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

MEMORANDUM IN OPPOSITION TO DEFENDANT APPLE INC.'S MOTION TO COMPEL ARBITRATION

INTRODUCTION

Plaintiffs' action against Apple is founded upon Apple's misleading conduct and failure to disclose material information regarding iPhone's MMS functionality. Nothing else. Despite this independent claim for relief, Apple attempts to invoke another party's arbitration clause to take advantage of what it perceives to be a positive development in arbitration law. Apple has waived this option. Rather than seeking arbitration from the beginning—which, as AT&T did, it could have done—Apple sought unqualified and non-perfunctory dismissal on the merits and has caused Plaintiffs to oppose those several motions. In addition, Apple's own express, written contracts contain no arbitration clause and, in fact, contemplate actions to be filed in court, while at the same time AT&T's arbitration-clause-containing contract expressly excludes Apple from the list of parties who are permitted to arbitrate alongside AT&T.

Finally, and despite Plaintiffs' consistent position that their action involves "*three* bases for relief" (Docket No. 204 at 8 (emphasis added)), Apple incorrectly argues that Plaintiffs only "allege a single theory of unified conduct" by Apple and AT&T (Docket No. 235-1 at 3). Apple does this because it believes that such an argument is a necessary predicate for its extraordinary request for "equitable estoppel," or, the rare decision from a court to compel arbitration between parties who never agreed to arbitrate. In making its plea for equitable estoppel, however, Apple fails to establish the *sine qua non* of the equitable estoppel test: that compelling Plaintiffs to arbitrate against Apple in these circumstances would be in any way "fair." The Court should deny Apple's motion.

FACTUAL BACKGROUND

I. Plaintiffs' Action Against Apple Is Independent of Plaintiffs' Action Against AT&T.

This proposed class action alleges unlawfully deceptive conduct on the part of Apple relating to the manner in which Apple, independently marketed, promoted, advertised, and sold

two of its most profitable products: the iPhone 3G and the iPhone 3GS. While Plaintiffs had also filed suit against AT&T relating to AT&T's own marketing, promotion, advertising, and selling of the iPhone 3G and 3GS and data plans, the two actions were[1] separate, divisible, and independently actionable.

Regarding Plaintiffs' action against Apple, Plaintiffs' claims are based upon the following three theories, none of which allege any obligation directly imposed upon Apple by AT&T's Wireless Service Agreement ("WSA"):

(1) Apple made affirmative misrepresentations to Plaintiffs regarding MMS availability on the iPhone 3G and 3GS;

(2) Apple failed to disclose that AT&T would charge Plaintiffs for MMS service but would not provide it; and

(3) Apple failed to disclose that AT&T's data plan required MMS but that service would not be provided to Plaintiffs.

Plaintiffs' first theory of liability alleges that Apple independently and affirmatively made representations regarding the availability of MMS on the iPhone 3G and 3GS that were false, deceptive, and misleading. *See, e.g.*, *Carbine* compl. ¶¶ 8, 12, 19, 22, 37, 38, 40, 42-48, 52, 59, 69-80, 90-120. Specifically, Plaintiffs allege that, with the launch of the iPhone 3GS, Apple engaged in a widespread and pervasive advertising campaign to promote the availability of MMS on the iPhone 3G and 3GS—when, in fact, it was not available—through the use of media presentations, press releases, product packaging, its internet website, in-store displays, guided tours, investor calls, etc. *Id.* Particularly lacking in Plaintiffs' complaints are allegations that Apple engaged in this deceptive behavior with the help of AT&T, jointly with AT&T, or together with AT&T. *See, e.g., id.* ¶¶ 12, 19, 22, 37, 59, 62, 80, 93, 97, 98, 100, 103, 115.

[1] All Plaintiffs have voluntarily dismissed their suits against AT&T. Their only remaining claims in Court are against Apple alone.

(alleging that defendants Apple and AT&T *each* engaged in conduct that is likely to deceive and has deceived the public). Additionally, not one of Plaintiffs' allegations regarding Apple's affirmative misrepresentations is in any way founded in or bound up with the terms or obligations in AT&T's WSA. Rather, these allegations depend solely on the misconduct of Apple, not on the terms of AT&T's WSA, for their success.

Plaintiffs' second theory of liability is founded upon Apple's failure to disclose to iPhone customers that AT&T was telling consumers that they were receiving MMS via their monthly billing statements when they were not, and, thus, charging these individuals for a service they were not getting. *See, e.g.*, *id.* ¶¶ 12, 55-59, 69-80, 110-120. These claims are not founded upon, nor do they rely upon, the terms or obligations of AT&T's WSA. To illustrate, every month AT&T would send a bill to consumers who had purchased a family unlimited message plan advising them that the amount charge reflected the provision of MMS. These bills were not contracts, but notifications to consumers that payment was due. MMS of course, was never provided to customers during the class period. It is with this background that Plaintiffs have alleged that Apple knew that AT&T was charging iPhone customers for MMS, but not providing it, triggering a duty to disclose a fact material to the iPhone purchase and use. Thus, by virtue of the obligations triggered by consumer protection statutes—*not* by AT&T's WSA—Apple engaged in deceptive conduct by failing to inform iPhone consumers of its knowledge of AT&T's practices. Apple's duty arises out of law, not out of contract, and certainly not out of AT&T's WSA. Stated differently, the Court need not examine the terms of the WSA in order to determine whether Apple failed to disclose these facts to Plaintiffs.

Plaintiffs' third theory of liability is based upon Apple's failure to disclose to iPhone customers that AT&T's data plan required MMS service but, unlike all other camera phone users

who paid for the same AT&T plan, they alone would not have MMS service. *See, e.g.*, *id.* ¶¶ 8, 12, 31, 54, 57-59, 69-80, 110-120. Despite the tangential reference to AT&T's data plan, Plaintiffs do not seek to hold Apple liable to any duties and obligations imposed upon it by the WSA—indeed, the terms and obligations in AT&T's WSA do not mention Apple at all. Nor do Plaintiffs attempt to hold Apple accountable for any kind of breach of the WSA. Rather, Plaintiffs seek to hold Apple liable pursuant to law, by virtue of the fact that Apple knew yet failed to disclose that AT&T's data plan required MMS service but that iPhone customers would not be receiving it. Again, Plaintiffs' cause of action against Apple is triggered by virtue of an obligation imposed by the consumer protection statutes, not by the WSA.

Notably absent from Plaintiffs' allegations of material omissions (i.e., Plaintiffs' second and third theories of liability) are any claims that Apple coordinated its behavior with AT&T or that Apple and AT&T conspired in such a way as to give rise to a claim of "concerted misconduct." While Apple cites to the fact that AT&T was the exclusive provider of cell phone and data services for iPhone, this has nothing to do with their independent marketing conduct. No advertisement or public communication by either Apple or AT&T contains any evidence of a joint marketing effort. Nor have Plaintiffs alleged one. In sum, Plaintiffs have alleged claims against Apple based on affirmative misrepresentations and omissions that are independent of their claims against AT&T.

II. Plaintiffs Entered Into Two Separate Agreements with Apple, Neither of Which Contained an Arbitration Provision.

In an attempt to bootstrap itself into AT&T's arbitration clause, Apple ignores the two written contracts which it entered into with Plaintiffs, both of which demonstrate that neither Apple nor any of the Plaintiffs intended to arbitrate their claims. These two written agreements

are the iPhone Software License Agreement ("Software Agreement") and the iTunes Terms of Service ("TOS").

A. The iPhone Software License Agreement.

When Plaintiffs purchased their iPhone 3G, 3GS, or both, regardless of whether they purchased it from Apple or AT&T,[2] each product package contained a Software Agreement. According to the Software Agreement's terms, "by using [the] phone, [the user was] agreeing to be bound by the following Apple and third party terms." (Ex. A.)[3] Additionally, Apple's "Legal Information" page on its website on June 27, 2009 (the period just after iPhone 3GS began to be sold), stated:

> **Hardware & Software Product Agreements**
>
> Your use of Apple-branded *hardware* and software products *is based on the software license* and other terms and conditions in effect for the product at the time of purchase. You will be asked to agree to the terms of the applicable agreement at the time that you obtain or install the software or *setup the hardware product*. You may review the agreements for Apple's currently shipping products, by clicking the appropriate link below.

(*Id.* (emphasis added).) Below this section was a hyperlink entitled "iPhone Software License," and if a consumer clicked on that link, an agreement appeared in PDF format. It is Plaintiffs' understanding that such agreement was the same as the Software Agreement they received in their iPhone product packaging. As such, that agreement likewise stated at the top that "by using [the] phone, [the user was] agreeing to be bound by the following Apple and third party terms." In sum, pursuant to language drafted by Apple itself, the Software Agreement governs the

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[2] Consumers who purchased their iPhones at an Apple store may not even have had the opportunity to first see or know about the arbitration clause in AT&T's WSA.

