UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

OPPOSITION TO MOTION TO STAY PLAINTIFFS' CLAIMS AGAINST DEFENDANT, APPLE INC.

NOW INTO COURT, through Plaintiffs' Liaison Counsel, come Plaintiffs, who file the instant Opposition to Motion to Stay Plaintiffs' Claims Against Apple Inc. ("Apple"):

Apple does not have an arbitration clause for the Court to consider. Nor does it have a motion to compel arbitration pending. Yet Apple claims that the Court should not resolve its current motions to dismiss the pleadings—or any motion relevant to Apple for that matter—until the Supreme Court Court decides *AT&T Mobility LLC v. Concepcion, et ux.*, a case that may impact the determination of whether this Court should deny *AT&T's* motion to compel arbitration. The decision in *Concepcion* would have *no* impact on the case against Apple. Thus, even if, *arguendo*, AT&T were to be dismissed from this case, the case against Apple would proceed.

Apple attempts to portray Plaintiffs' counsel's decision to decline Apple's request as somehow inappropriate, stating that, "no substantive reason was articulated for this opposition." Def. Br. at 3. As an initial matter, when he requested Plaintiffs' agreement to delay the briefing and hearing on Apple's own motion, the only reason raised was that Apple wanted all the motions to be heard at the same time. In that instance, Apple's motion was granted before counsel for Plaintiffs were able to file an opposition. Apple now fails to provide adequate grounds to delay this case any further. For the reasons set forth below, Apple's motion for delay should be denied.

ARGUMENT

I. Apple's Argument That Consideration of Some "Overlapping" Rule 12(b)(6) Issues, Both Now and after the *Concepcion* Decision, Would Somehow Waste the Court's Time, Is Not Logical.

There is a significant flaw in Apple's logic regarding its "inefficient" argument. This is no surprise, given Apple's inability to cite a single authority to commend it. In fact, not staying the case against Apple both promotes efficiency and ensures compliance with federal courts' primary mandate: "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The fact that some issues Defendants' share may overlap is no reason to delay the case against Apple.

To the extent that the Court decides an issue with regard to Apple that is also relevant to AT&T, the Court may later find either (1) that the issue is the same with respect to AT&T and has the same outcome or (2) AT&T's facts are legally distinguishable and will have a different outcome. The analysis now will be no different than the analysis later, and this Court will in no way need to duplicate its efforts with respect to AT&T down the road, as the research and analysis with regard to purely "overlapping" issues will by definition be already done. *See*, *e.g.*, *White v. E-Loan, Inc.*, No. C 05-02080, 2006 WL 2850041, *3 (N.D. Cal. Oct. 5, 2006) (*denying* motion to stay certain category of discovery *because* of "the overlapping nature of the issues involved").

Furthermore, although there is some overlap in Defendants' Rule 12 motions, AT&T's 12(b)(6) motion takes a back seat to its motion to compel arbitration pursuant to 9 U.S.C. §§ 1-16,[1] whereas Apple has not sought to compel arbitration at all, having focused all its arguments into a Rule 12(b)(6) motion. The stay, as to AT&T, depends solely on the pendency of

[1] In every one of its memoranda filed in support of its Rule 12(b)(6) motions, AT&T urges the Court to "decide its motion to compel arbitration before reaching this motion" because "the arbitration motion raises the threshold issue of whether plaintiff may pursue his claims against ATTM in this forum. If the Court ultimately determines that plaintiff may pursue his claims against ATTM in this forum, then this [Rule 12(b)(6)] motion should be heard." Memoranda in Support of Motions of AT&T Mobility LLC to Dismiss First Amended and Supplemental Complaint, Documents 140-53 at 2 n.1.

Concepcion, a case regarding the scope of Federal Arbitration Act preemption of state laws. Doc. No. 193 (noting the basis of the stay and citing *AT&T Mobility LLC v. Concepcion*). The stay's genesis was the comity Plaintiffs were willing to provide to the Court and to AT&T, which would otherwise need to litigate the major issues of both arbitrability and the discovery related thereto, in light of the Supreme Court's consideration of a related issue. For whatever reason, Apple seeks to delay *its own motion* to dismiss—brought on an entirely different basis—by thinly claiming that the process would be "inefficient," rather than by claiming that it, too, somehow stands in the shadow of *Concepcion*.

