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 PLAINTIFFS' POSITION PAPER

INTRODUCTION

This litigation was stayed on November 17, 2010, pending the Supreme Court's decision in *AT&T v. Concepcion*. That decision was issued on April 27, 2011. Pursuant to the Court's directive, Plaintiffs submit this memorandum summarizing Plaintiffs' position on the future proceedings necessary in this litigation and the legal status of the case in light of the *Concepcion* decision. Plaintiffs filed amended complaints in each of the cases in this MDL on June 4, 2010. On August 10, 2010, Defendant AT&T filed motions to compel arbitration in each case, submitting eight declarations and 119 evidentiary exhibits in support of its motions. Docket Nos. 112-119. On the same date both Defendants also filed motions to dismiss each action. Apple's standard contract with Plaintiffs and class members does not contain an arbitration clause, and Apple did not move to compel arbitration.

Plaintiffs propounded discovery requests upon AT&T concerning arbitration issues on August 19, 2010. *See* Docket No. 180-3—180-6. On September 20, 2010, AT&T responded to these requests with a series of objections and very few actual responses. *Id.* A Rule 37.1 conference was held, but AT&T stated that it refused to expand its responses to Plaintiffs'

arbitration discovery. Accordingly, Plaintiffs filed a motion to compel further discovery responses from AT&T on October 15, 2010. Docket No. 181. In short, AT&T relies upon one-sided, affidavit evidence in support of its motions to compel arbitration, while Plaintiffs have not had the opportunity to conduct discovery regarding the formation of the service agreement and its arbitration clause.

Prior to the resolution of this motion to compel, Plaintiffs and AT&T agreed to a stay of litigation against AT&T pending a decision in *Concepcion*. In accordance with this Order, the Court dismissed Plaintiffs' pending motion to compel further discovery responses, without prejudice. Docket No. 197. Defendant Apple also requested a stay, which was granted on November 17, 2010. *See* Order, Doc. No. 206. The Supreme Court issued its decision in *Concepcion* on April 27, 2011. On July 19, 2011, the Court directed the parties to submit position papers regarding the effect of the Supreme Court's decision on this litigation and regarding what discovery should take place at this time in advance of a status conference before the Court scheduled for September 22, 2011.

Accordingly, the motions pending before the Court are:

(1) Plaintiffs' Motion to Compel Arbitration Discovery (Docket No. 181);

(2) Defendant AT&T's Motions to Dismiss (Docket Nos. 138-153);

(3) Defendant AT&T's Motions to Compel Arbitration (Docket Nos. 112-119);

(4) Defendant Apple's Motions to Dismiss (Docket Nos. 120-135).

It would seem prudent that, in light of *Concepcion*, the Court decide the following:

(1) Are Plaintiffs entitled to discovery against AT&T's on the issue of their Motions to Compel Arbitration and to Dismiss? If so, then Plaintiffs would suggest that the Court schedule a date to consider motions to compel discovery and that in the

meantime a 10.1 conference be held between the PSC and AT&T to narrow any discovery issues. To the extent that issues cannot be agreed to the parties could avail themselves of the pre-set date and file the appropriate pleadings before the Court (see Plaintiffs' letter to the Court of October 29, 2010, Ex. A);

(2) Is Apple entitled by law to a dismissal of its claims? We believe this matter can be resolved despite the outcome of the AT&T claim.

As Plaintiffs discuss below, the *Concepcion* decision does not completely eliminate Plaintiffs' need for arbitration discovery, and Plaintiffs' limited requests should be granted. Plaintiffs also request that the Court set a briefing schedule to complete the briefing of AT&T's motions to dismiss, as Plaintiffs need to draft opposing memoranda, and Apple's motions to dismiss, as Apple's reply brief is yet to be filed. Also, Plaintiffs request a briefing schedule as to AT&T's Motion to Compel Arbitration, reflecting any time necessary for AT&T to produce discovery and Plaintiffs to review such responses.

DISCUSSION

I. *Concepcion* Does Not Affect Plaintiffs' Requests for Discovery.

Plaintiffs seek discovery (in the form of answers to interrogatories, requests for admissions, requests for production and 30(b)(6) deponents), relevant to Plaintiffs' claim that the arbitration provisions are procedurally and substantively unconscionable.

