In Re: Apple iPhone 3G and 3GS MMS Marketing and Sales Practices Litigation Doc. 227

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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

APPLE'S POSITION STATEMENT REGARDING *CONCEPCION* AND DISCOVERY

Pursuant to the Court's July 20, 2011 Order and in anticipation of the status conference scheduled for September 22, 2011, defendant Apple Inc. ("Apple") respectfully submits its position statement regarding the impact of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). ("*Concepcion*") on the actions herein. As set forth below, plaintiffs' claims against both ATTM and Apple must be ordered to arbitration. Moreover, this result is clear as a matter of law; discovery is neither necessary nor appropriate.

I. STATUS OF THE MDL

This MDL consists of twenty-three underlying actions (the "Actions"). On June 4, 2010, plaintiffs filed first amended complaints in sixteen of the Actions. Defendant AT&T Mobility ("ATTM") filed a motion to compel arbitration based on the arbitration agreement each plaintiff signed when purchasing his or her iPhone and wireless service. Apple and ATTM also filed motions to dismiss each of the Actions.

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On November 17, 2010, the Court stayed proceedings as to both defendants pending the United States Supreme Court's decision in *Concepcion*. (*See* Dkt. No. 206.) On April 27, 2011, the Supreme Court held that ATTM's arbitration clause, and the class action waiver therein, is enforceable. *Concepcion*, 131 S. Ct. at 1753.

II. THE IMPACT OF *CONCEPCION*

As set forth in ATTM's filing herein, *Concepcion* holds that the arbitration clause contained in ATTM's wireless service agreement is enforceable. The wireless service agreement considered in *Concepcion* is the same one that plaintiffs in this case entered into when they purchased their iPhones and related ATTM wireless service. *Concepcion* overruled the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005), which had held that that class action waivers in arbitration agreements were unconscionable and unenforceable. *Conception* concluded that the *Discover Bank* rule was preempted by the Federal Arbitation Act. *Concepcion* thus establishes that plaintiffs' claims in this MDL must be arbitrated pursuant to the terms of the service agreement that plaintiffs entered into with ATTM.

Plaintiffs' amended complaints, and in particular their opposition to Apple's motion to dismiss, make clear that their claims against Apple, as well as their claims against ATTM, are predicated on ATTM's service agreement. Accordingly, plaintiffs' claims against Apple, like their claims against ATTM, are subject to arbitration.

Under the doctrine of equitable estoppel, a non-signatory to an arbitration agreement can compel a signatory to arbitrate where: (1) the complaint raises allegations of substantially

interdependent and concerted misconduct by both a signatory and one or more non-signatories; or (2) this alleged misconduct is founded in and intertwined with the underlying contractual obligations. Fifth Circuit law is clear on this issue, and the law of the other Circuits is in accord. *Grigson v. Creative Artists Agency, LLC.*, 210 F.3d 524, 527-28 (5th Cir. 2000) (citing *MA Dealer Serv. Corp. v. Franklin*¸ 177 F.3d 942, 947 (11th Cir. 1999)); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008) (where subject of suit against non-signatory was intertwined with scope of arbitration agreement, arbitration was appropriate); *Brown v. Gen. Steel Domestic Sales, LLC*, No. CV 08-00779 MMM (SHx), 2008 U.S. Dist. LEXIS 97832, at *25 (C.D. Cal. May 19, 2008) (compelling arbitration of claims against non-signatory defendants where they involved same questions of fact and law as claims against signatory defendant).

As Apple will argue in its motion to compel arbitration, that rule applies squarely here. Faced with the fact that Apple never represented that MMS was available on iPhone 3G and Apple's clear disclaimer respecting the timing of MMS on iPhone 3GS, plaintiffs now rest their claims against Apple as well as against ATTM on their service agreements with ATTM. Accordingly, plaintiffs' claims against Apple are inextricably intertwined with their claims against ATTM and must be arbitrated. Plaintiffs focus almost exclusively on alleged misrepresentations contained in their contract with ATTM, and Apple's purported failure to disclose them to plaintiffs. (*See, e.g, Carbine* FAC ¶¶ 7, 8, 12, 22.) Plaintiffs themselves have urged this interpretation of their complaints, arguing that they are entitled to relief based on Apple's alleged "failure to disclose to iPhone purchasers – who are also captive AT&T customers - that AT&T was contractually obligated to provide MMS to them" and Apple's

alleged "failure to disclose to iPhone purchasers . . . that AT&T would charge iPhone users for MMS." (*See* Plaintiffs' Joint Opp'n to Apple's Motions to Dismiss, Dkt. No. 204 at 8.)[1] Further, plaintiffs' only alleged harm – that ATTM charged class members "for something they did not receive" – makes clear that their claims are predicated on their service contracts with ATTM. (*See, e.g., Carbine* FAC, ¶¶ 10, 53-56.) In plaintiffs' own words, "[t]his case sounds in material omissions related to the obligation to provide MMS and . . . AT&T charging iPhone users for MMS." (Plaintiffs' Joint Opp'n to Apple's Motions to Dismiss at 10.)

Because of the potentially dispositive nature of Apple's anticipated motions to compel arbitration, Apple believes that the Court should address these motions before it considers the outstanding motions to dismiss. Accordingly, Apple respectfully requests that the Court set a schedule, pursuant to ATTM's proposal, for the parties to file and brief motions to compel arbitration, and postpone briefing and a hearing on the motions to dismiss pending resolution of motions regarding arbitration.

III. DISCOVERY

Apple does not believe discovery is necessary or appropriate at this time. Particularly in light of *Concepcion*, plaintiffs' claims must be arbitrated as a matter of law. Plaintiffs' complaints make clear on their face that plaintiffs' claims against Apple are predicated on ATTM's service agreement, are inextricably intertwined with their claims against ATTM, and

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[1] Plaintiffs go farther, responding to Apple's argument regarding their failure to adequately allege misrepresentations in advertisements by acknowledging that Apple's own statements constitute a "small portion of [p]laintiffs' claims." Rather, plaintiffs admit that their "*primary claims for relief*" are related to "Apple and AT&T fail[ure] to disclose that AT&T would be obligated by contract to provide picture messaging services to iPhone users." (*See* Plaintiffs' Joint Opp'n to Apple's Motions to Dismiss at 9 (emphasis added).)

must be arbitrated. There is no factual issue as to which discovery would be relevant or appropriate.

Respectfully submitted,

__*/s/ Quentin F. Urquhart*________________

IRWIN FRITCHIE URQUHART & MOORE, LLC
QUENTIN F. URQUHART, JR. (#14475)
DAVID W. O'QUINN (#18366)
DOUGLAS J. MOORE (#27706)
400 Poydras Street, Suite 2700
New Orleans, Louisiana 70130
Telephone: (504) 310-2100
Facsimile: (504) 310-2101

PENELOPE A. PREOVOLOS (*admitted pro hac vice)*
ANDREW MUHLBACH (*admitted pro hac vice)*
HEATHER A. MOSER (*admitted pro hac vice)*
MORRISON & FOERSTER, LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Counsel for Apple Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been electronically filed on September 19, 2011, with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing.

_________*/s/ Quentin F. Urquhart*_____