[3] All exhibits referenced herein are attached to the Declaration of David M. Cialkowski in Support of Plaintiffs' Opposition to Defendant Apple Inc.'s Motion to Compel Arbitration filed contemporaneously herewith.

relationship between Apple and Plaintiffs for both software and hardware issues. In other words, Apple cannot be heard to argue that the Software Agreement governs only a small, inapplicable part of the relationship between the parties. Rather, it covers all phone purchase and software issues and, thus, governs the current dispute between the parties.

There are several provisions in the Software Agreement that are relevant to the present motion. First, as mentioned above, the first sentence specifically states, "[B]y using your iPhone, you are agreeing to be bound by the following Apple and third party terms." (Ex. B.) Thus, when the iPhone was turned on for the first time, either by Plaintiffs or someone acting on their behalf, Plaintiffs became bound by the terms of the agreement. While the agreement references "third party terms," there is no mention anywhere in the agreement that AT&T was a contemplated "third party." In fact, neither AT&T nor its WSA are mentioned in the Software Agreement.

Second, the Software Agreement contains the following choice-of-law provision: "This License will be governed by and construed in accordance with the laws of the State of California, as applied to agreements entered into and to be performed entirely within California between California residents." (*Id.*) In other words, California law controls the agreement, no matter who sues Apple, or where.

Finally, the Software Agreement does not contain an arbitration provision nor does it reference AT&T's arbitration provision.[4] However, it does contain an invalidation provision that contemplates suits in court, not complaints in arbitration: "If for any reason a *court* of competent jurisdiction finds any provision, or portion thereof, to be unenforceable, the remainder of this License shall continue in full force and effect." (*Id.* (emphasis added).) Apple's reference to "a

[4] Apple's latest iPhone-related license, released in October 2011, likewise does not contain an arbitration clause.

court of competent jurisdiction" within the parties' Software Agreement is inconsistent with an intent to arbitrate. Rather, it contemplates that all claims, whether brought by Apple or against Apple, will be brought in court.

B. The iTunes Terms of Service.

In addition to the Software Agreement, every Plaintiff was required to accept the iTunes TOS in order to activate their iPhones. (Docket No. 225-1 at 4.) The TOS contains a choice-of-law provision similar to that of the iPhone Software Agreement: "All transactions on the iTunes Service are governed by California law . . . ." (*Id.*) Thus, this provision also mandates that California law governs Plaintiffs' claims against Apple.

Additionally, as opposed to an arbitration agreement, the iTunes TOS contains the following exclusive jurisdiction clause: "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." (*Id.* (emphasis added).) The plain text of this clause makes clear that it applies to "any claim or dispute with Apple," and not just claims or disputes relating to use of the iTunes service. Based on this jurisdiction clause, Plaintiffs are not required nor permitted to arbitrate claims against Apple. Rather, they must bring all claims against Apple in court.

Apple's website, as discussed above, further makes clear that the iTunes TOS covers the iPhone. Again, the website states that Plaintiffs' "use of Apple-branded hardware [i.e., iPhones] and software products is based on the software license and others terms and conditions [i.e., the iTunes TOS] in effect for the product." (Ex. A.) In other words, the iPhone is governed by both the Software Agreement and the iTunes TOS. In addition, the website confirms that every Plaintiff was "asked to agree to the terms of the [iTunes TOS]" at the time they installed the iTunes software in order to set up and activate their iPhones. (*Id.*) In sum, Apple cannot argue

that the iTunes TOS is not relevant here when its own website and exclusive jurisdiction clause make clear that the TOS applies to Plaintiffs' use of their iPhones.

III. The Arbitration Provision in AT&T's WSA Specifies Which Nonsignatories May Enforce It, and Apple Is Not One of Them.

The arbitration provision in AT&T's WSA states: "AT&T and you agree to arbitrate all disputes and claims between us." (Docket No. 117-1.) It further provides: "References to 'AT&T,' 'you,' and 'us,' include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or Device under this or prior Agreements between us." (*Id.*) Thus, the express terms of the arbitration provision in AT&T's WSA explicitly limit arbitrable disputes to those between Plaintiffs and the enumerated categories of persons and entities identified by AT&T. Apple does not contend, nor can it, that it falls under any of the entities defined in the provision.

ARGUMENT

I. Because Apple Has Sought a Non-Perfunctory Adjudication on the Merits, Apple Has Waived Any Right It May Have Had to Compel Arbitration.

Without having to decide whether equitable estoppel applies here, the Court should dispose of Apple's request by finding that Apple has waived any right it may have had to compel arbitration. A party waives the right to compel arbitration when it has "substantially invoked the judicial process to the detriment or prejudice of the other party." *In re Mirant Corp.*, 613 F.3d 584, 588 (5th Cir. 2010). The right to arbitration, like any other contract right, can be waived, and a "party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right." *Miller Brewing Co. v. Fort Worth Distrib. Co., Inc.*, 781 F.2d 494, 497 (5th Cir. 1986) (citations omitted). While the determination of whether a party has

waived arbitration depends upon the particular facts of the case, "[w]hen one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial. . . . . Substantially invoking the litigation machinery qualifies as the kind of prejudice . . . that is the essence of waiver." *Id.* (citing *E.C. Ernst, Inc. v. Manhattan Const. Co.*, 559 F.2d 268, 269 (5th Cir. 1977)). To waive its right to arbitrate a "party must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration." *Republic Ins. Co. v. Paico Receivables, LLC*, 383 F.3d 341, 344-45 (5th Cir. 2004). Indeed, the Fifth Circuit has recognized that "[a] party waives arbitration by seeking a decision on the merits before attempting to arbitrate." *Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009).

In *MC Asset Recovery, LLC v. Castex Energy, Inc.*, 2009 WL 900745, at *6 (N.D. Tex. Apr. 3, 2009), the court held that the defendant, Castex, waived the right to compel arbitration as it first filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and three motions to dismiss under Rules 9 and 12(b)(6). On appeal, the Fifth Circuit affirmed, finding that Castex's motions to dismiss were not perfunctory but instead sought a decision on the merits prior to attempting to arbitrate. *In re Mirant Corp.*, 613 F.3d at 589. The Fifth Circuit also found that the plaintiff had been prejudiced by Castex's conduct in that it incurred considerable legal expenses responding to the motions, suffered an eighteen month delay in the litigation, and was placed in a weaker legal position by being unable to pursue discovery. *Id.* at 591-92.

Here, Apple waived its right to seek arbitration after having first sought a decision on the merits by filing 16 motions to dismiss directed to the Plaintiffs' First Amended Complaints then

consolidated before this Court.[5] Each of these motions to dismiss argued, among other things, that Plaintiffs lacked Article III standing, that Plaintiffs' complaints failed to allege fraud against Apple with requisite specificity as required by Federal Rule of Civil Procedure 9(b), and that Plaintiffs had failed to state causes of action for negligent misrepresentation, breach of warranty, breach of contract, and unjust enrichment. Apple tailored each of its 16 motions to dismiss to the state law applicable to each of the respective complaints and filed with the Court numerous exhibits in support of its motions, including videos and a transcript of a telephone conference call with industry analysts regarding Apple's third quarter 2009 earnings.[6]

Unquestionably, Apple's filing of its motions to dismiss evidenced an intent to seek resolution of the present MDL proceedings through litigation rather than arbitration. Apple's motions to dismiss constitute a serious effort to enlist the decision-making power of the Court to eliminate Plaintiffs' claims on their merits and not just an effort to preserve legal arguments pending a motion to compel arbitration. In fact, Apple's submission of over 55 pages of exhibits along with CDs containing videos and other materials illustrates its desire to litigate this case in court as opposed to an arbitral forum. Far from being a "perfunctory" motion to dismiss, Apple fully briefed and supported a comprehensive request to have this Court rule on the merits of Plaintiffs' claims.

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[5] After Apple filed its salvo of motions to dismiss, additional actions were either transferred by the JPML to this Court or direct filed pursuant to this Court's direct filing order. For a variety of procedural reasons, Apple was not required to respond to these additional seven complaints until now.

[6] In its brief supporting each respective motion to dismiss, Apple argued that the factual material attached to its motions consisted only of items referenced or pled by Plaintiffs thereby not converting its motions to dismiss into motions for summary judgment. (*See, e.g.*, Docket No. 135-1 at 5 n.4.) Plaintiffs were required to respond substantively to this evidence, and argued that the evidence went beyond the pleadings, requiring the Court to convert the motions to those requesting summary judgment. (Docket. No. 204 at 29-33.)