Such discovery is routinely granted. *See, e.g., In re: Checking Account Overdraft Litig.,* 09-md-02036, Order Deferring Ruling on Motions to Compel Arbitration (M.D. Fla. Jun. 3, 2011) (Dkt. No. 1576), Ex. B, (granting Plaintiffs' request for arbitration discovery, concluding: "Given the complexity of the legal and factual issues; the astronomical size of the potential class; and the critical impact the decision on Defendants' Motion to Dismiss will have on the future course of this litigation; the Court finds a fully developed, complete record is essential."); *Green*

Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 91-92 (2000); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 608-10 (3d Cir. 2002); *Dun Shipping Ltd. v. Amerada Hess Shipping Corp.*, 234 F. Supp. 2d 291, 294-96 (S.D.N.Y. 2002); *also Alzaidi v. U-Haul Co. of Kan.*, No. 09-2293-CM, 2009 WL 3045462, at *1 (D. Kan. Sept. 22, 2009); *R&F, LLC v. Brooke Corp.*, No. 07-2175-JWL-PJW, 2007 WL 2809845, at *2-3 (D. Kan. Sept. 24, 2007); *Coneff v. AT& T Corp.*, No. C06-0944RSM, 2007 WL 738612, at *1 (W.D. Wash. Mar. 9, 2007); *Wilson v. Yellow Transp., Inc.*, No. 06-2281-CM, 2007 WL 445197, at *1 (D. Kan. Jan. 29, 2007); *Livingston v. Associates Fin., Inc.*, No. 01-C-1659, 2001 WL 709465, at *2-4 (N.D. Ill. June 25, 2001).

Moreover, several courts have evaluated class action bans in arbitration clauses subsequent to *Concepcion* and have recognized that *Concepcion* does not preclude a party from challenging an arbitration clause on unconscionability grounds. For example, in *Hamby v. Power Toyota Irvine*, No. 11cv544-BTM (BGS), 2011 WL 2852279 (S.D. Cal. July 18, 2011), the court found that "*AT&T* does not stand for the proposition that a party can never oppose arbitration on the ground that the arbitration clause is unconscionable" and allowed plaintiffs to conduct discovery on unconscionability of the arbitration clause. In addition, in *Larsen v. J.P. Morgan Chase Bank, N.A.*, Nos. 10-12936, 10-12937, 2011 WL 3794755 (11th Cir. Aug. 26, 2011), the Eleventh Circuit remanded a case to the district court for consideration of arbitrability to be decided after limited discovery on the arbitrability of the dispute.

AT&T's responses to the discovery at issue would be directly relevant to factors to be considered by the Court on this motion. Therefore, Plaintiffs respectfully request that the Court allow Plaintiffs to conduct arbitration-related discovery.

A. *AT&T Mobility LLC v. Concepcion*

Although Defendants are likely to overstate the holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), the majority opinion in *Concepcion* was

narrowly drawn to address a limited question: "whether § 2 preempts California's [*Discover Bank*] rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." 131 S. Ct. 1746. The majority answered that limited question in the affirmative, holding that "California's *Discover Bank* rule is preempted by the FAA" because "it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' *Id.* at 1753 (citation omitted).

Nothing in the Court's opinion, however, purports to limit the scope, meaning, or application of the FAA's saving clause. The FAA reserves to the States the power to invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Court recognized in *Concepcion*, "[t]his saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration, or that derive their meaning from the fact that an agreement to arbitrate is at issue." 131 S. Ct. at 1746 (internal quotations and citations omitted). The enforceability of AT&T's arbitration provision, therefore, is still subject to scrutiny under generally applicable contract law.

B. The Discovery Sought by Plaintiffs Is Directly Relevant to AT&T's Arbitration Motion.

A court cannot compel arbitration unless it first determines that an agreement to arbitrate exists under the generally applicable contract law of the state whose law governs the question. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). The FAA policy in favor of enforcing arbitration clauses does not come into play in determining whether an agreement to arbitrate exists. *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002). The Supreme Court confirmed these long-standing principles in *Concepcion*, stating unequivocally that "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties'

expectations." *Concepcion*, 131 S. Ct. at 1752-53 (citing *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2774, (2010)).

Moreover, *Concepcion* reaffirms that state law based contract defenses to arbitration are still valid. Prior to *Concepcion*, case law was clear that "as a matter of federal law, arbitration agreements and clauses are to be enforced unless they are invalid under principles of state law that govern all contracts." *Brown v. Pacific Life Ins. Co*, 462 F.3d 384, 396 (5th Cir. 2006) (citing *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir.2004)). Furthermore, prior to *Concepcion*, courts recognized that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." *Brown*, 462 F.3d at 396 n.8 (citing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)). The *Concepcion* decision does not change this law. Indeed, as noted by Justice Scalia at the outset of *Concepcion*, the sole issue before the Court was whether the "*Discover Bank* rule" under California law, which held that class action waivers were unconscionable as a matter of law in certain small-value cases, was preempted by the FAA. In holding the *Discover Bank* rule was indeed preempted, the Court nonetheless recognized:

> The final phrase of s. 2 [of the FAA], however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This savings clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionabililty," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

131 S. Ct. at 1746. Based upon this explicit language in *Concepcion*, AT&T cannot be heard to say that arbitration clauses are no longer subject to invalidation under state standards for unconscionability.

Governing state law in the present consolidated cases recognizes unconscionability as a generally available contract defense. Some states will invalidate a contract or contractual provision upon a showing of procedural or substantive unconscionability, some only upon a showing of both, and others upon a sliding scale where a showing of greater procedural unconscionability requires less of a showing of substantive unconscionability and vice versa. *See Matthews v. AT&T Operations, Inc.*, 764 F.Supp.2d 1272, 1279-1280 (N.D. Ala. 2011); *Gentry v. Superior Court*, 165 P.3d 556, 572 (Cal. 2007); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999); *Lovey v. Regence BlueShield of Idaho*, P.3d 877, 881-82 (Id. 2003); *Montgomery v. Corinthian Colleges, Inc.*, 2011 WL 1118942, at *3 (N.D. Ill. March 25, 2011); *Vigil v. Sears Nat. Bank*, 2002 WL 987412, at *4 (E.D. La. May 10, 2002); *Skirchak v. Dynamics Research Corp., Inc.*, 432 F.Supp.2d 175, 179-180 (D. Mass. 2006); *Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208, 214 (Mich. Ct. App. 1999); *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 502 (Minn. Ct. App. 1999); *Anglin v. Tower Loan of Mississippi, Inc.*, 635 F.Supp.2d 523, 530 (S.D. Miss. 2009); *Whitney v. Alltel Communications*, 173 S.W.3d 300, 308 (Mo. 2005); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 369-370 (N.C. 2008); *Sitogum Holdings, Inc. v. Ropes*, 352 N.J.Super. 555, 564, 800 A.2d 915, 922 (Ch.Div.2002); *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1 (N.Y. 1988); *Miller-Holzwarth, Inc. v. L-3 Commc'ns, Corp.*, 2010 WL 2253642, * 1- 5, at *3 (N.D. Ohio June 02, 2010); *Provencher v. Dell, Inc.*, 409 F.Supp. 2d 1196, 1204 (C.D.Cal. 2006); *Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA)*, 560 F.3d 935, 941 (9th Cir. 2009). Based upon this law, the question of whether the arbitration agreement at issue here is procedurally or substantively unconscionable (or both) is relevant and necessary to this Court's evaluation of AT&T's motion to compel arbitration, even post-*Concepcion*.

i. Discovery May Show That a Contract Was Never Formed or That Enforcement of the Agreement Would Be Procedurally Unconscionable.

For instance, an agreement to arbitrate may be invalid and procedurally unconscionable if the imposed-upon party is not shown the arbitration clause prior to purchasing the iPhone or entering into the agreement. *Trujillo v. Apple Computer, Inc.*, 578 F. Supp. 2d 979, 992-95 (N.D. Ill. 2008) (after fact intensive analysis, court denied AT&T motion to compel arbitration on grounds of procedural unconscionability, finding that arbitration agreement was not available to plaintiff prior to or at time of iPhone purchase). In such cases, because the consumer did not have a chance to review the arbitration agreement prior to signing up for service, the agreement is procedurally deficient as the imposed-upon party has no meaningful choice about whether and how to enter into the transaction. 8 Richard A. Lord, *Williston on Contracts*, § 18.10 (4th ed. 1998).

