UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS "MMS" MARKETING AND SALES PRACTICES LITIGATION **THIS DOCUMENT RELATES TO: ALL CASES**	**CIVIL ACTION** **MDL No. 2116** **SECTION "J"** **JUDGE BARBIER** **MAGISTRATE JUDGE WILKINSON**

REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY PLAINTIFFS' CLAIMS AGAINST DEFENDANT, APPLE INC.

NOW INTO COURT, through undersigned counsel, comes defendant, Apple Inc. ("Apple"), who respectfully submits this Reply Memorandum in Support of its Motion to Stay Plaintiffs' Claims against Apple. Plaintiffs misconstrue Apple's arguments, ignore manifest inefficiencies resulting from their position, and offer no basis for denying Apple's motion.

INTRODUCTION

Plaintiffs' opposition to Apple's motion to stay ("Opposition") misses the point of Apple's motion and completely mischaracterizes: (1) the basis for Apple's motion to stay; (2) the allegations of plaintiffs' own complaints; (3) the relationship between Apple's and ATTM's motions to dismiss; (4) the Northern District of California's FCA preemption holding; and (5) the application of FCA preemption here. Plaintiffs also studiously ignore the fact that

Concepcion was argued last week, so that the "delay" which is the core of plaintiffs' Opposition will be at most a few months. There thus will be no real impact on plaintiffs if Apple's motion is granted.

Plaintiffs' principal argument is that the motions should proceed on different tracks since Apple, unlike ATTM, does not have an arbitration motion that will be affected by the Supreme Court's decision in *Concepcion*. This argument entirely misses the point of Apple's motion. The point of Apple's motion is simple: contrary to what plaintiffs now contend, their claims against Apple and ATTM are largely the same. Accordingly, Apple's and ATTM's motions to dismiss also are largely overlapping. If the motions proceed against Apple alone, the result is that either the Court will effectively resolve the issues against both defendants in ATTM's absence (plainly not appropriate) or the Court will address sixteen largely identical motions twice (equally inappropriate).

The primary difference between Apple and ATTM's motions to dismiss is ATTM's argument that plaintiffs' claims against ATTM are preempted by the FCA. But that difference supports Apple's stay motion. Plaintiffs argue that Apple failed to fully brief the preemption issue — but that is because FCA preemption only applies to a telecommunications carrier such as ATTM. However, *as Judge Ware held in the 3G MDL*, if plaintiffs' claims as to ATTM are preempted, their claims against Apple *must also be dismissed* because ATTM is an indispensable party and the claims against Apple cannot proceed without it. Thus, if this Court enters a similar ruling, it will dispose of all pending claims against both defendants. While Apple does not suggest that the Court resolve the preemption issue now, it clearly should be the first issue resolved when the Court considers the motions to dismiss. That cannot happen if those motions proceed without ATTM. The six pages plaintiffs devote to the preemption issue in their

Opposition only underscore the point that preemption is a serious and potentially dispositive issue.

For the same reason, plaintiffs' argument that there is no prejudice to Apple from proceeding now is flat wrong. The result of proceeding now against Apple is a complete waste of Apple's and the Court's resources if the Court later determines that FCA preemption applies and the litigation must be dismissed against both defendants.

For all these reasons, and as set forth in more detail below, the Court should grant Apple's present motion so that both defendants' motions to dismiss can be briefed and decided at the same time. Contrary to plaintiffs' argument, the resulting delay is insignificant and is far outweighed by the desirability of the efficient conduct of this litigation.

ARGUMENT

I. THE MOTIONS TO DISMISS ARE LARGELY OVERLAPPING AND SHOULD BE RESOLVED ON THE SAME SCHEDULE

Plaintiffs argue that the motions should proceed on different schedules since Apple does not have an arbitration motion that will be affected by the Supreme Court's decision in *AT&T Mobility LLC v. Vincent Concepcion, et ux.* (Opp. at 1 (arguing that the "decision in *Concepcion* would have *no* impact on the case against Apple") (emphasis in original).) But that argument misses the point — Apple does not contend that *Concepcion* will resolve plaintiffs' claims against Apple. Rather, the Court should hear defendants' motions on the same schedule because they present substantially overlapping factual and legal issues.

Plaintiffs do not dispute that the consequence of proceeding on different tracks is that the Court will need to resolve sixteen separate motions under the laws of twelve states as to Apple, only to repeat that same burdensome task as to ATTM once *Concepcion* is resolved. There is no sound basis for proceeding in that manner, as the Court already implicitly recognized in its

September 29, 2010 order granting Apple's request to have the motions heard on the same track. (Rec. Doc. 173.) Moreover, plaintiffs cannot seriously suggest that the Court should resolve issues raised in both Apple's and ATTM's motions to dismiss without ATTM and then later hold ATTM bound by those rulings.

Plaintiffs' argument that their claims against Apple and ATTM are significantly different (and hence can proceed separately) is flatly contradicted by their amended complaints. Plaintiffs argue that there are "differences" in the claims asserted (Opp. at 4), but those differences are extraordinarily minor. For example, in the California complaint plaintiffs cite in their opposition, plaintiffs have one claim against ATTM only (for breach of contract) and *six* claims against both defendants. (Rec. Doc. 70.) In other amended complaints, moreover, plaintiffs allege contract claims against both defendants. (*See, e.g.*, Rec. Doc. 69.) There thus is almost complete overlap in the claims asserted against the two defendants.

Plaintiffs also contend that the alleged "omissions and representations" of Apple and ATTM on which plaintiffs' claims are based "were made in different contexts by each defendant." (Opp. at 4.) That is not true. The complaints allege that Apple and ATTM "co-marketed" the iPhone and the complaints repeatedly make allegations about "*defendants'* marketing campaign." (*See, e.g.*, Rec. Doc. 69, ¶¶ 2, 9 (emphasis added).)

Not surprisingly, then, the arguments in defendants' motions to dismiss are largely overlapping. (Rec. Doc. 131 & 138) To resolve them as to one defendant without the other simply makes no sense.

II. RESOLUTION OF THE PREEMPTION ISSUE, WHICH CANNOT OCCUR WITHOUT ATTM, COULD RESOLVE ALL CLAIMS AGAINST BOTH DEFENDANTS

The inefficiency of proceeding on different tracks with respect to Apple and ATTM's motions to dismiss is amplified here given the possibility that resolving ATTM's motion to dismiss on preemption grounds could and should dispose of all claims as to both defendants. Plaintiffs implicitly acknowledge this possibility by devoting a large percentage of their opposition brief to arguing the merits of the preemption issue. (Opp. at 5-11.) Plaintiffs cannot reasonably dispute that it would be inefficient for the Court to resolve Apple's sixteen motions to dismiss given the possibility that ATTM's motion to dismiss will obviate the need to reach any issue other than preemption. Given the dispositive nature of the preemption issue, it makes no sense to allow this action to proceed against Apple alone.

Moreover, plaintiffs' arguments on the merits of preemption are incorrect. Although this is not the place for a full response, it is noteworthy that plaintiffs' attempt to distinguish *In re Apple iPhone 3G Prods. Liab. Litig.*, ___ F. Supp. 3d ___, No. C 09-02045 JW, 2010 WL 3059417 (N.D. Cal. Apr. 2, 2010), is contradicted by allegations in plaintiffs' own complaints. Plaintiffs' complaints, like the iPhone 3G complaint, squarely attack the adequacy of ATTM's network. Moreover, plaintiffs completely misinterpret the ruling in that case.

Plaintiffs' amended complaints all contain the following paragraphs respecting the alleged inadequacy of ATTM's network to support MMS:

> Plaintiffs are informed and believe that as the Defendants were about to launch the 3G phone, a grave complication developed. Sending pictures by text took considerably more capacity than sending a written text message, and AT&T realized that its entire network would be overloaded if millions of new iPhone users began texting pictures on the 3G iPhone.
>
> *AT&T needed to build up its network to support this new capacity and that would take time…*

> *AT&T's network was unable to provide the service of texting pictures until it upgraded its network* and therefore, the Apple iPhone 3G and 3GS could not, contrary to almost all other phones on the market, text or receive pictures or videos from other phones.

(*See*, *e.g.,* Sterker First Amended Complaint, Rec. Doc. 70, ¶¶ 4-6 (emphasis added).)

These allegations demonstrate that plaintiffs' claims are clearly preempted under both Judge Ware's ruling in the iPhone 3G MDL and the holding in *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (2000), on which the *iPhone 3G* holding is based. Thus, in *In re Apple iPhone 3G Prods. Liab. Litig.*, ___ F. Supp. 3d ___, No. C 09-02045 JW, 2010 WL 3059417, the court held that plaintiffs' claims were preempted by the FCA because plaintiffs' "core allegation [was] that Defendants knew…the network was not sufficiently developed…and that Defendants deceived Plaintiffs into paying higher rates for a service that Defendants knew they could not deliver." *Id.* The court held that because "plaintiffs' claims are an attack on ATTM's rates and 3G market entry, [they] therefore tread on ground reserved by the FCA." *Id*., Slip Op. at 9.

Plaintiffs' allegations here are indistinguishable. As set forth above, plaintiffs allege that ATTM's network was not sufficiently developed at the time iPhone 3G was released to support MMS, yet Apple and ATTM allegedly "deceived Plaintiffs into paying higher rates for a service [MMS] that Defendants knew they could not deliver." Accordingly, plaintiffs' claims here are preempted by the FCA as to ATTM.

Similarly, as in the iPhone 3G MDL, plaintiffs' claims against Apple must be dismissed if the claims as to ATTM are preempted. In the iPhone 3G MDL, the court dismissed the claims against Apple on the ground that ATTM was an indispensable party to claims about ATTM's network. *Id.* The court found that "the case could not proceed without ATTM in 'equity and good conscience' because any adjudication of claims against Defendant Apple would necessarily require a determination of the sufficiency of ATTM's network infrastructure." *Id.* The same

holds equally true here and requires dismissal of plaintiffs' claims. *Bry-Man's, Inc. v. Stute*, 312. F.2d 585, 586 (5th Cir. 1963). For plaintiffs to proceed now as to the claims against Apple, ignoring the likelihood that those claims will later be barred, makes no sense.

Plaintiffs try to avoid this conclusion by arguing that plaintiffs' claims in the iPhone 3G MDL were not dismissed with prejudice. Plaintiffs are wrong. The state law claims in the iPhone 3G MDL – the only claims that plaintiffs here allege – were dismissed with prejudice. Judge Ware granted plaintiffs leave to amend to attempt to state an FCA claim (and plaintiffs have also attempted to allege a RICO claim) under *federal* law. (Apple and ATTM have motions to dismiss pending as to those claims). Plaintiffs here, however, have not sought to allege federal claims. The state law claims plaintiffs allege were dismissed with prejudice in the iPhone 3G MDL and that should be the result here. To deny Apple's motion to stay because plaintiffs *might* later seek to allege federal claims – which in any event will also be barred – is untenable.

III. THE FACTORS PLAINTIFFS CITE SUPPORT APPLE'S MOTION

Plaintiffs identify five factors they argue this Court should consider in determining whether to grant a stay. These factors, contrary to plaintiffs' argument, dictate that a stay be entered.

First, there is no prejudice to plaintiffs from the brief delay necessary to avoid inefficient and piecemeal adjudication of defendants' motions to dismiss. Plaintiffs cannot seriously suggest that memories will fade or that there will be a significant impact in terms of the "time value of money" (Opp. at 13-14) as the result of a few months' delay. Moreover, if *Concepcion* is decided against ATTM, this litigation will not be resolved until plaintiffs' claims are litigated as to both defendants. Thus, in that circumstance, granting Apple's motion will not result in any delay in the ultimate resolution of the case.

Second, and conversely, the undue burden on Apple of proceeding with litigation that may be preempted is evident. Equally evident is the potential prejudice to ATTM if this Court considers factual and legal issues raised by ATTM's motions in ATTM's absence.

Third, the inconvenience to the Court of considering sixteen motions under twelve states' laws twice is manifest. Indeed, the preemption issue, which can only be decided with ATTM present, may obviate the need for the Court to consider the remainder of the motions as to either defendant. Accordingly, this factor weighs strongly in favor of a stay.

As to the final two factors, granting Apple's motion will not have any impact on nonparties or the public interest. To the extent that absent purported class members are regarded as "nonparties," their interests will not be affected by a delay of a few months in the overall time required to resolve the action.

WHEREFORE, defendant Apple Inc., respectfully requests that this Court grant its Motion to Stay Plaintiffs' claims against Apple and that, following a decision in *Concepcion*, Apple and ATTM's motions to dismiss be put on the same briefing schedule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been electronically filed on November 15, 2010, with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing.

/s/ Quentin F. Urquhart