Moreover, the contrast between Apple's conduct and that of AT&T illustrates that Apple's conduct in this case evinces a desire to litigate as opposed to arbitrate. Apple filed its motions to dismiss on the same day that AT&T filed its own series of motions to dismiss, that is, on August 10, 2010. In sharp contrast to Apple's approach, AT&T filed motions to dismiss not only urging the Court to dismiss Plaintiffs' complaints on similar substantive grounds as advanced by Apple, but AT&T also concurrently filed motions requesting that the Court dismiss Plaintiffs' cases in favor of compelling the parties to arbitration. In its briefs supporting its numerous motions to dismiss Plaintiffs' complaints on substantive grounds, AT&T stated that it was contemporaneously filing motions to compel arbitration and that the Court should rule on the arbitration motions first, the Court should consider deferring "briefing on the motion[s] to dismiss," and its substantive motions to dismiss were being filed for the Court's consideration only in the event that the Court were to deny AT&T's motions to compel arbitration. (*See* Docket No. 139-1 at 1 n.1.) Apple did not so condition or qualify its motions to dismiss, which instead were completely silent on the issue of arbitration.

Recognizing that its initial conduct in the case was inconsistent with an intent to pursue arbitration, Apple now disingenuously claims that it could not have moved to compel arbitration earlier because the *Discover Bank* rule was effective in California at the time it filed its motions to dismiss. In reality, the *Discover Bank* rule applied with equal force to its codefendant, AT&T, at the time the parties filed their respective motions to dismiss in August 2010. AT&T had no qualms about asking the Court to compel arbitration at that time, which was well before the Supreme Court overturned the *Discover Bank* rule in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Apple could have easily joined in AT&T's motion to compel arbitration at that time just as it has now done post-*Concepcion.* Moreover, as of August 2010, the present MDL

proceeding involved numerous cases filed outside of California and nothing prevented Apple from seeking to compel arbitration in jurisdictions other than California even when the *Discover Bank* rule still had vitality. In reality, Apple's new found enthusiasm for arbitration is an opportunistic about-face that should not be countenanced by this Court.

Finally, Plaintiffs have suffered prejudice by virtue of Apple's delay in requesting arbitration. Plaintiffs have been prejudiced by Apple's conduct in that their lawyers have spent significant time preparing responses to the 16 motions to dismiss and, as was true in *Castex Energy*, Plaintiffs have not been able to engage in discovery against Apple pending resolution of Apple's motions. *See Castex Energy, Inc.*, 2009 WL 900745, at *6. Thus, as the court did in *Castex Energy,* this Court should deny Apple's present motion to compel arbitration on the basis that the Plaintiffs have suffered prejudice due to Apple's delay and untimely change of heart.

II. The Court Need Not Consider Equitable Estoppel Because All of the Express, Written Contracts Applicable to the Parties Indicate that iPhone Purchasers Did *Not* Agree or Intend to Arbitrate with Apple.

Apple's express, written contracts with Plaintiffs contain zero arbitration clauses. AT&T's WSA contains an arbitration clause, but also contains a limitation as to who may arbitrate under that arbitration clause, and Apple is *not* an authorized party. Again, this Court need not reach the issue of equitable estoppel at all, as the plain reading of all the relevant contracts indicates that it is inappropriate for Plaintiffs to be compelled to arbitration with Apple.

A. The Court Should Give Effect to the Plain Language of AT&T's Arbitration Clause, Which Expressly Limits Mandatory Arbitration to Disputes Between AT&T and Its Customers.

In seeking to compel Plaintiffs to submit their claims to arbitration based upon AT&T's WSA, Apple goes straight to the theory of equitable estoppel without even analyzing the arbitration provision that it seeks to invoke. "[T]hat approach skips the first step [of]

determining whether a valid agreement to arbitrate exists." *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 382 (5th Cir. 2008). That first step requires the Court to examine the terms of the arbitration provision at issue to determine who is actually bound by it. *See id.* at 381. Indeed, a party to an arbitration agreement is entitled "to limit *with whom* [it] will arbitrate its disputes." *Concepcion*, 131 S. Ct. at 1749. Accordingly, "[i]f [an] agreement specifies the circumstances in which a signatory is required to arbitrate his claims against a nonsignatory, the terms of the contract govern." *Green v. Serv. Corp. Int'l*, 333 F. App'x 9, 11 n.1 (5th Cir. 2009).

Because AT&T's WSA expressly limits to whom its arbitration clause applies, and that clause does not include Apple, equitable estoppel should not even be considered. *Mims v. Global Credit & Collection Corp.*, No. 10-23830-CIV, 2011 WL 3586056 (S.D. Fla. Aug. 12, 2011), is instructive. In *Mims*, a debt collector sought to compel arbitration based on a credit agreement between the plaintiff and his creditor which contained an arbitration provision. *Id.* at *1. The arbitration provision covered claims "between you and us," and it defined "us" as including the "[the creditor], its successors, assigns, agents, and/or authorized representatives." *Id.* The court found:

> [I]n defining "us" as referring only to certain enumerated categories of individuals, the parties evinced a clear intent that the arbitration provision only apply to disputes between Plaintiff and those specific individuals. Consequently, the Court will not construe the provision as limitlessly expanding that definition.

Id. at *6; *see also Fox v. Nationwide Credit, Inc.*, No. 09-cv-7111, 2010 WL 3420172, at *4 (N.D. Ill. Aug. 25, 2010) (denying nonsignatory's motion to compel where agreement "expressly and specifically limited" the claims subject to arbitration "to those between the [plaintiff] and a defined list of persons and entities"); *cf. Sherer*, 548 F.3d at 382 (compelling arbitration because plaintiff's claim fell within loan agreement that "clearly identif[ied] when [plaintiff] may be compelled to arbitrate with a nonsignatory"); *Hornicek v. Cardworks Servicing, LLC*, No. 10-

3631, 2011 WL 2623274, at *3 (E.D. Pa. June 29, 2011) (compelling arbitration because nonsignatory "falls squarely within one of the enumerated categories with which [plaintiff] has agreed to arbitrate"). Further, when an agreement specifies who is bound by it, a court need not "draw[] on various theories of contract and agency law, including equitable estoppel, to determine a nonsignatory's rights and duties under an arbitration clause." *Sherer*, 548 F.3d at 382.

Like the arbitration provision at issue in *Mims*, the express terms of the arbitration provision in AT&T's WSA explicitly limit arbitrable disputes to those between Plaintiffs and the enumerated categories of persons and entities—specifically, "subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or Device under this or prior Agreements between us." (Docket No. 117-1.) None of these entities includes Apple. "Plaintiff[s] thus cannot fairly be considered to have consented to arbitration with other unenumerated entities." *Mims*, 2011 WL 3586056, at *6. As such, this Court should give effect to the plain language of the provision and need not consider whether equitable estoppel applies.

B. Apple's Express, Written Agreements Make Clear That Neither Plaintiff Nor Apple Contemplated Arbitration.

In determining whether parties have agreed to arbitrate a dispute, courts apply "general state-law principles of contract interpretation." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989). One such principle is that equitable relief cannot be granted where the rights of the parties are governed by an express, valid contract. 30A C.J.S. *Equity* § 60 (2011) ("[E]quitable remedies will not lie where the rights of the parties are governed by a valid contract."). Consistent with this principle, some courts have found that the existence of a separate agreement between the parties litigating a motion to compel arbitration

precludes equitable estoppel. For example, in *Goldman v. KPMG LLP*, 92 Cal. Rptr. 3d 534 (Cal. Ct. App. 2009), the plaintiffs sued their investment advisors and accountants for damages in connection with fraudulent tax shelter schemes. The plaintiffs' "standard operating agreement" with their investment advisors included an arbitration provision. *Id.* at 539. Their accountants, who were not parties to that agreement, moved to compel arbitration on the basis of equitable estoppel even though the accountants' separate engagement letter with the plaintiffs did not contain an arbitration provision. *Id.* at 539-40. According to the court,

> The existence of engagement letters . . . containing no arbitration clauses makes it all the more apparent that the application of an equitable doctrine to require arbitration between parties who have not agreed to arbitrate is entirely inappropriate in this case. . . . [U]nless a party to an arbitration agreement has used the substantive terms of that agreement as the foundation for his claims against a nonsignatory, there is no reason in equity why he should be forced to arbitrate his claims against the nonsignatory. This is especially so where that party actually has a written agreement with the defendant containing no arbitration clause.

