**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"**<br>**JUDGE BARBIER** |
| ***All Actions*** | **MAGISTRATE JUDGE WILKINSON** |

# REPLY IN SUPPORT OF DEFENDANT APPLE INC.'S MOTION TO COMPEL ARBITRATION

Dockets.Justia.com

## TABLE OF CONTENTS

**Page**


I. INTRODUCTION ........ 1

II. ATTM'S WSA IS CRITICAL TO PLAINTIFFS' CLAIMS AGAINST APPLE ........ 2

A. Plaintiffs' Three "Theories" Establish that ATTM and Its WSA Are at the Core of This Dispute ........ 2

B. Plaintiffs' Belated Dismissal of ATTM Is Cosmetic Gamesmanship ........ 5

III. THE ITUNES AND SOFTWARE LICENSE AGREEMENTS PROVIDE NO BASIS FOR AVOIDING ARBITRATION ........ 6

IV. EQUITABLE ESTOPPEL MANDATES ARBITRATION AGAINST APPLE ........ 7

A. Equitable Estoppel Principles Mandate Arbitration of Plaintiffs' Claims ........ 7

B. Plaintiffs' Efforts to Avoid Equitable Estoppel Are Meritless ........ 10

V. APPLE HAS NOT WAIVED ITS RIGHT TO ARBITRATION ........ 12

A. Plaintiffs Ignore Relevant Authority After *Concepcion* Rejecting Waiver ........ 12

B. Plaintiffs Have Not Shown and Cannot Show Prejudice ........ 13

VI. CONCLUSION ........ 15

## I. INTRODUCTION

Plaintiffs have insisted for nearly two years that their claims are primarily predicated on the contents of their Wireless Service Agreement ("WSA") with AT&T Mobility ("ATTM"). Plaintiffs' recent effort to avoid arbitration following *Concepcion*, by dropping ATTM from the case, is unavailing. Plaintiffs have not amended their complaints, which continue to rest squarely on ATTM's alleged obligations under the WSA, the very contract requiring that plaintiffs' claims be arbitrated. Equitable estoppel precludes plaintiffs, signatories to the WSA, from having it both ways: they may not rely on the WSA to state claims against Apple while seeking to evade the arbitration it mandates. Moreover, as set forth in Apple's separate motion, the present action cannot proceed without ATTM, and plaintiffs' claims against both ATTM and Apple must be arbitrated.

The United States District Court for the Northern District of California has already rejected the same tactic by the plaintiffs in a case involving the same two defendants (Apple and ATTM) and the same contract. In *In re Apple & AT&TM Antitrust Litig.* ("Antitrust Litigation"), the plaintiffs, like plaintiffs here, recast their claims after *Concepcion* and argued that they were not relying on the WSA. Judge Ware granted Apple's motion to compel arbitration on equitable estoppel grounds, noting that "[p]laintiffs themselves have contended throughout this litigation that their . . . claims against . . . ATTM and . . . Apple arise from their respective ATTM service contracts." *Antitrust Litigation*, No. C 07-05152 JW, 2011 U.S. Dist. LEXIS 138539, at *26 (N.D. Cal. Dec. 1, 2011).[1] The same is true here.

Similarly, in *In re Apple iPhone 3G Prod. Liab. Litig.* ("iPhone 3G MDL"), the plaintiffs purported to dismiss ATTM and to delete references to ATTM in their complaint in an effort to avoid *Concepcion*. On December 1, 2011, Judge Ware rejected this strategy, ruling that the plaintiffs' "cosmetic modifications" did not "alter[] the gravamen of their allegations" regarding

---

[1] A true and correct copy of Judge Ware's December 1, 2011 Order in the Antitrust Litigation is attached as Exhibit A to the Declaration of Penelope A. Preovolos ("Preovolos Decl."), filed concurrently herewith.

iPhone 3G functionality on ATTM's network. *iPhone 3G MDL*, MDL No. C 09-02045 JW, 2011 U.S. Dist. LEXIS 138532, at *13 (N.D. Cal. Dec. 1, 2011).[2] Judge Ware dismissed the complaint for failure to join ATTM, ruling that the plaintiffs must replead to join ATTM if they wish to pursue their claims. *Id.* Here, plaintiffs' dismissal of ATTM has not changed the nature of their claims. As in the litigation before Judge Ware, this case cannot proceed without ATTM and this case must be pursued, if at all, in arbitration.

Plaintiffs' arguments to the contrary are specious. Plaintiffs first argue that Apple is not an "authorized party" to the WSA, but, as Judge Ware held in the Antitrust Litigation, that is irrelevant. The claims against Apple must be arbitrated based on the doctrine of equitable estoppel, not on the terms of the WSA.

Second, plaintiffs advance the extraordinarily misleading argument that Apple itself chose to have claims between iPhone customers and itself litigated in court rather than arbitrated. Plaintiffs' supposed evidence for this is the Terms and Conditions for Apple's *iTunes Store* (which do not contain an arbitration provision). Like the plaintiffs in the Antitrust Litigation, plaintiffs here ignore the fact that the iTunes Store Terms and Conditions ("iTunes T&C") cover iTunes Store service, not the MMS services that are at issue in this case.

Finally, plaintiffs argue that Apple waived its right to seek arbitration, but ignore numerous cases (including the Antitrust Litigation) rejecting exactly the same waiver argument after *Concepcion*.

## II. ATTM'S WSA IS CRITICAL TO PLAINTIFFS' CLAIMS AGAINST APPLE

### A. Plaintiffs' Three "Theories" Establish that ATTM and Its WSA Are at the Core of This Dispute

To avoid arbitration, plaintiffs assert that the alleged misconduct by Apple is "separate [from claims against ATTM], divisible, and independently actionable," and that their "theories" of liability against Apple do not allege "any obligation . . . imposed . . . by [the WSA]." (Opp'n

---

[2] A true and correct copy of Judge Ware's December 1, 2011 Order in the iPhone 3G MDL is attached as Exhibit B to the Preovolos Declaration.

at 2) These assertions are false. They are flatly contradicted by the allegations in plaintiffs' 23 underlying complaints (*see, e.g.*, *Carbine* FAC ