UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

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

PLAINTIFFS' OPPOSITION TO DEFENDANT AT&T MOBILITY LLC'S MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

Defendant AT&T Mobility LLC ("ATTM") filed a 78-page, fact-intensive motion to compel arbitration against each individual Plaintiff, but has refused to produce even the most basic information related to the class action ban contained in its arbitration clause. Now ATTM seeks a protective order from the Court barring Plaintiffs from taking a Rule 30(b)(6) deposition specifically related to the enforceability (or lack thereof) of ATTM's class action ban contained in its arbitration clause. ATTM disingenuously suggests this deposition is "burdensome" and that Plaintiffs should seek such information through "less obtrusive" means like "written discovery," despite ATTM's complete failure to respond to Plaintiffs' class ban-related requests

for production, interrogatories and requests for admission (as well as Plaintiffs' right to take discovery by all available methods). ATTM's position is untenable, and its Motion should be denied. It should immediately be ordered to provide a date for its deposition.

II. ADDITIONAL FACTUAL BACKGROUND

On August 10, 2010, ATTM filed a fact-intensive, 78-page motion—in addition to over 920 pages of declarations and exhibits—to dismiss Plaintiffs' class action and compel each Plaintiff to arbitrate his or her claim individually. (*See* Dkt. Nos. 95-119.) In response, Plaintiffs sought written discovery narrowly tailored to the question of whether ATTM's class action ban is unconscionable and/or against public policy, and therefore unenforceable. ATTM objected to every discovery request, and after numerous meet-and-confer conferences, produced two items of information already in Plaintiffs' possession: (1) Plaintiffs' executed service agreements and (2) a copy of the American Arbitration Association rules. In response, Plaintiffs were forced to file a motion to compel further responses to that discovery, which is currently pending before this Court. (*See* Dkt. No. 181.)

In addition to tailored, class ban-related written discovery, Plaintiffs noticed a 30(b)(6) deposition requesting information directly related to the unconscionability of ATTM's class action ban. As with the written discovery, ATTM has refused to produce a deponent and now seeks a protective order from this Court barring Plaintiffs from taking ATTM's deposition.

III. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Deposition Topics are *Directly* Relevant to Whether ATTM's Arbitration Ban is Unenforceable

ATTM applies the wrong standard in its Motion and cites case law related to whether ATTM's arbitration clause applies to individual Plaintiffs, *not*—as Plaintiffs will argue in their

opposition—*whether ATTM's class action ban is unconscionable and against public policy, and therefore unenforceable*. Accordingly, ATTM is incorrect when it argues that deposition topics related to the arbitration clause's broader effects on consumers are irrelevant to Plaintiffs' claims. Such topics are directly on point.

The law is clear that an arbitration agreement is invalid if there is a contractual basis, including state law unconscionability, for its invalidation. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). In the context of small individual value consumer claims such as those asserted in this case, there is abundant law that class action bans such as ATTM's are unconscionable and unenforceable.

The California Supreme Court's much-cited opinion in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005), is one of the leading cases on point. There, the California Supreme Court found that, under California law, when a class action ban acts as an exculpatory clause by depriving consumers with small individual claims of a class action remedy (and therefore, effectively, of any remedy at all), the provision is unconscionable and unenforceable under California law:

> [W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

36 Cal. 4th at 162-63.

Federal authority supports and/or anticipated the holding in *Discover Bank* as well. In *Ting*, 319 F.3d 1126 (cited with approval on the unconscionability issue in *Discover Bank*), for example, the Ninth Circuit held that AT&T's consumer contract contained illegal and unconscionable arbitration terms, including a class action ban, which could not be given effect. In *Shroyer v. New Cingular Wireless Service, Inc.*, 498 F.3d 976 (9th Cir. 2007), the Ninth Circuit refused to enforce Cingular's procedurally and substantively unconscionable class action ban, holding that the case "cannot be distinguished from *Discover Bank*." *Id.* at 983. Similarly, in *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), the Ninth Circuit applied the reasoning of *Discover Bank* to invalidate the class action ban in ATTM's arbitration agreement. *See also Fensterstock v. Education Finance Partners*, 611 F.3d 124, 140 (2d Cir. 2010) (exculpatory class action ban is unconscionable and unenforceable under California law).

Here, like in *Discover Bank* and the many cases that have both followed and preceded it, Plaintiffs and plaintiff class members' consumer claims are individually small, and the effect of a class action ban under circumstances such as those present here is to act as an exculpatory clause and to negate the deterrent effect class action proceedings have on corporate misconduct. Certainly Plaintiffs are entitled to discovery on this issue in order to oppose ATTM's arbitration motion on the ground that ATTM's "no class action" arbitration provision is unconscionable and unenforceable.