Id. at 555; *see also Hallwood Group Inc. v. Balestri*, No. 3:10-CV-1198-K, 2010 WL 427454, at *2 (N.D. Tex. Oct. 21, 2010) (affirming denial of motion to compel arbitration where "[t]he only contract signed by both parties . . . did not contain an arbitration clause" and "contained a jury trial waiver and consent to Texas state court jurisdiction," which "are clearly inconsistent with an intent to arbitrate"); *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 191 (Tex. 2007) (finding nonsignatories had no right under arbitration agreement where that agreement "referred to some affiliates and third parties, but not [the nonsignatories]," those nonsignatories "signed their own contracts with the plaintiffs, which had no arbitration clauses," and where allowing them "to compel arbitration would effectively rewrite their contracts"); *Hartford Life Ins. Co. v. Forman*, Nos. 13-08-00547-CV & 13-08-00603-CV, 2009 WL 1546924, at *6 (Tex. App. June 3, 2009) (finding that, where defendants—nonsignatories to the arbitration agreement—"had

separate contracts with [plaintiff] which did not contain arbitration clauses," compelling arbitration "would allow them to effectively rewrite their contracts").

Here, the existence of, not one, but two agreements between Apple and Plaintiffs, neither of which contain an arbitration provision, makes it all the more apparent that applying equitable estoppel to force arbitration between parties who have not agreed to arbitrate is inappropriate.[7] Apple could have included an arbitration provision in the software license agreement or the iTunes TOS, but chose not to do so.[8] In fact, the iTunes TOS evinces an intent *not* to arbitrate by providing that the "exclusive jurisdiction for any claim or dispute" resides in court, not arbitration. *See Hallwood*, 2010 WL 427454, at *2. Additionally, the invalidation provision in the Software Agreement, which refers to "a court of competent jurisdiction" further evinces an intent not to arbitrate. Apple should not be allowed to rewrite its own agreements in favor of AT&T's contract. "To allow [Apple] to assert the right to arbitrate under these circumstances would further denude the doctrine of equitable estoppel of its essence: equity." *Goldman*, 92 Cal. Rptr. 3d at 555.

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[7] Apple argues that the existence of other agreements between Plaintiffs and Apple is irrelevant. (Docket No. 235-1 at 16 n.7.) Apple, however, misstates the holdings in the two cases that it cites. In *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (5th Cir. 2000), the court mentions a separate contract between the two codefendants, but makes no mention of a separate contract between the nonsignatories and the parties to be estopped. The court in *NS Holdings LLC v. American International Group, Inc.*, No. 10-1132, 2010 WL 4718895 (C.D. Cal. Nov. 15, 2010), likewise makes no mention of separate contracts between the nonsignatories and the parties to be estopped.

[8] Apple may argue that it did not include an arbitration clause because it could not do so until after *Concepcion*. That argument is unpersuasive. First, many corporations, including AT&T, have arbitration clauses in their contracts that are applicable in California, and have repeatedly argued that they are valid and enforceable. One example is the *Concepcion* case itself. Simply put, Apple made a strategic choice not to include an arbitration clause. Second, the latest iPhone-related license, released in October 2011 after *Concepcion*, still does not contain an arbitration clause. Third, the argument is irrelevant—Apple's motivation for not having an arbitration clause cannot possibly have any bearing on the analysis.

Apple argues that the iTunes TOS is irrelevant, brazenly stating that the service is used only to purchase things like music and books. Yet since iPhone's inception, Apple has utilized the iTunes software interface to perform many housekeeping tasks necessary for iPhone's use, including updating the operating system. (*See* Ex. C (stating that "iTunes can update your [iPhone] device to the latest available iOS software," and explaining the step by step procedures)). In fact, when Apple finally made MMS available to its customers in late September 2009, all users were *required* to use iTunes to acquire the necessary software update that permitted MMS messages to be received, viewed, and sent on the iPhone. (Ex. D.) To claim that the iTunes contract is irrelevant to MMS functionality does not comport with reality.

III. If the Court Reaches the Question, Apple Does Not Meet Its Burden of Showing That This Constitutes One of the "Rare Circumstances" Where Equitable Estoppel May Apply.

Even if Apple's contracts permitted mandatory arbitration, and even if AT&T's WSA included Apple as a party that was permitted to arbitrate under the WSA, this Court should nevertheless find that Apple has failed to satisfy the narrow test for applying equitable estoppel. Apple has the burden of showing that equitable estoppel applies. *See Just Film, Inc. v. Merchant Servs., Inc.*, 2011 WL 3809908, at *6 (N.D. Cal. Aug. 29, 2011) (stating that "parties seeking to invoke estoppel, have the burden to show that it applies"); *Cal. Chiropractic Ass'n v. Am. Specialty Health Plans, Inc.*, No. D039238, 2003 WL 1870963, at *6 (Cal. Ct. App. Apr. 14, 2003). Under all potentially applicable iterations of the elements of equitable estoppel, Apple fails to meet this burden.

Additionally, the federal policy favoring arbitration does not apply to Apple's motion. "The question here is not whether a particular issue is arbitrable, but whether a particular party is bound by the arbitration agreement. Under these circumstances, the liberal federal policy

regarding the scope of arbitrable issues is inapposite." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006); *see Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002). Rather, "[o]ridinary contract principles determine who is bound." *Fleetwood*, 280 F.3d at 1073 (internal quotations omitted).

A. California Law Should Apply to the Issue of Equitable Estoppel, But Even If It Does Not, the Entire Body of Caselaw Establishes that Arbitration Should Not Be Compelled in This Case.

When deciding a motion to compel arbitration on the grounds of equitable estoppel, the United States Supreme Court has stated that a district court must look to the appropriate state's contract law to determine whether it should be granted. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Here, because Plaintiffs entered into two separate contracts with Apple in which they agreed that California law would apply to any claim or dispute between them, *see supra*, California contract law is the appropriate state's contract law to apply to Apple's motion to compel arbitration. *See Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058 (5th Cir. 1982) (stating that, in Louisiana, choice-of-law clauses in contracts are given effect unless there is law or strong public policy justifying the refusal to enforce the contract as written).

Prior to the U.S. Supreme Court's decision in *Carlisle*, the Fifth Circuit had directed that "the federal substantive law of arbitrability," not state contract law, applies to the question of "to what extent a non-signatory is bound by an arbitration provision contained in a contract." *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (internal quotations omitted). Since *Carlisle*, the Fifth Circuit has found that uncertainties continue to exist regarding whether state contract law or the federal substantive law of arbitrability should be applied. *See*,

e.g., *D.K. Joint Venture 1 v. Weyand*, 649 F.3d 310, 314 (5th Cir. 2011). Given this uncertainty, the Fifth Circuit has advised that, when deciding whether to compel arbitration on the grounds of equitable estoppel, a district court may first determine if a conflict exists between state law and federal law such that a choice of law analysis is necessary. *Id.* Should the Court find that both bodies of law lead to the same conclusion, then a choice of law analysis need not be undertaken. *Id.* Here, because both federal and California law lead to the same ultimate conclusion—that plaintiffs cannot be compelled to arbitrate their claims against Apple—this Court should deny Apple's motion.

California and federal courts both adhere to the general rule that "a nonsignatory to an agreement cannot be compelled to arbitrate." *Sweidan v. Fountain Valley Reg'l Hosp.*, No. B228392, 2011 WL 4639911, at *6 (Cal. Ct. App. Oct. 7, 2011); *see also Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002) (stating that "courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives"). The rationale behind this rule is simple—"one cannot be required to submit a dispute to arbitration unless one has agreed to do so." *Goldman*, 92 Cal. Rptr. 3d at 542; *see also Westmoreland*, 299 F.3d at 467.

Nevertheless, both California and federal law provide for exceptions to this general rule—one rare exception being equitable estoppel. *Weingarten Realty Investors v. Miller*, No. 11-20676, 2011 WL 5142183, at *5-6 (5th Cir. Nov. 1, 2011); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045-46 (9th Cir. 2009); *Sweidan*, 2001 WL 4639911, at *6. Federal courts apply an "intertwined-claims test" to determine whether to apply equitable estoppel. *Weingarten*, 2011 WL 5142183, at *5-6. California courts, on the other hand, are split as to the legal standard for applying equitable estoppel. Some apply federal decisional authority (i.e., the intertwined-claims test), while others apply the traditional common law requirements of

equitable estoppel. *Compare Sweidan*, 2011 WL 4639911, at *6, *with Cal. Chiropractic*, 2003 WL 1870963, at *5. Regardless of whether this Court applies the common law principles of equitable estoppel or the intertwined-claims test, the specific facts of this case mandates denial of Apple's motion.