In addition, there are differences between Apple's and AT&T's Rule 12(b)(6) motions themselves, namely that Plaintiffs are pursuing a breach of contract claim against AT&T, not Apple, and that the omissions and representations were made in different contexts by each Defendant. But the largest problem Apple has is the fact that AT&T's arbitration defense overarches all other defenses, in both timing and emphasis, that AT&T raises. And, in the unlikely event that the Supreme Court's opinion in *Concepcion* counsels in favor compelling Plaintiffs to arbitrate against AT&T, Plaintiffs' case against Apple still goes forward before this Court. Because

this litigation has languished at the pleading stage for well over a year, the delaying tactics must end.

II. Defendants' FCA Defense Does Not Apply in this Case, and Even If It Did, Apple Would Not Be Dismissed Alongside AT&T.

Perhaps recognizing that *Concepcion* cannot conceivably impact the claims against Apple, Defendant cites a secondary, tenuous basis to stay the case against it: preemption under the Federal Communications Act. Although Apple's preemption defense was relegated to a cursory footnote in its pending motions as a possible basis for dismissal, Apple now spends two full pages in its motion to stay expanding on its original gloss.. Def. Br. at 6-8. Its logic is that, if AT&T both fails in its bid for individual arbitration and succeeds in its FCA preemption argument, then Apple should also be dismissed because it cannot litigate the current claims for relief without AT&T's participation. But Apple's voluntary reliance on AT&T to make its own arguments should not be countenanced in the context of Defendant's motion to stay, when Apple had the opportunity to make full-throated bid for dismissal based on FCA preemption. To grant a stay here would be to reward a party who (1) fails to defend itself, (2) opts instead to hope that AT&T carries Apple's water on an FCA defense allegedly applicable to both parties, and (3) seeks to capitalize on its failures by labeling its neglect an "inefficiency" the Court should avoid by imposing *further* delay to this case.

AT&T includes an FCA preemption argument in its motions to dismiss, and Apple bootstraps that argument into its own motion.[2] However, the preemption argument has no merit. In *In re Apple iPhone 3G Prods. Liability Litig.*, the plaintiffs alleged that AT&T's upload and download transfer rates

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[2] In each of the briefs Apple filed in support of its motions to dismiss, it states, based on AT&T's FCA preemption argument, "If this Court grants ATTM's motion to dismiss on the basis of FCA preemption, it must also dismiss Apple," because "AT&T is an indispensable party to claims about its network." *Cf.* Doc. 131 n.3, Memorandum of Law in Support of Defendant Apple Inc.'s Motion to Dismiss First Amended and Supplemental Complaint (re *Sterker, et al.* (N.D. Cal.)). In this case however, AT&T would not be an "indispensable party" in an action solely against Apple because Plaintiffs here do not challenge "the sufficiency of ATTM's 3G network infrastructure" (even though Plaintiffs cursorily note ATTM's network difficulties in their complaint, that statement is in no way a predicate for relief in their complaints). *Cf. In re Apple iPhone 3G*, 2010 WL 3059417 at *9. Furthermore, Plaintiffs do not claim a remedy from Apple that would require participation by AT&T. *Cf. id.* They merely seek damages, and there is nothing to enjoin, particularly now that AT&T has since September 25, 2009, abided by the terms of its contract and promise to provide MMS services. Unlike in *In re Apple iPhone 3G*, Plaintiffs' damages claims here would not "alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service" (*id.* at *5, quoting *Ball v. GTE Mobilnet of California*, 96 Cal. Rptr. 2d 801 (Cal. Ct. App. 2000)), and thus AT&T need not be present to protect itself against the impact of Plaintiffs' damages claims against Apple. Finally, Defendants are not "joint obligors or obligees" as Apple apparently implies by its citation to *Bry-Man's, Inc. v. Stute*, 312 F.2d 585 (5th Cir. 1963). As will be made clear by Plaintiffs' Oppositions due November 16, 2010, Apple is not part of AT&T's service contracts, and Plaintiffs are not pursuing breach of contract claims against Apple. Also, Defendants are not joint parties to any contracts with Plaintiffs. Thus, Defendants have no joint "'right to stand upon their contracts and insist that they shall not be harassed with different actions or suits to recover parts of one single demand.'" *Id.* at 587 (quoting *McAulay v. Moody*, 185 F. 144, 147 (C.C.D. Or. 1911)). AT&T is *not* and indispensable party.