AT&T's standardized, form arbitration clause, hidden in 16 pages of legalese, is imposed on a "take it or leave it" basis, and, as the *Trujillo* court found, was presented to customers *after* they buy their iPhones. Further, a customer could not use the iPhone without signing up for wireless service with AT&T since AT&T was the exclusive provider of wireless service for the iPhone, and a customer could not sign up for a service plan without acquiescing to the agreement. AT&T has attempted to show that Plaintiffs agreed to the arbitration clause. However, questions remain as to whether they were presented with or given a chance to review the arbitration provisions prior to signing up for service through the submission of eight declarations and 119 supporting exhibits. AT&T's information also fails to answer whether the arbitration clause was presented prior to Plaintiffs' purchases of their iPhones. Plaintiffs should be permitted to respond with their own evidence and thus arbitration discovery is appropriate.

Furthermore, the very fact that ATTM has submitted statements from eight declarants, with 119 supporting exhibits demonstrates that resolution of this issue necessary extends beyond the pleadings. Plaintiffs should be permitted, at the very least, to depose the declarants and inquire as to the value of their declarations in informing these issues. *See Trujillo*, 578 F. Supp. 2d at 983 (upon examination of ATTM affidavits in support of motion to compel arbitration, court found affidavits were *incorrect* and ultimately insufficient to establish that Terms of Service were provided to customers prior to purchase of iPhone or wireless service).

Plaintiffs seek, *inter alia*, the following categories of arbitration discovery (in the form of answers to interrogatories, requests for admissions, requests for production and 30(b)(6) deponents), relevant to Plaintiffs' claim that the arbitration provisions are procedurally and substantively unconscionable:

- Negotiations between AT&T and customers regarding terms and conditions of any arbitration clauses included in the WSA [Wireless Service Agreement] and any resulting alterations or modifications as a result of such negotiations.

- Methods by which customers are provided copies of the WSA, informed of the terms and conditions in the WSA, and specifically of its arbitration provisions.

- Availability of the WSA and terms and conditions prior to and during process by which customers enter into the WSA, and specifically availability of the arbitration provisions.

ii. Discovery May Show That the Agreement Is Substantively Unconscionable.

Similarly, governing law in many states declares as either substantively unconscionable or generally unenforceable an arbitration provision that prevents a party from being able to vindicate statutory rights or that effectively exculpates a defendant from all liability. For example, the Washington Supreme Court has held that the class action ban in AT&T's (then Cingular's) contract was unenforceable because it "effectively denie[d] plaintiffs a forum to

vindicate the consumer protections guaranteed by Washington law and effectively exculpate[d] its drafter from liability for a broad range of wrongful conduct." *Scott v. Cingular Wireless*, 160 Wash. 2d 843, 859, 161 P.3d 1000, 1009 (Wash. 2007). In so holding, the court relied upon the factual record and made clear that "whether any particular class action waiver is unenforceable will turn on the facts of the particular case." *Id.* at 1009 n.7. Similarly, the New Jersey Supreme Court has recognized that "exculpatory waivers that seek a release from a statutorily imposed duty are void as against public policy," and has held that in small-dollar cases, "a class action waiver can act effectively as an exculpatory clause" in violation of this public policy. *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1, 21, 912 A.2d 88, 100 (N.J. 2006). Again, in reaching this conclusion, the court looked to the specific facts of the case and undertook a detailed analysis of the arbitration clause under New Jersey law dealing with contracts of adhesion. Under California law, the very same arbitration clause as is at issue in the present case was declared by the Ninth Circuit to be substantively unconscionable because the court had found it acted to exculpate AT&T. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 (9th Cir. 2009).

