.

For example, Topic No. 1 seeks testimony on "[t]he policies and procedures for sale of iPhone and presentation to buyers of the AT&T service contract at AT&T and Apple retail stores," while Topic No. 2 seeks testimony on "[t]he policies and procedures for sale of iPhone and presentation to buyers of the AT&T service contract on the internet." Pianka Decl. Ex. 4 at 3. At this early stage of the litigation, however, class-wide discovery into ATTM's contracting processes is inappropriate: The details of how ***other*** customers contracted with ATTM is irrelevant. The question here is how the ***named plaintiffs themselves*** agreed to arbitrate. As another district court in the Fifth Circuit has observed, "there is no apparent need for discovery as to [a party's] knowledge of" how an arbitration agreement was formed. *Coates*, 125 F. Supp. 2d at 828. The same is true here: plaintiffs already have full knowledge as to how they agreed to arbitrate, making any discovery unnecessary. Moreover, ATTM already has provided plaintiffs with evidence of how they (or the customers on whose accounts they receive service) assented to ATTM's terms of service. Requiring an ATTM representative to provide deposition testimony regarding the various ways in which other customers might have done would place an undue burden on ATTM, especially at this stage of the litigation, when no class has been certified and the only relevant question is how the named plaintiffs agreed to arbitrate their disputes with ATTM.

Topic No. 3 seeks testimony on "the names of customers, locations, and outcomes of arbitrations between iPhone customers and AT&T that have taken place pursuant to the AT&T service contract within the last 3 years." Pianka Decl. Ex. 4 at 3. Again, an inquest into the past

disputes of other customers—and attendant invasion of those customers' privacy—is unnecessary for plaintiffs to respond to ATTM's motion to compel arbitration. Plaintiffs may argue that they would like this information to examine the fairness of ATTM's arbitration process. But the terms of ATTM's arbitration provision, along with rules of the AAA, which administers arbitration under that provision, fully answer that question. Indeed, the Eighth Circuit has rejected virtually identical discovery requests as improper, explaining that "whether other consumers have elected to arbitrate claims under other contracts is not material to the determination of" an unconscionability challenge. *Pleasants v. Am. Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008).

Topic No. 4 seeks testimony on "[t]he drafting, evolution, and content of [the] AT&T arbitration clause over the last five years, whether for AT&T Wireless or AT&T Mobility, including the locations where the clauses were drafted." Pianka Decl. Ex. 4 at 3. As noted above, ATTM already has provided plaintiffs with their own arbitration agreements, and those documents speak for themselves. ATTM's contracts with other customers have no bearing on whether the particular terms of the plaintiffs' own arbitration agreements are unconscionable Even less relevant is discovery concerning the drafting of ATTM's arbitration provisions, and in any event, such discovery is clearly precluded by the attorney-client privilege and other related protections. *See Pleasants*, 541 F.3d at 859 (rejecting plaintiff's contention that she needed discovery relating to drafting of arbitration agreement to support her unconscionability challenge). Likewise, contracts between other customers and AT&T Wireless—an entity that is not even a party to this litigation and that has never provided service for use with any iPhone—are completely irrelevant.

Topic No. 5 seeks testimony on "[d]iscussions between AT&T and Apple regarding the exclusive arrangement of using AT&T as the sole service provider for iPhones." Pianka Decl.