B. Apple Fails to Meet the Common Law Test for Equitable Estoppel.

Several California courts have adhered to the common law test for equitable estoppel in determining whether to compel arbitration between a signatory and a nonsignatory. *See Coachmen Indus., Inc. v. Freightliner LLC*, No. C045709, 2005 WL 1714234, at *3-4 (Cal. Ct. App. July 25, 2005); *Cal. Chiropractic*, 2003 WL 1870963, at *5; *CD Listening Bar, Inc. v. Superior Court*, 2001 WL 1660049, at *5 (Cal. Ct. App. 2001); *see also Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 541 (Ill. App. Ct. June 22, 2004) ("A claim of equitable estoppel exists where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person."). These courts reason that equitable estoppel "is founded on concepts of equity and fair dealing," and whenever a party has, by his own statement or conduct, "intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he . . . is not, in any litigation arising out of such statement or conduct, permitted to contradict it." *Cal. Chiropractic*, 2003 WL 1870963, at *5 (internal quotations omitted); *see also Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir. 2000) ("The linchpin for equitable estoppel is equity-fairness."). Specifically, for equitable estoppel to apply

> [t]here must be (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts, (3) to a party ignorant, actually and permissibly, of the truth, (4) with the intent, actual or virtual, that the latter act upon it, and (5) the party must have been induced to act upon it.

Cal. Chiropractic, 2003 WL 1870963, at *5 (alteration in original) (internal quotations omitted).

A case with facts very similar to the one at present is *Ervin v. Nokia, Inc.* While *Ervin* was decided by an Illinois state court, it applied common law principles of "equitable estoppel," as does California. 812 N.E.2d at 541. In *Ervin*, a cell phone purchaser brought a putative class action against the cell phone manufacturer (Nokia) and the cell phone service provider (AT&T) for damages for the alleged manufacture and sale of a defective product. *Id.* at 536. Similar to the case at bar, the cell phone purchaser entered into a contract with AT&T for cell phone service. *Id.* at 536-37. The box of the cell phone contained an owner's manual which did not contain an arbitration clause. *Id.* at 537. Nokia moved to compel arbitration on the grounds of, inter alia, equitable estoppel. The court denied the motion, holding that Nokia could not compel arbitration based on the arbitration clause in AT&T's wireless service agreement because Nokia did not reasonably rely to its detriment upon the acts or representations of the purchaser regarding the arbitration clause and such reliance is a requirement of the common law doctrine of equitable estoppel. *Id.* at 541-43. To hold otherwise would deny the purchaser "access to the courts and force him to arbitrate his claim against Nokia, in spite of the fact that Nokia was not a party to [AT&T's wireless service agreement] that [the purchaser] entered into with AT&T." *Id.* at 543.

Here, Apple does not argue that it meets the five elements of equitable estoppel described above. Nor can it. There is no evidence that Plaintiffs represented or concealed any material fact with the intent that Apple act upon it. Further, it cannot be said that Apple was ignorant of the arbitration agreement in AT&T's WSA or Plaintiffs' claims. Simply put, the common law principles of estoppel do not permit Apple to invoke the arbitration clause in AT&T's WSA.

C. Even if the Court Does Not Apply the Common Law Test for Equitable Estoppel, Apple's Motion Still Fails Because It Cannot Show that Plaintiffs' Claims Are Intertwined with AT&T's WSA.

In determining whether to apply equitable estoppel, "the *sine qua non* . . . is that the claims the plaintiff asserts against the nonsignatory must be dependent upon, or founded in and *inextricably intertwined* with, the underlying contractual obligations of the agreement containing the arbitration clause." *Goldman*, 92 Cal. Rptr. 3d at 540 (emphasis added); *see Weingarten*, 2011 WL 5142183, at *6. Thus, the intertwined-claims test permits equitable estoppel "only if the plaintiffs' claims against the nonsignatory are dependent upon, or inextricably bound up with, *the obligations imposed by* the contract plaintiff has signed with the signatory defendant." *Goldman*, 92 Cal. Rptr. 3d at 550 (emphasis added). The rationale behind this is fairness. *Grigson*, 210 F.3d at 528 ("The linchpin for equitable estoppel is equity-fairness."). A signatory "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 the arbitration's applicability because the defendant is a non-signatory." *Id.* (emphasis added); *see also Goldman*, 92 Cal. Rptr. 3d at 542-43 (stating that equitable estoppel "precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity" (internal quotations omitted)).

Courts have found the intertwined-claims test met where plaintiffs have attempted to hold signatories liable pursuant to duties or obligations imposed by the agreements containing the arbitration clause.[9] *See Grigson*, 210 F.3d at 527-28 (finding estoppel to be appropriate under the facts of that particular case because plaintiffs were attempting "to hold the

[9] Apple recognizes this "imposition of duty" principle in its brief (*see* Docket No. 235-1 at 11) but it fails to direct the Court to allegations contained in Plaintiffs' complaints in which Plaintiffs alleged that Apple owed them a duty imposed by AT&T's WSA. Indeed, no such allegations exists. *See supra*.

nonsignatory liable pursuant to *duties imposed by the agreement*, which contain[ed] an arbitration provision," while at the same time trying to avoid the arbitration clause contained in the same contract (emphasis added)); *see also Bank One of Ariz., N.A. v. Wilton Hurst*, No. 3:00-cv-2254-x, 2001 WL 276891, at *2 (N.D. Tex. March 19, 2001) (applying estoppel where plaintiff attempted to hold nonsignatory general partner liable pursuant to duties imposed by the loan agreement containing arbitration clause); *Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 840-41 (N.D. Cal. 2007) (applying estoppel where plaintiff attempted to use the written agreement containing the arbitration clause as a basis for his action against nonsignatory defendants). In other words, the plaintiffs were trying to "have it both ways" and fairness dictated that the court apply equitable estoppel. *See Grigson*, 210 F.3d at 528.

Conversely, in denying motions to compel arbitration, courts have made clear that equitable estoppel applies only in rare circumstances where a signatory is bringing suit arising out of *duties* directly imposed by the underlying agreement containing the arbitration clause. *See, e.g.*, *Weingarten*, 2011 WL 5142183, at *5-6 (denying motion to compel arbitration where nonsignatory's duty arose from a separate agreement which did not contain an arbitration provision); *Corporate Am. Credit Union v. Herbst*, 397 Fed. App'x 540, 542 (11th Cir. 2010) (denying motion to compel arbitration where plaintiffs' claims of negligence or fraudulent misrepresentations did not arise from the terms of the contract containing the arbitration provision); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 360-62 (5th Cir. 2003)[10]

[10] Notably, the Fifth Circuit panel deciding *Bridas* further placed the *Grigson* opinion into question, observing, "*Grigson*, and the 11th Circuit decision that it relied upon, have been referred to as misguided deviations from traditional estoppel theories." *Bridas*, 345 F.3d at 361 n.12. It specifically took heed of language in the *Grigson* dissent, which stated, "[N]early anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel." *Id.* (internal quotations omitted). Thus, *Grigson* should not be hastily applied beyond its narrow facts.

(denying signatory's motion to compel arbitration against a nonsignatory, narrowing *Grigson*, where the nonsignatory did not sign a contract containing an arbitration provision nor ever sued the signatory on the agreement containing the arbitration provision); *Westmoreland*, 299 F.3d at 467 (denying motion to compel arbitration where signatory's suit did not seek to enforce any duty created by the agreement containing the arbitration clause); *Goldman*, 92 Cal. Rptr. 3d at 540-41 (finding that signatories' claims against nonsignatories were unrelated to any obligations in the operating agreements containing the arbitration clause).