were slow for the iPhone. ___ F. Supp. 2d ___, 2010 WL 3059417, *1 (N.D. Cal. Apr. 2, 2010). The court determined that the Federal Communications Act gives the FCC authority to regulate cellular service "rates" and market entry, and that state law claims challenging the reasonableness of a cellular service provider's rates are therefore preempted. *Id.* at *4. The court noted case law holding that a complaint of poor service quality "is really an attack on the rates charged." *Id.* at *5. Thus, the court held, the plaintiffs' claims that the service was "slow" amounted to a preempted attack on AT&T's rates. *Id.* at *6.

Plaintiffs have no quarrel with Defendants' assertion that claims challenging the reasonableness of rates or the *quality* of service provided may be preempted by the FCA. However, Defendants are distorting Plaintiffs' square claims here solely to force them into preemption's round hole. Plaintiffs challenge neither the reasonableness of the text messaging rates charged nor the quality of AT&T's service. Rather, they specifically challenge AT&T's non-provision of a feature they were contractually obligated to provide. Defendants conveniently leave out this stark distinction, expressly noted by the court in *In re Apple iPhone 3G*: "[T]he FCA also contains a savings clause that 'allow[s] claims that do not touch on the areas of rates or market entry. * * * The states remain free to regulate 'other terms and

conditions' of mobile telephone service.'" *Id.* at *4 (quoting *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000)); *see also Texas Office of Public Utility Counsel, et al., v. FCC*, 183 F.3d 393, 432 (5th Cir. 1999) (holding that "States . . . are free to regulate all other terms and conditions [than rates and market entry] for CMRS providers"); *AT&T Corp. v. FCC,* 349 F.3d 692, 701 (D.C. Cir. 2003) (recognizing that state courts may not determine reasonableness of rates but may inquire into existence of contract and compliance with it). Consumers may also clearly challenge the failure to provide services as promised. *See Union Ink Co., Inc. v. AT&T Corp.,* 801 A.2d 361, 376 (N.J. Super. Ct. App. Div. 2002) (claims regarding whether service was provided in accordance with the terms of contract may be appropriately reviewable in state court because court need not inquire into reasonableness of charges, even though it could be appropriate for it to take price charged into consideration in calculating damages). Both courts and the Federal Communications commission have universally "rejected the notion that all claims related to rates or billing are necessarily preempted." *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073-74 (7th Cir. 2004).

Plaintiffs clearly plead that AT&T breached its terms and conditions—and that Apple failed to inform its captive customers of this unavoidable breach—by not providing MMS to iPhone customers. Plaintiffs do not assert

that the *quality* of the MMS feature, had it been provided, was somehow lacking. The fact that Plaintiffs seek damages for breach of contract, and for the failure to disclose the material fact that AT&T would not be providing a service promised in its terms and conditions and in Defendants' advertising, removes this case from the realm of judicial regulation, as all that is required to provide relief to Plaintiffs is a determination that Defendants broke their promises; a finding regarding the quality of services or the reasonableness of rates is wholly unnecessary.

In re Apple iPhone 3G differs significantly from the present case in that the plaintiffs in that case made the *quality* of the network itself the basis of its claim. Here, Plaintiffs have tethered all their claims to the terms and conditions (and omissions and advertisements relevant to those terms and conditions), which this Court has the ability to adjudicate. The only reason why Plaintiffs here have made reference to AT&T's network capacity is to note Defendants' *a priori* knowledge that MMS would not be provided *at all* to iPhone customers. *See*, *e.g.*, FAC (N.D. Cal.) at ¶ 5 ("AT&T needed to build up its network to support this new capacity and that would take time. *Defendants knew* that consumers would expect that the iPhone . . . would be able to text pictures and videos. *Defendants did not want to lose market share by announcing this feature would not be available* and did not want to

delay the lucrative launch of the new generation of 3G iPhones and thus, lose out on the extra revenue from millions of additional customers who had to lock into AT&T's exclusive contract for service.") (emphasis added). The statement about AT&T's network does not stand as a factual predicate for any of Plaintiffs' claims, but it does show an improper motive for not announcing the unavailability of MMS to the very customers to whom it was obligated to provide those services. There is a huge difference between non-provision of an identifiable, discrete, promised service and generalized complaints about network "quality."