As noted by the California Supreme Court in *Discover Bank v. Superior Court*, courts call for *fact-specific* inquiry into whether a class action waiver is unenforceable. 36 Cal.4th 148, 159-161 (Cal. 2005). Particularly in the context of small individual claims and statutory consumer protection claims such as those at issue here, this requires an analysis of a number of

factors, including, for example: (1) the number of arbitrations actually conducted by the enforcer and whether the numbers demonstrate a claim-suppressing or exculpatory effect of the ban, *Discover Bank*; *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006); *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1258, 1257 (D. Wash. 2009); (2) the outcome of such arbitrations, i.e., "the actual percentage of customers utilizing allegedly 'pro-consumer' [arbitration] provisions," *Coneff*, 620 F. at 1257-58; (3) whether the agreement allows the enforcer to "buy off" small claimants for the face amount of their claim, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); (4) whether the enforcer has ever filed a class action against its consumers (and therefore whether the class action ban is "one sided"), *Coneff*, 620 F. Supp. 2d at 1259; (5) the amounts of potential, individual recoveries under enforcer's agreement, *Coneff*, 620 F. at 1257; *Dale v. Comcast Corp*., 498 F.3d 1216 (11th Cir. 2007); (6) the cost of pursuit of individual actions, *Green Tree Financial Corp-Alabama v. Randolph*, 531 U.S. 79, 92, (2000); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471, n. 1 (5th Cir. 2002) (citing *Green Tree*); and (6) a fact-intensive showing that depriving consumers of the right to participate in a class action would effectively deprive them of the ability to pursue their claims, *In re American Express Merchants' Association*, 554 F.3d 320 (2d Cir. 2009).

Even from a common sense standpoint, the fairness of ATTM's class action ban simply cannot be limited to a narrow examination of the terms of individual Plaintiffs' contracts. Contract law has long been concerned with the contract's effect beyond contracting parties. *Tunkl v. Regents of the University of California*, 383 P.2d 441, 443-46 (Cal. 1963). Unconscionability and exculpatory-clause doctrines are not blind to a contract's effects on similarly situated parties to the same form of contract. Posner, *Economic Analysis of Law* 94

(6th ed. 2003). As one court put it, such doctrines do not concern "purely personal and private affair[s]" since through their "generalized use . . . [they] may have an impact upon thousands[.]" *McCutcheon v. United Homes Corp.*, 486 P.2d 1093 (Wash. 1971).

Here, Plaintiffs seek eight narrow categories of discovery, each directly relevant to Plaintiffs' claim that ATTM's class action ban is unconscionable and/or against public policy:

- ATTM's policies/procedures re: presentation of the ATTM service contract in retail stores;
- ATTM's policies/procedures re: presentation of the ATTM service contract on the internet;
- Basic information about ATTM's arbitration outcomes with iPhone customers subject to the ATTM service contract in the last 3 years;
- Drafts and revisions to the ATTM arbitration clause over the last five years;
- Communications between ATTM and Apple re: ATTM's exclusive contract and relationship with Apple phone customers;
- Communications between ATTM and Apple re: ATTM's arbitration clause;
- ATTM's policies/procedures for iPhone activation and acceptance of ATTM's service agreement via computer, phone or both; and
- The number of class action complaints filed against ATTM in which ATTM has argued arbitration should be compelled (including the number of customers alleged to be represented in those class actions), and the number of class actions ATTM has filed against customers.

Each one of these topics either directly corresponds with the fact-specific information courts have found relevant in a class action ban substantive unconscionability inquiry, as discussed above (*see, e.g., Coneff*, 620 F. Supp. 2d at 1257-1259), or relates to procedural

unconscionability, which is also sometimes required, at least to a small degree, in order to invalidate a class action ban.[1] ATTM's Motion for Protective Order should be denied.

B. ATTM's Suggestion that Plaintiffs Seek the Discovery Through "Less Burdensome Means" is Disingenuous

ATTM suggests that Plaintiffs' deposition request is "burdensome" and that Plaintiffs should seek relevant arbitration discovery "through less . . . obtrusive means." (Motion at 12.) Plaintiffs cannot imagine what "less obtrusive" avenues ATTM envisions—ATTM has already refused to respond to Plaintiffs' arbitration-related requests for admission, interrogatories, and requests for production.[2]

Even absent ATTM's production deficiencies, ATTM has failed to meet its burden of "proving the subpoena is unduly oppressive." *Wiwa v. Royal Dutch Petroleum*, 392 F.3d 812, 818 (5th Cir. 2004) (party seeking to quash deposition bears burden of proving oppression). ATTM does not contend that Plaintiffs' deposition is inconvenient in its location, date or length. ATTM does not even request modification of the deposition topics in order to make it less burdensome. *See Wiwa*, 392 F.3d at 818 ("modification of a subpoena is preferable to quashing it outright."). Instead, ATTM merely argues that Plaintiffs should continue to "meet and confer"

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[1] *See, e.g., Discover Bank*, 36 Cal. 4th at 160 ("To briefly recapitulate the principles of unconscionability, the doctrine has ' "both a 'procedural' and a 'substantive' element," the former focusing on " 'oppression' " or " 'surprise' " due to unequal bargaining power, the latter on " 'overly harsh' " 'or " 'one-sided' " results.' [Citation.] The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, ' "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." ' ... [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.") (citations omitted).

[2] This is not to say that the 30(b)(6) deposition is a "replacement" for ATTM's written discovery. Not only are Plaintiffs entitled to pursue all available discovery methods, but the deposition topics seek information on informal policies, procedures and discussions for which there may be no relevant documents or simple answers.

with ATTM on the scope of discovery and move to compel ATTM to provide further documents (both of which Plaintiffs have already done).

The noticed deposition topics are limited and narrowly-tailored to class ban-related discovery necessary for Plaintiffs' opposition to ATTM's arbitration motion. ATTM has not presented a single valid reason why producing an ATTM employee to testify on this topic would be unreasonably burdensome. ATTM's Motion for a Protective Order barring this deposition testimony should be denied.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to deny ATTM's Motion for Protective Order and order ATTM to immediately provide an available date for its deposition.

Dated: October 26, 2010

Respectfully submitted,

MARTZELL & BICKFORD

/s/Scott R. Bickford

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record via ECF this 26th day of October, 2010.

/s/Scott R. Bickford

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