Even where the signatory relies, to some extent, upon the contract containing the arbitration provision, courts have denied a nonsignatory's motion to compel. For example, in *Weingarten Realty Investors v. Miller*, two companies, Weingarten Realty Investors ("WRI") and Miller Sheriden, LLC ("MS"), created a joint venture ("JV") and WRI agreed to loan the joint venture $75 million under the "Loan Agreement" entered into between WRI and the JV. *Weingarten*, 2011 WL 5142183, at *1. The Loan Agreement was signed both by WRI and by the JV, and contained an arbitration provision which provided that any dispute "arising out of, in connection with, or relating to the Note or any of the other Loan Documents" would be settled by arbitration. *Id.*

Defendant, Steven Miller, *did not* sign the Loan Agreement that contained the arbitration clause. *Id.* Miller *did* personally sign a "Limited Guarantee" for the loan, which was executed contemporaneously with the Loan Agreement. *Id.* The Limited Guarantee was also signed by Miller Sheriden, LLC. *Id.* The Limited Guarantee did not contain an arbitration clause and the Loan Agreement did not identify the Limited Guarantee as a Loan Document.[11] *Id.* Therefore,

[11] The Loan Agreement was subsequently amended twice and in both amendments the definition of "Loan Documents" included the Limited Guarantee. *Weingarten*, 2011 WL 5142183, at *1. However, the Fifth Circuit determined, "Although the two amendments to the

defendant Miller was a nonsignatory to any arbitration clause. To summarize:

Loan Agreement = Arbitration Clause	Limited Guarantee = No Arbitration Clause
Signatories: WRI and JV	Signatories: Miller and MS

The JV subsequently did not pay on its note, so WRI sought payments from Miller under the terms of the Limited Guarantee. *Id.* After suit was filed against Miller for payment pursuant to the Limited Guarantee, Miller sought arbitration on the grounds of, *inter alia,* equitable estoppel. *Id.* Nonsignatory Miller contended that WRI's claims against it depended upon the Loan Agreement, because Miller's obligation to pay, as guarantor, was automatically triggered when the joint venture did not perform under the terms of the Loan Agreement. *Id.* at *6. Thus, Miller argued that liability under the Limited Guarantee was determined solely by whether and when there was a breach of the Loan Agreement, and thus equitable estoppel needed to be applied to enforce the arbitration clause contained in the Loan Agreement. *Id.*

The district court rejected Miller's argument, finding that Miller's Limited Guarantee was not covered by the arbitration provision in the Loan Agreement. (Ex. E.) The Fifth Circuit affirmed the district court's denial, rejecting the nonsignatory's argument that equitable estoppel applied, even though plaintiff WRI's cause of action directly arose, and was entirely dependent upon, the joint venture breaching Loan Agreement. *Weingarten*, 2011 WL 5142183, at *6. The Fifth Circuit held that, although proving a breach of the Loan Agreement was necessary to establish nonsignatory Miller's liability under the Limited Guarantee, that was not enough for the Fifth Circuit to find reliance upon the terms of the Loan Agreement so as to apply equitable

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Loan Agreement describe 'Loan Documents' as including the Limited Guarantee, those recitals are not strictly part of the contract [and] cannot extend contractual stipulations . . . . Therefore, even though the recitals of the subsequent amendments refer to the Limited Guarantee as a Loan Document, it cannot extend the arbitration clause's coverage in the original Loan Agreement." *Id.* at *5 (internal quotations omitted). Thus, the Limited Guarantee could not fall within the scope of the arbitration clause agreed to.

estoppel. *Id.* ("[T]he district court did not abuse its discretion in concluding that the Limited Guarantee is not so intertwined with and dependent on the distribution agreement that arbitration should be compelled under the exceptional principle of equitable estoppel.") Therefore, the mere fact that the nonsignatory's liability depended on proving that a contract containing an arbitration clause had been breached was not enough to show that the claim against the nonsignatory was so intertwined with and dependent on the arbitration-clause-containing contract as to trigger equitable estoppel.

Similarly, in *Ellen v. A.C. Shultes of Maryland, Inc.*, 615 S.E.2d 729 (N.C. Ct. App. 2005), the North Carolina Court of Appeals affirmed the trial court's denial of a motion to compel arbitration. The defendant, a general contractor, signed an agreement with a subcontractor that contained an arbitration clause. *Id.* at 730. Plaintiffs were shareholders in the subcontractor but were not signatories to the agreement. *Id.* Plaintiffs then filed a complaint against the general contractor, alleging unfair and deceptive trade practices and tortious interference with prospective business advantages. *Id.* Invoking the arbitration clause in its agreement with the subcontractor, the general contractor sought to compel plaintiffs to arbitrate their claims based on equitable estoppel. *See id.* at 732. The court recognized that the agreement "provides part of the factual foundation" for plaintiffs' complaint. *Id.* (internal quotations omitted). Nevertheless, it refused to force plaintiffs to arbitrate their claims because the general contractor's "liability will be determined by its duties under North Carolina statutory and common law, not by its duties under the [agreement]." *Id.* at 733; *see also Billieson v. City of New Orleans*, 863 So. 2d 557, 560 (La. Ct. App. 2003) (denying motion to compel arbitration because plaintiffs' suit against nonsignatory defendants sounded in tort, not contract, and plaintiffs were only making reference to the underlying agreement containing the arbitration

provision to assert tort liability not to enforce the contract itself); *Simmons Housing, Inc. v. Shelton ex rel. Shelton*, 36 So. 3d 1283, 1288 (Miss. 2010) (denying motion to compel where actions sounded in tort); *Netco, Inc. v. Dunn*, 194 S.W.3d 353, 361 (Mo. 2006) (noting that "estoppel theory in this context is most often applied in cases where a plaintiff alleges that a defendant is liable under the terms of a contract" and denying motion to compel arbitration where charge being alleged against nonsignatories was conspiracy to misappropriate plaintiffs' business, not failure to perform pursuant to the terms of the agreement containing the arbitration clause); *I Sports v. IMG Worldwide, Inc.*, 813 N.E.2d 4, 9 (Oh. Ct. App. 2004) (denying nonsignatories' motion to compel arbitration finding that the plaintiffs' need to establish breach of the underlying agreement containing the arbitration clause did not mean that plaintiff must rely upon the terms of the agreement to assert their claims of defamation, interference with contractual relations, unfair and deceptive trade practices, and unauthorized practices of law against nonsignatories).

As discussed above, Plaintiffs here claim that Apple engaged in deceptive conduct in one of three ways: (1) by affirmatively misrepresenting the availability of MMS on the iPhone 3GS; (2) by failing to disclose that AT&T would be charging them for MMS but not providing it; and (3) by failing to disclose that AT&T's data plan required MMS but they would not receive it. In asserting these three claims, Plaintiffs have not alleged a duty on the part of Apple imposed by AT&T's WSA nor have they alleged reliance upon AT&T's WSA. Rather, Apple's duty to disclose was imposed by the consumer protection statutes upon which Plaintiffs assert a cause of action. As in *Weingarten Realty Investors*, the mere "fact" of a breach of contract *triggered* a duty arising from a separate agreement or legal obligation does not make that contract so "intertwined" with the nonsignatory as to allow equitable estoppel to apply.

First, Plaintiffs' claims of affirmative misrepresentation by Apple do not reference AT&T or the WSA. The duty allegedly owed by Apple giving rise to Plaintiffs' affirmative misrepresentation claims against Apple is imposed by law. *See, e.g.*, *Carbine* compl. Counts I, II, VIII, and IX (duties imposed by law); *id.* Counts IV, V, and VI (duties imposed by contract between Plaintiffs and Apple); *id.* Count VII (duty imposed by principles of equity).

Second, Plaintiffs' claims of Apple's failure to disclose that they would be charged for MMS, again, do not refer to the WSA. Nor do they allege that Apple owed or breached a duty under the WSA. Rather, Plaintiffs allege that Apple owed them a duty imposed by law to disclose that AT&T would be charging for MMS but not providing it, and that Apple violated that duty by failing to disclose the material information. *See, e.g.*, *id.* Counts I, II, and VIII. In other words, Plaintiffs' claims are based upon Apple's knowledge of certain material facts, which the law requires them to disclose and which Apple affirmatively and independently chose not to disclose. *Id.*

Third, Plaintiffs' claims of Apple's failure to disclose to iPhone customers that the AT&T data plan required MMS service but they would not receive it are based upon legal duties imposed on Apple by law, not contract, and most certainly not AT&T's WSA. *See, e.g.*, *id.* Counts I, II, and VIII. While this particular claim does refer to the WSA so as to provide *factual* background, the legal basis of Plaintiffs' claim against Apple does not depend on any obligation imposed on Apple by the terms of the WSA. *See Weingarten*, 2011 WL 5142183, at *6 (merely using underlying agreement containing arbitration provision and signatory's breach thereof to trigger collateral legal duty was not enough for nonsignatory to compel arbitration); *Weisblatt v. Apple, Inc.*, No. C-10-02553, 2010 WL 4071147, at *4 (N.D. Cal. Oct. 18, 2010); *Goldman*, 92 Cal. Rptr. 3d at 541 (finding that signatory "must rely on the terms" of the agreement with an

arbitration clause and that "merely mak[ing] reference to [it] . . . is not enough" (first alteration in original) (internal quotations omitted)). Rather, this claim refers to the WSA only to inform the Court of the material information which was within Apple's possession and which Apple chose not to disclose to Plaintiffs in violation of their duties imposed by law.