Plaintiffs' assertion that MMS was not provided *at all*, despite AT&T's obligation to do so, is dispositive of Apple's (and AT&T's) oblique invocation of FCA preemption. The present allegations are similar to the breach of contract claim in *Iberia Credit Bureau, Inc. v. Cingular Wireless*, where the plaintiff asserted that Cingular's terms and conditions promised a certain amount of minutes, which the plaintiff did not receive. 668 F. Supp. 2d 831, 840 (W.D. La. 2009). In rejecting Cingular's FCA preemption argument that these claims were "disguised attacks on the reasonableness of the rates charged," the court determined,

> This is clearly an anaylsis of whether, under state law, there was a difference between promise and performance. * * * In this situation, the Court need not rule on the reasonableness of the charges in order to calculate a compensatory amount for the

> injury that might have been caused. Plaintiff's claim that Defendant billed her for noncommunication time, an allegedly undisclosed billing practice, is also a claim that there was a difference between promise (to receive a certain quantity of minutes) and performance.

Id. at 840-41. Because Plaintiffs here bring no challenge to the quality of any service or the reasonableness of the rate charged, their claims cannot be preempted. They simply complain that AT&T did not meet its obligations under the terms and conditions—claims expressly exempted from preemption by both the Fifth Circuit and the very case upon which Apple relies.

III. Apple's Implication That It May Be Dismissed "Completely" Is Disingenuous, As the FCA Provides for Both a Private Cause of Action and a Basis to Amend If Plaintiffs' Claims Are Preempted Thereunder.

Finally, Apple's argument against "inefficiency" is based on the fact that this preemption argument could "result in complete dismissal." Def. Br. at 7. However, while the court in *In re Apple iPhone 3G* found that the FCA preempted *state law* claims against AT&T, Apple's current argument that the domino effect, resulting in Apple's parasidic "dismissal," does not quite tell the whole story. Apple fails to report, and its word game conceals, that the dismissal was not in fact "complete," in that the dismissal was "without prejudice," and with "leave to amend." *In re Apple iPhone 3G*, 2010 WL 3059417 at *10. In fact, the Court in that case held that, while the *state* legal theories could not support a claim for relief, "[t]he Supreme Court has

recognized that Section 207 [of the FCA] provides a [federal] private right of action for violations of Section 201(b) and regulations implementing that Section." *Id.* (citing *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 52-55 (2007)). In fact, despite allegedly being "completely dismissed" from that case, both Apple and AT&T are *actively litigating it*. *See* Exhibit 1, *In Re: Apple iPhone 3G Products Liability Litigation*, Docket Report, printed Nov. 11, 2010 (recording post-"dismissal" filing of amended complaint, Doc. # 190, and motion practice by Apple and AT&T, *e.g.*, Doc. ## 202, 207, 211, and 212). Thus, even a successful attempt to dismiss Plaintiffs' current claims will necessarily result in further litigation against Apple and AT&T in this MDL.

IV. The Weight of Authority Counsels Against Staying This Litigation.

A district court's discretionary authority to stay proceedings stems from its inherent authority to control the disposition of the cases on its own docket "with economy of time and effort for itself, for counsel, and for litigants." *Alcala v. Texas Webb County*, 625 F. Supp. 2d 391, 407 **(**S.D. Tex. 2009**)** **(**citing *Landis v. North American Co.,* 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936)**)**. The Federal Rules of Civil Procedure, however, do not expressly provide for a stay of proceedings.