Concepcion's holding does not invalidate and preempt this body of state law. The U.S. Supreme Court has consistently held that statutory claims are arbitrable only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"—and that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 637, 628; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors*). There is no question that *Mitsubishi Motors* and *Gilmer* remain good law after *Concepcion*; indeed, Justice

Scalia cites both cases with authority in *Concepcion*. *Concepcion*, slip op. at 8 (citing *Mitsubishi Motors*); *id.* at 9 n.5 (citing *Gilmer*). Thus, in order to rule that the FAA required enforcement of AT&T's class action ban in *Concepcion* even if the evidence established that enforcement would prevent the parties from vindicating their claims, the Court would have had to overrule prior precedent. *See also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) ("[C]laims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions.") (citation omitted).

iii. Arbitrability of an Agreement Is a Fact-Intensive Inquiry and Tailored Discovery Requests Are Routinely Permitted.

As discussed in Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Compel Further Discovery Responses from Defendant AT&T Mobility (Dkt. 181-3), the question of whether AT&T's arbitration clause is enforceable is extraordinarily fact-intensive. For example, Plaintiffs' arbitration discovery requests seek documents referencing methods by which the contracts purporting to bind arbitration were communicated to customers and the format and appearance of any manner in which individuals were compelled to sign arbitration agreements presented to them. Docket No. 180-4, RPD Nos. 6 and 7. AT&T's responses to this discovery are directly relevant to factors to be considered by the Court if it reaches the contract formation/procedural unconscionability arguments. Issues of contract formation and unconscionability go to the very heart of whether the parties agreed to arbitrate. Plaintiffs request that the Court allow Plaintiffs to have a reasonable opportunity to conduct arbitration-related discovery.

Similarly, Plaintiffs have propounded narrowly tailored discovery concerning the potentially exculpatory effect of AT&T's arbitration clause. The discovery sought by Plaintiffs

on this point encompasses five general categories: 1) exemplars of all versions and drafts of all documents AT&T contends require arbitration of the disputes in this class action; 2) the planning and implementation of AT&T's arbitration provisions and programs; 3) the reasons for the class action bans contained in AT&T's arbitration provisions; 4) the arguments and legal rationale advanced by AT&T in other cases challenging the enforceability of the arbitration and anti-class action provisions; and 5) any arbitrations initiated by AT&T against its customers or any arbitrations initiated by customers against AT&T including the subject matter, forum, procedures, costs, number and outcome of any such arbitrations. However, AT&T objected and failed to adequately respond to Plaintiffs' narrowly tailored requests, thereby preventing Plaintiffs from establishing a factual record sufficient to fully demonstrate that AT&T's class ban prevents Plaintiffs from vindicating their rights and impermissibly exculpates the company. As discussed in Plaintiffs' memorandum in support of its motion to compel discovery, the discovery sought by Plaintiffs is directly relevant to how AT&T's arbitration clause impacts Plaintiffs' ability to vindicate their legal rights and will aid Plaintiff in developing the factual record necessary for this Court to rule on this issue.

II. Plaintiffs Have Taken the Position That Apple Is Not Entitled to Compel Arbitration Through AT&T's Service Agreement.

Apple may attempt—two years after Plaintiffs initiated the present lawsuits against it—to argue that it can piggyback on the arbitration agreement contained in AT&T's Wireless Service Agreement ("WSA"), and seek to compel Plaintiffs to arbitration. Apple is not entitled to this extraordinary, equitable outcome. First, Apple's contract with Plaintiffs specifies that "exclusive jurisdiction for any claim or dispute with Apple" resides in court, not in an arbitral forum. Second, it is too little, too late. Apple has waived any such right by substantially invoking the judicial process. Whereas AT&T responded to the complaint by moving to compel arbitration

on August 10, 2010, Apple filed motions to dismiss these actions with prejudice based solely on Rule 12(b)(6).the merits. It cannot abruptly change course now and seek to arbitrate Plaintiffs' claims. Furthermore, Apple expressly chose in its user agreements not to use arbitration as a dispute resolution alternative, and as a non-signatory to AT&T's WSA, Apple has no claim to enforce the AT&T arbitration clause.

For these reasons and the reasons set forth below, Plaintiffs contend that briefing on Apple's Motion should go forward.