In short, not one of Plaintiffs' causes of action against Apple arise out of any duty imposed on Apple by AT&T's WSA. Nor do Plaintiffs' complaints allege that the duty owed to them by Apple arose out of the WSA. In fact, Plaintiffs specifically do not allege a duty owed to them by Apple under AT&T's WSA. *See Carbine* compl. Count III (cause of action against AT&T *only* for breach of obligations imposed by the WSA). Accordingly, because Plaintiffs are not seeking to hold Apple liable pursuant to duties imposed by AT&T's WSA, the underlying principle of fairness, which supports the application of equitable estoppel only in rare circumstances, does not apply. *See Westmoreland*, 299 F.3d at 465 (stating that arbitration agreement can be invoked by nonsignatory only in "rare circumstances"). As such, the Court should deny Apple's motion.

D. Plaintiffs Have Not Raised Allegations of Substantially Interdependent and Concerted Misconduct by Apple and AT&T.

Apple misstates the bases upon which this Court may apply equitable estoppel. It asserts that, in addition to showing that Plaintiffs' claims rely on or are inextricably bound up with the obligations imposed by the WSA, equitable estoppel also applies upon a showing of interdependent and concerted misconduct by Apple and AT&T. According to Apple, the latter constitutes an "independently sufficient bas[i]s" for estoppel. (Docket No. 235-1 at 9.) However, allegations of "interdependent and concerted misconduct by signatories and nonsignatories, *standing alone*, are not enough: the allegations of interdependent misconduct

must be founded in or intimately connected with the obligations of the underlying agreement." *Goldman*, 92 Cal. Rptr. 3d at 541; *see also Weingarten*, 2011 WL 5142183, at *6.

Nevertheless, even if allegations of interdependent and concerted misconduct are sufficient, Apple has not pointed to any such allegations in Plaintiffs' complaints. Rather, Apple has misconstrued the contents of Plaintiffs' allegations. A clear reading of each complaint, however, reveals that, despite Apple and AT&T having an exclusive relationship with regard to iPhone service, not a single Plaintiff has alleged that they coordinated their conduct regarding MMS misrepresentations or non-disclosures. In fact, Apple was likely frustrated with the fact that AT&T would not provide MMS services for iPhone. Indeed, Plaintiffs' claims against Apple are independent of their claims against AT&T and can be maintained "without regard to the intent, knowledge or liability of [AT&T]." *See Weisblatt*, 2010 WL 4071147, at *4 (denying Apple's motion to stay plaintiffs' actions against Apple pending *Concepcion* where plaintiffs' claims against Apple, while related to AT&T's iPad data plans, centered around specific misrepresentations made by each defendant, "each of which [was] independently actionable against the party that made them, without regard to the intent, knowledge or liability of the other [d]efendant").

Plaintiffs have alleged separate causes of action against Apple based upon Apple's deceptive behavior in misrepresenting and failing to disclose material information to Plaintiffs. Not one of Plaintiffs' allegations specifically state that Apple and AT&T jointly, interdependently, or conspiratorially engaged in these activities. In fact, throughout their complaints, Plaintiffs have specifically delineated which activities were engaged in by Apple and which were engaged in by AT&T, examples of which are as follows:

- AT&T made a decision to let all of its customers, except iPhone customers, have access to its network to text pictures. AT&T promoted and sold unlimited texting

plans to all it customers, called "Messaging Unlimited" which gave its customers the ability to send unlimited messages to any wireless phone in the United States for $19.99 per month. Promoting its Messaging Unlimited MMS capabilities, AT&T advertised and represented to consumers, including Plaintiff, that its Messaging Unlimited plan **"included text, picture, video and IM."** AT&T also offered unlimited "Family Plans" for $30.00 per month. While AT&T allowed customers other than iPhone users to text pictures, AT&T intentionally barred iPhone users from having the same ability given its network limitations. However, AT&T continued to charge the consumers for that service and represented to the iPhone users that the service included pictures. *See, e.g.*, *Carbine* compl. ¶ 7.

- For Apple's part, it covered up the "problem" with an intentionally misleading advertising campaign. Specifically, Apple never disclosed to consumers that they had to pay for the picture messaging under the unlimited plans from their exclusive provider, AT&T, even though they would not have that service. Moreover, Apple made affirmative representations that such a service was available on the iPhone, including large in-store videos showing people texting pictures with small, fine print disclosures about when the service was available, intentionally designed so that consumers would not see or understand them. *See, e.g., id.* ¶ 8.

- Defendants each engaged in conduct that is likely to deceive and has deceived the public. *See, e.g., id.* ¶ 12.

- Defendants Apple and AT&T each promoted and advertised the iPhone and AT&T's messaging plans. *See, e.g., id.* ¶ 22.

- In the spring of 2009, Apple and AT&T each initiated an advertising campaign to sell its older 3G models in preparation for the launch of 3GS . . . On March 17, 2009, Apple issued a press release relating to the iPhone 3GS, which stated in part, "The new iPhone OS 3.0 software will be available to iPhone . . . users this summer with over 100 new features including . . . MMS to send and receive photos . . . ." That same press release states that "MMS available only on the iPhone 3G" which was false and misleading. *See, e.g., id.* ¶ 37.

- During the class period, through advertising campaigns, Apple and AT&T each misrepresented and/or concealed, suppressed, or omitted material facts to and from customers about the fact that MMS was not an available feature on the iPhone 3G. Further, iPhone users had to pay for MMS if they wanted unlimited AT&T messaging plans. *See, e.g., id.* ¶ 59.

As demonstrated from a clear reading of each complaint, it is Plaintiffs' position that the misconduct engaged in by Apple was done by Apple on its own with no help from AT&T and it

is Apple's knowledge of AT&T's behavior, separate and apart from AT&T's behavior itself, which serves as the basis for Plaintiffs' fraudulent concealment claims against Apple. *Cf. Brown v. Gen. Steel Domestic Sales, LLC*, No. 08-00779, 2008 WL 2128057, at *8-9 (C.D. Cal May 19, 2008) (granting motion to compel arbitration where allegations were made against all defendants in general and plaintiffs had not differentiated between or individualized the activity engaged in by each defendant). As such, the Court should deny Apple's motion.

IV. The Court Must Balance the Equities of Compelling Arbitration against Nonconsensually Depriving Plaintiffs of Their Day in Court.

As a preliminary matter, FAA preemption only applies to express written contracts signed by both Parties, not to nonsignatories seeking an equitable entre into arbitration. The purpose of the FAA is to compel courts to honor contractual agreements to arbitrate, even in the face of state efforts to restrict the enforceability of arbitration agreements. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987) ("The Act was intended to reverse centuries of judicial hostility to arbitration agreements, by placing arbitration agreements upon the same footing as other contracts." (internal quotations omitted)). The FAA is not self-executing, as it does not define or specify the controversies that are subject to arbitration, does not prescribe any mandatory procedures for arbitration, nor does it confer jurisdiction on any particular court to enforce its purpose. Instead, the groundwork for arbitration must be found in the agreement of the parties, and by virtue of the express language of the FAA, the agreement to arbitrate must be in writing—that is, the FAA only applies as to express written contractual agreements. *Westmoreland*, 299 F.3d at 465 ("An 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. It is then not surprising that to be enforceable, an arbitration clause must be in writing and signed

by the party invoking it."); *Rojas v. TK Comms., Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (observing that the "FAA requires that the arbitration clause being enforced be in writing"); *see also* 9 U.S.C. § 2 ("A *written* provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or *an agreement in writing* to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal . . . ." (emphasis added)); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) ("We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'"); *Kaltwasser v. Cingular Wireless LLC*, 543 F. Supp. 2d 1124, 1127 (N.D. Cal. 2008) (The FAA "applies to all written contracts involving interstate or foreign commerce.").

FAA preemption jurisprudence is similarly limited in its scope. The preemptive language is found in Section 2 of the FAA, which "makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) (quoting 9 U.S.C. § 2). "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1988). Instead, FAA preemption rests on the basis of "conflict" preemption. A state's arbitration statute may "be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the

accomplishment and execution of the full purpose and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Since the FAA only applies to express written agreements to arbitrate, FAA preemption therefore can only apply to state laws affecting express written agreements to arbitrate. Apple cites the recent FAA preemption case of *Concepcion* throughout its brief, but *Concepcion* can only have an effect on the enforceability of a written arbitration agreement, such as the one signed between Plaintiffs and AT&T. *Concepcion* is actually a narrow case, as Apple points out in its simple statement of the holding in its brief. (*See* Docket No. 235-1 at 8 ("In *Concepcion*, the Supreme Court held that the Federal Arbitration Act preempts state rules prohibiting class action waivers in consumer agreements."). Even after *Concepcion*, Apple's entre into arbitration in this case is still only founded on the basis of equitable principles, which the FAA does not change, and therefore those principles are clearly not affected by the Supreme Court's ruling in *Concepcion*.[12] Since Apple's entre into arbitration is based on equity, the Court should consider the equitable factors involved in such an action to determine whether Apple can equitably arbitrate the claims against it as a nonsignatory third party to the AT&T agreement.