Federal district courts generally disfavor stays of litigation. *Bushman Inv. v. Properties, Ltd.*, No. 09-cv-674, 2010 WL 330224 (D. Colo. Jan. 20, 2010). Federal courts have "an obligation to move its docket, and not let cases languish before it." *In re Scrap Metal Litig.*, No. 02-0844, 2002 WL 31988168, *7 (N.D. Ohio Nov. 7, 2002). At least one federal district has created a balancing test to determine if a stay should be entered in a particular matter: (1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. *String Cheese Incident, LLC v. Stylus Show, Inc.,* No. 02-cv-01934, 2006 WL 894955, at * 2 (D.Colo. Mar. 30, 2006). After weighing of the *String Cheese* factors, this Court should deny Apple's Motion to Stay.

A. Plaintiff's Interests in Proceeding Expeditiously

According to William Gladstone, justice delayed is justice denied. *See also* Fed. R. Civ. P. 1 ("[These rules] should be construed and administred to secure the just, speedy, and inexpensive determination of every action and proceeding"). The Plaintiffs have alleged (at minimum) tortious actions by Apple; actions that affect millions of people. Time value of money theory dictates that the longer the delay, the longer the harm. In addition, courts

have found that "with the passage of time, the memories of the parties and other witnesses may fade, witnesses may relocate or become unavailable, or documents may become lost or inadvertently destroyed. As such, delay may diminish Plaintiffs' ability to proceed and may impact their ability to obtain a speedy resolution of their claims." *Bushman*, 2010 WL 330224 at *1. This observation is particularly poignant here, where class members may relocate and be more difficult to notify.

B. Burden on the Defendants

Apple asserts no undue burden, only "inefficiency." *See Bushman*, 2010 WL 330224 at *1 ("Defendants do not suggest any *undue* burden in proceeding with the case") (emphasis in original). Even so, there is no burden on Apple should this Court deny the Motion to stay. Regardless of the outcome of the ATTM Motions to Compel Arbitration or the Motions to Dismiss, the claims against Apple will move forward, as demonstrated above. Furthermore, Apple has already filed its motions and memoranda of law in support, meaning that a stay will have much less impact on its expenditures. The fact that there are pending motions do not counsel in favor of a stay. *Id.*

C. The Convenience to the Court

"(C)onvenience of the courts is best served when motions to stay proceedings are discouraged." *U.S. v. Private Sanitation Industry Ass'n of*

Nassau/Suffolk, Inc. 811 F. Supp. 802, 808 (E.D.N.Y. 1992). "The Court is inconvenienced by an ill-advised stay because the delay in prosecuting the case which results from imposition of a stay makes the Court's docket less predictable and, hence, less manageable. This is particularly true when the stay is tied to a pending motion on which ultimate success is not guaranteed." *Bushman*, 2010 WL 330224 at *2. As discussed *supra*, because claims against Apple persist even if some of the state tort law claims are preempted, there is no justification for delay. The Court will not be inconvenienced by moving forward now with the Apple motions to dismiss and have the concern of the entire matter being dismissed later when ATTM's motions to dismiss are heard.

D. The Interests of Persons Not Parties

Again, this litigation affects millions of people. The Putative Class that is not yet before the Court has the same interest as the class representatives in moving this case forward in an expeditious manner.

E. The Public Interest

Public interest weighs against delaying the decisions on the Apple motions to dismiss. The court "has an obligation to move its docket, and not let cases languish before it." *In re Scrap Metal* Litig., 2002 WL 31988168 (N.D. Ohio Nov. 7, 2002). In addition, courts have "identifie[d] a strong

interest held by the public in general regarding the prompt and efficient handling of all litigation." *Bushman*, 2010 WL 330224 at *2. The Court's obligation to move its docket benefits the litigants before it in the case being decided, the litigations before it in other cases before that Court, and the future litigation that will be before the Court. Thus, it is in the public's interest for this Court to move its docket and deny Apple's Motion to Stay.

CONCLUSION

Based on the foregoing points and authorities, Plaintiffs respectfully request that this Court DENY Apple's motion to stay.

Dated: November 15, 2010

Respectfully submitted,
MARTZELL & 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 15th day of November, 2010.

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