A. Apple's Contract with Plaintiffs' Demands Litigation, Not Arbitration.

To activate their iPhones, every Plaintiff was required to accept the written iTunes Terms of Service ("TOS"). Pursuant to its terms, every Plaintiff was required to bring all claims against Apple in court: "You expressly agree that exclusive jurisdiction for any claim or dispute with Apple or relating in any way to your use of the Service resides in the courts of the State of California." Ex. C. Thus, the TOS neither requires or permits Plaintiffs to arbitrate claims against Apple. Apple cannot now avoid its own contract in favor of AT&T's contract.

B. Even if Apple Were Entitled to Compel Arbitration, It Has Waived Any Right to Arbitrate.

As a threshold matter, Apple has waived any right it may claim under AT&T's WSA to demand arbitration against Plaintiffs and must be estopped from seeking to compel arbitration because it has knowingly and intentionally engaged in substantial litigation inaddressing the merits of this case for almost two years without demanding arbitration, seeking to compel arbitration or claiming or asserting the right to arbitrate. Plaintiffs would be substantially and unfairly prejudiced if, after litigating this case for almost two years at significant expense, Apple was permitted to demand arbitration now.

The Fifth Circuit has held that a party waives any right to compel arbitration when that party engages the litigation process before moving to compel arbitration and the party opposing arbitration has been prejudiced by the delay. *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346-47 (5th Cir. 2004). Despite the presumption against waiver, the Fifth Circuit has repeatedly found waiver is particularly appropriate where the party seeking to arbitrate makes an untimely motion to compel *after* attempting to obtain dismissal with prejudice from the district court. As the court held in *In re Mirant Corp.*, 613 F.3d 584, 591 (5th Cir. 2010), "[a] party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court." Thus, the court found that the moving party waived any right to arbitrate because it waited eighteen months before moving to compel arbitration while attempting to obtain dismissal with prejudice from district court. *Id. See also, Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480-81 (5th Cir. 2009) ("A party waives arbitration by seeking a decision on the merits before attempting to arbitrate."); *Miller BrewingCo. Co. v. Ft. Worth Distributing Co.*, 781 F.2d 494, 498 (5th Cir. 1986) ("Any attempt to go to the merits and to retain still the right to arbitration is clearly impermissible.") (quotation omitted).

Apple has clearly engaged the judicial process in this case. Apple has never asserted that claims against it are arbitrable under the AT&T WSA, but *has* filed motions to dismiss each Plaintiff's amended complaint. Docket Nos. 120-135. After filing briefs about whether Plaintiffs should file a "master" complaint, Apple filed multiple motions to dismiss the complaints "on the grounds that the Plaintiffs' [First Amended Complaint] fails to meet the pleading requirements of Rules 8, 9 and 12 of the Federal Rules of Civil Procedure." None of its motions ever mention arbitration. Prior to the Court's issuance of a stay of this action pending the Supreme Court's

decision in *AT&T Mobility LLC v. Concepcion*, Plaintiffs prepared responses to each of Apple's 15 motions to dismiss. Apple cannot, after substantially invoking the judicial process, now reverse course and seek to compel arbitration.

Furthermore, Plaintiffs will suffer prejudice if Apple is permitted to seek to compel arbitration at the eleventh hour. "[F]or purposes of a waiver of an arbitration agreement: 'prejudice ... refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party'sparty's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.' " *Subway*, 169 F.3d at 327 (quoting *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir.1997)) (omission in original). Here, Plaintiffs have fully briefed *and filed* responses to Apple's motions to dismiss their cases, and have been forced to litigate against Apple's various positions on discovery, pre-trial management issues, including the filing of an exemplar complaint, and the stay of this litigation. Plaintiffs should not now be forced into arbitration after such delay and expense incurred through litigating against Apple in this Court.

C. As a Non-Signatory to the Agreement Containing the Arbitration Clause, Apple Cannot Compel Arbitration.

The scope of the AT&T WSA states that the agreement extends only to AT&T's "subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or Devices under this or prior Agreements between us." Apple and AT&T do not have any of the types of corporate relationships specified above. The Supreme Court in *Conception* reaffirmed the fundamental principle that a party to an arbitration agreement is entitled "to limit *with whom* [it] will arbitrate its disputes." *Conception*, 2011 WL 1561956, at *8 (emphasis added) (citing *Stolt-Neilsen S.A. v.*

AnimalFeeds Int'l Corp., 559 U.S.___, (2010), slip. op at *19). Here, there is no dispute that Plaintiffs could *not* have agreed to arbitrate any claims with Apple through the AT&T WSA.