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[12] *See also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774-75 (2010) ("We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement." (emphasis added)); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) ("[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (An arbitrator "has no general charter to administer justice for a community which transcends the parties." (internal quotations omitted)); *accord First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." (emphasis added)). It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties. *Volt Info.*, 489 U.S. at 479.

On one hand, Apple is seeking to equitably compel arbitration when they are not a signatory to the arbitration agreement. As discussed earlier in this brief, such non-contractual arbitration should only be allowed in rare circumstances. Moreover, Apple has a separate agreement with Plaintiffs that does not include an arbitration clause. To at the same time allow Apple to use the equitable doctrine of estoppel against the Plaintiffs flies in the face of basic notions of fairness. *Goldman v. KPMG LLP*, 92 Cal. Rptr. 3d 534, 555 (Cal. Ct. App. 2009) ("The existence of [a separate agreement between the nonsignatory and the party to be estopped] containing no arbitration clauses makes it all the more apparent that the application of an equitable doctrine to require arbitration between parties who have not agreed to arbitrate is entirely inappropriate in this case.").

On top of this, the Court must weigh the fact that arbitration with Apple will deprive class members, without their consent, of their right to have their claims against Apple heard in a court of law. *See, e.g., McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir.1994) ("Subject matter jurisdiction over an action or series of claims can be conceptualized as conferring a personal right on the parties to have that action, or those claims, adjudicated in a judicial forum.); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.1984) (en banc) (recognizing that the "federal litigant has a personal right, subject to exceptions in certain classes of cases, to demand Article III adjudication of a civil suit"); *accord Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). Though a person may, by contract, waive his or her right to adjudication, *see* 9 U.S.C. § 2, there can be no waiver in the absence of an agreement signifying an assent. To allow Apple to enter arbitration on this nonconsensual basis is indeed inequitable and against the basic notions of fairness upon which the American legal system rests.

V. Because the Claims Against Apple Are Independent and Distinct from the Claims Against AT&T, and Because This Court Should Not Speculate That Someone Might Arbitrate an Individual Claim, This Court Should Not Stay the Case Against Apple Pending Arbitration with AT&T.

For the same reasons that the Court should not compel Plaintiffs to arbitrate their claims against Apple, the Court should not stay the present case against Apple.[13] In the context of granting a discretionary stay pending arbitration in favor of a nonsignatory to an arbitration agreement, the Fifth Circuit has stated that "the moving party bears a *heavy burden* to show why a stay should be granted absent statutory authorization, and a court should tailor its stay so as not to prejudice other litigants unduly." *Costal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 204 n.6 (5th Cir.1985) (emphasis added). Thus, this Court should consider the potential prejudice to other litigants if a stay is granted and employ the

> exercise of judgment, which must weigh competing interests and maintain an even balance. . . . True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.

Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co., 339 F.2d 440, 442 (2d Cir. 1964) (citing *Landis v. North Am. Co.*, 299 U.S. 248, 254-255, (1936)). Finally, the granting of such a stay should not be a quotidian exercise, as "[t]he words 'pending arbitration' can do no more to close the judicial doors than the words 'open sesame' can do the reverse." *Costal (Bermuda) Ltd.*, 761 F.2d at 203-04 & n.6.

As has been detailed throughout this memorandum, Plaintiffs' claims against Apple are separate and distinct from the claims they have raised against AT&T. Given this, allowing the claims against Apple would not be unduly prejudicial to Apple. In fact, the court in *Weisblatt v.*

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[13] Apple implicitly recognizes that as a nonsignatory to AT&T's WSA, it is not entitled to a mandatory stay under Section 3 of the Federal Arbitration Act, codified at 9 U.S.C. § 3. *See Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 541 (5th Cir. 2001).

Apple, Inc., No. C-10-02553, 2010 WL 4071147 (N.D. Cal. Oct. 18, 2010), concluded that, although "plaintiffs' claims are related to [AT&T's] iPad data plans," the plaintiffs could proceed against Apple while claims with respect to AT&T would be stayed "[b]ecause plaintiffs' claims against Apple are not subject to the [AT&T] arbitration agreement and appear to be independently actionable." *Id.* at *4. Similarly, as has been discussed throughout this memorandum, the claims Plaintiffs raise against Apple are independently actionable and should not be stayed even though claims against AT&T may proceed in arbitration.

Furthermore, Plaintiffs have dismissed their claims against AT&T. Although Plaintiffs will not refile their claims against AT&T in court, there is no requirement that they actually pursue their cases individually in arbitration, either. Nor is there a probability that they will, and at the present time Plaintiffs are not aware of anyone planning to litigate in two forums. Courts have recognized that in the absence of class-based proceedings, individual litigation will as a practical matter not be pursued over small claims due to the time and effort needed to recover a few thousand dollars. *See Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Cal. Ct. App. 2004) (noting that the costs of litigation may involve travel expenses and time off from work to pursue the case, and the value of any ultimate recovery may be further reduced by legal expenses). As the Seventh Circuit recognized, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2007) (Posner, J.).

Even if a consumer were to pursue individual arbitration against AT&T, it makes little sense to put the claims of millions of consumers on hold while a scant few arbitrate separate and independent claims against a different party. This would place a tremendous burden on those not arbitrating at all—a key factor in this Court's analysis.

As to the named Plaintiffs, granting a stay to Apple in the present case will greatly prejudice Plaintiffs with additional delay, particularly where Plaintiffs have already been waiting over 18 months to litigate their claims against Apple in court, as contemplated by the express agreement between them. Indeed, aside from arguments that it is entitled to benefit from AT&T's arbitration agreement, Apple provides the Court with no clear case of hardship or inequity in being required to go forward in the present forum should the Court determine that it is not entitled to enforce AT&T's arbitration clause against Plaintiffs. Absent such a showing, Apple has not met its heavy burden in justifying a stay, and the Court should deny its request.

The cases cited by Apple in support of its request for a stay are inapposite. For example in *Subway Equip. Leasing Corp. v. Forte,* 169 F.3d 324, 329 (5th Cir. 1999), the court held that claims against a franchisor's affiliates should have been stayed pending arbitration proceedings against the franchisor even though the affiliates themselves had no right to arbitration because the claims brought by the franchisees were based entirely on the franchisees' rights under the very same contract that required arbitration. Also cited by Apple is *Citgo Petroleum Corp. v. M/T Bow Fighter,* No. H-07-2950, 2009 WL 960080 (S.D. Tex. Apr. 7, 2009), which involved various parties suing over the late delivery of certain cargo by ship. The *Citgo* court stayed claims of a nonsignatory to an underlying bill of lading and charter party agreement containing an arbitration clause because of the overlapping issues to be resolved in both arbitration and litigation. The court found that issues such as "the nature of the various agreements between the parties, the existence and scope of duties potentially owed by the defendants, and the mechanical condition of the Bow Fighter" would need to be resolved in both arbitration and litigation and thus allowing cases to move forward in both forums would be unduly prejudicial. *Id.* at *6. In *Sam Reisfeld & Son Imp. Co. v. S. A. Eteco,* 530 F.2d 679, 681 (5th Cir. 1976), the court found it

appropriate to stay claims asserted against a parent corporation where those claims were "inherently inseparable" from the claims against the subsidiary that had successfully moved to compel arbitration. In so finding, the court noted that "[i]f the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Id.* Notably, however, the court allowed antitrust claims to proceed in litigation despite ordering arbitration of the other claims on the basis that antitrust claims are generally not arbitrable. *Id.* Finally, in *Wolf v. Langemeier*, No. 2:09-cv-03086, 2010 WL 3341823, at *8 (E.D. Cal. Aug. 24, 2010), the court stayed claims of certain plaintiffs where it appeared likely that those plaintiffs had signed the same agreement containing an arbitration clause as the other plaintiffs in the action whose claims the court compelled to arbitration. None of these cases are applicable to the present case where Plaintiffs' claims against Apple are separate and distinct from those Plaintiffs raise against AT&T. Likewise, the cases cited by Apple are distinguishable from the present case in that there are no allegations and no evidence of a relationship between Apple and AT&T such as between a parent and subsidiary corporation or an agent and principal.

Given Apple's failure to meet its heavy burden to justify a stay, the Court should deny Apple's request and allow Plaintiffs to move forward with litigation against it. Allowing Plaintiffs to litigate against Apple will avoid undue and unnecessary prejudice to Plaintiffs by forcing Plaintiffs—and the constituent class members—to wait an indeterminate period of time to resolve their independent claims against Apple.

CONCLUSION

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

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 21st day of November, 2011.

/s/Scott R. Bickford
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