Ex. 4 at 3. If plaintiffs simply seek to show that, with respect to their own iPhones, they were required to accept ATTM's terms of service because they could not have activated their iPhones with a carrier other than ATTM, a deposition is not necessary, as plaintiffs propounded—and ATTM answered—a request for admission on this topic. *See* Pianka Decl. Ex. 3 at 2. If, on the other hand, plaintiffs are seeking the details of any negotiations between Apple and ATTM, such discovery is inappropriate merits discovery, because it has nothing to do with any of the issues raised in ATTM's Motions to Compel Arbitration and therefore runs afoul of the FAA's prohibition of merits discovery before resolution of the arbitration issues. *See, e.g.*, *Prima Paint*, 388 U.S. at 404; *CIGNA*, 294 F.3d at 855 (permitting "discovery on the merits" before "the issue of [the] arbitrability [of the dispute] is resolved puts the cart before the horse"); *St. Paul Fire & Marine Ins. Co. v. Apartment Inv. & Mgmt. Co.*, 2010 WL 148264, at *1 (D. Colo. Jan. 12, 2010) ("neither [the court's] nor the parties' time is well-served by being involved in possible discovery motions and other incidents of discovery when, as here, a dispositive motion [to compel arbitration] * * * is pending"); *Cole v. Halliburton Co.*, 2000 WL 1531614, at *2 (W.D. Okla. Sept. 6, 2000) (rejecting plaintiff's request for discovery on the merits, because "a motion to compel arbitration * * * has no effect on the merits themselves but is akin to a challenge to jurisdiction or venue") (internal quotation marks omitted).

Topic No. 6 demands testimony on "[d]iscussions between AT&T and Apple regarding AT&T's arbitration clause." Pianka Decl. Ex. 4 at 3. Again, this topic is not relevant to the issues raised by ATTM's motion to compel arbitration—how the plaintiffs themselves agreed to arbitrate and what procedures would be used in arbitration. Moreover, any such discussions that occurred after litigation commenced would be privileged joint defense communications.

Topic No. 7 seeks testimony on "[t]he policies and procedures for activation of buyers' iPhones and agreement to AT&T's service agreement via either computer, telephone, or both."

Pianka Decl.. Ex. 4 at 3. As indicated above, ATTM has already provided plaintiffs with evidence of how they (or the customers on whose accounts they receive service) assented to ATTM's terms of service. Plaintiffs do not need any additional information from ATTM about how they agreed to arbitrate their disputes with ATTM in order to respond to ATTM's Motions to Compel Arbitration. Indeed, any additional information would be within plaintiffs' own knowledge, making a deposition unnecessary. *See Coates*, 125 F. Supp. 2d at 828.

Topic No. 8 seeks testimony on "[t]he number of class action complaints filed against AT&T, the number of consumers alleged to be represented in those class actions, in response to which AT&T has argued arbitration should be compelled, and the number of class actions AT&T has filed against its customers." Pianka Decl. Ex. 4 at 4. The number and composition of putative class actions in which ATTM has ever been involved, however, is irrelevant to the issues raised in ATTM's Motions to Compel Arbitration. Whether ATTM has faced or filed class action lawsuits (and the relative size of those class actions) has no bearing on whether plaintiffs' arbitration provisions should be enforced. Moreover, if plaintiffs believe such information is essential, they can obtain it by reviewing public court filings.

C. Plaintiffs Should Obtain The Discovery They Seek Through Less Burdensome Means.

Even if the Court were to conclude that the plaintiffs were entitled to some additional discovery to oppose ATTM's Motions to Compel Arbitration, they should be required to obtain it through a less burdensome and obtrusive means. Requiring one or more ATTM employees to neglect their other duties in order to familiarize themselves with the open-ended topics plaintiffs have identified—and then to participate in a deposition on these topics—would be extremely burdensome. Instead, plaintiffs can much more efficiently obtain any information that they genuinely need through written discovery—and indeed have already propounded written discovery requests to which ATTM has responded. Because the parties are continuing to meet

and confer on the scope of that discovery, a deposition is premature. To the extent that plaintiffs believe ATTM's responses to their discovery requests were insufficient, the appropriate course is for them to move the Court to compel ATTM to provide a further response.

CONCLUSION

Because the Notice of Deposition is directly at odds with the FAA's requirement that arbitrable disputes be moved "out of court and into arbitration as quickly and easily as possible" (*Preston*, 552 U.S. at 357), ATTM respectfully submits that the Court should issue a protective order barring plaintiffs from taking the Rule 30(b)(6) deposition.

Respectfully submitted,

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October 14, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2010, I served the foregoing by causing it to be filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to case participants.

/s/ Archis A. Parasharami
Archis A. Parasharami