Rather, Apple may take the position that it is entitled to compel arbitration as a non-signatory under an equitable theory, on the basis that Plaintiffs should be estopped from adherence to the terms of the agreement, and should be forced to arbitrate with Apple. There is, however, no basis to apply equitable estoppel here.

In *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), the Fifth Circuit affirmed that a signatory may be equitably estopped from asserting that it is not bound by an arbitration agreement in limited circumstances, based on a very specific fairness rationale. *Grigson* thus permits a non-signatory to enforce an agreement to compel arbitration through equitable estoppel when the signatory must rely on the terms of the agreement to bring its claim against the non-signatory or when the signatory raises allegations of *substantially* interdependent and concerted misconduct against both a nonsignatory and one or more of the signatories to the contract.[1] Since *Grigson*, the Fifth Circuit has clarified and significantly narrowed nonsignatory-compelled arbitration to "rare circumstances," and has repeatedly warned that district courts should be cautious in upending a contractual relationship with an equitable doctrine *Grigson*, 210 F.3d at 527. The *Grigson* court noted the unique facts of the case, where the plaintiff-signatory filed suit against a defendant-signatory but when faced with a motion to arbitrate, dropped the case and re-filed against non-signatories, asserting claims of tortious

[1] *Grigson* also permits a non-signatory to enforce an agreement to compel arbitration through equitable estoppel when the signatory must rely on the terms of the agreement to bring its claim against the non-signatory. *Grigson*, 210 F.3d at 527. The rationale behind this test is that equity does not permit a signatory to hold a non-signatory liable on the basis of the agreement containing the arbitration clause while denying the effect of the arbitration clause to the non-signatory. *Id.* at 528.

interference with contract based on the original signatory-defendant's duties to perform under the contract. *Id.* at 530-31. Thus, the court noted that the rationale behind this test is that the signatory "cannot 'have it both ways': it cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." *Id.* at 528.

Thus, the Court of Appeals further cabined Grigson to its facts in *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002), the Court of Appeals warnedwarning that "[a]n agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems—an openness this country has been committed to from its inception." The court continued to explain that, "we are wary of choices imposed after the dispute has arisen and the bargain has long since been struck. And hence we will allow a nonsignatory to invoke an arbitration agreement only in rare circumstances." *Westmoreland*, 299 F.3d at 467 (citing *Hill v. G.E. Power Systems, Inc.*, 282 F.3d 343, 347-49 (5th Cir. 2002)). While the *Westmoreland* court admittedstated that it had previously "sustained orders compelling persons who have agreed to arbitrate disputes when the party invoking the clause is a nonsignatory," it limited the doctrine to circumstances where "a signatory pursues a nonsignatory based upon duties imposed by the party ordered to arbitrate has agreed to arbitrate disputes arising out of a contract and is suing in reliance upon that contract.". *Westmoreland*, 299 F.3d at 465, 467 (5th Cir. 2002) (citing *Grigson*, 210 F.3d at 531. The Court concluded: "we have been cautious" in allowing equitable estoppel, because "[d]irectly put, the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable

backdrop of legal rules—the cardinal prerequisite to all dispute resolution." *Westmoreland*, 299 F.3d at 465, 467. Thus, the Fifth Circuit has cabineddirects that the *Grigson* rule toshould only be applied in "rare circumstances" and has cautioned against its use.

After the *Westmoreland* decision, the Fifth Circuit again limited the application of *Grigson* by distinguishing it as factually unique and justified by a specific rationale. Thus the court noted:

> We justified applying equitable estoppel in *Grigson* in part because to do otherwise would permit the signatory plaintiff to "have it both ways." *Id.* at 528. *See Hill*, 282 F.3d at 349 (5th Cir. 2002). "[The plaintiff] cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a nonsignatory." *Grigson*, 210 F.3d at 528. The rationale of *Grigson* does not apply to the circumstances of this case.

Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 360-63 (5th Cir. 2003). The *Bridas* Court further concluded that the simple fact that the claims against a signatory and nonsignatory to an arbitration agreement are "inextricably intertwined . . . is insufficient, standing alone, to justify the application of equitable estoppels." *Bridas*, 345 F.3d at 360-63. *See also Palmer Ventures LLC v. Deutsche Bank AG*, 254 F. App'x. 426, 432 (5th Cir. 2007) (nonsignatory must do more than "simply conclude that [nonsignatory] is intertwined with the facts of [the] case") (citing *Grigson*, 210 F.3d at 527).

Here, the allegations against Apple and AT&T are not interdependent, let alone "substantially interdependent." Plaintiffs have independent claims against both Apple and AT&T for misrepresentations and omissions. The claims against Apple are in no way based upon enforcement of the AT&T WSA. Neither are there allegations or evidence that Apple and AT&T coordinated their misrepresentations or omissions regarding the plan to charge Plaintiffs

for MMS when they knew no such services would be provided. Furthermore, plaintiffs have not alleged any conspiracy claims such that would constitute claims of "concerted misconduct."

Even were it so, at least one court has rejected this analysis regarding "concerted misconduct," where a party alleged to have engaged in an antitrust conspiracy attempted to take advantage of an arbitration agreement by arguing claims of concerted misconduct entitled it to compel arbitration, noting that it would be perverse to allow a defendant to "bootstrap their way into arbitration based on nothing more than the very conduct which constituted a violation of the antitrust laws in the first place." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, M 07-1827 SI, 2011 WL 4017961, at *5 (N.D. Cal. Sept. 9, 2011) (citation omitted). Similarly, here, it would be wholly unfair to allow Apple to bootstrap its way into AT&T's arbitration agreement on the basis of any allegations that suggest concerted fraudulent activity.

Moreover, the facts here are on all fours with those faced by the court in *Weisblatt v. Apple*, No. C-10-02553 RMW, 2010 WL 4071147 (N.D. Cal. Oct. 18, 2010). In *Weisblatt*, plaintiffs alleged that Apple and AT&T engaged in a classic "bait and switch" scheme in marketing the 3G Capable iPad product for which AT&T is the exclusive 3G service provider, in violation of common law fraud and consumer protection statutes. Plaintiffs alleged that AT&T and Apple induced them to buy the more expensive 3G Capable iPad with the offer of unlimited data plan pricing options, and subsequently AT&T withdrew the unlimited option. In rejecting Apple's request for a stay pending the outcome in *Concepcion*, the *Weisblatt* court found that, although "plaintiffs' claims are related to ATTM's iPad data plans," "plaintiffs' claims against Apple are not subject to the ATTM arbitration agreement and appear to be independently actionable . . . ." The court held that the decision in *Concepcion v. AT&T Mobility* would have no impact on the plaintiffs' claims against Apple. *Id.* at *4.

Similarly, here, Plaintiffs' claims against Apple are independently actionable based on specific misrepresentations and omissions made by Apple. Although one of Plaintiffs' claims against Apple is related to AT&T's iPhone service plans,[2] as in *Weisblatt*—in that Apple hadit does not seek to enforce duties created by the contract but instead relates to Apple's omissions of its knowledge of *AT&T*'s obligations—and, as in *Weisblatt*—the misrepresentations and omissions were "made by each Defendant, each of which is independently actionable against the party that made them, without regard to the intent, knowledge, or liability of the other Defendant." *Weisblatt*, 2010 WL 4071147 at *4.

In sum, the Fifth Circuit has warned that courts should tread lightly in subverting a contract by allowing nonsignatories unbargained-for contractual rights, reasoning that it is unfair to allow a nonsignatory to belatedly piggyback upon a contract once "the trouble arrives." *Westmoreland*, 299 F.3d at 465. This is exactly Apple's plan—to attempt to horn in on AT&T's arbitration agreement after the trouble has arrived and after strategically lying in wait to weigh the strength of Plaintiffs' oppositions to its motions to dismiss on the merits. The Court should deny this attempt, as Plaintiffs claims against Apple are independently actionable.

[2] *Cf.* Apple's failure to disclose AT&T's obligation to provide MMS.

Respectfully submitted,

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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 19th day of September, 2011.

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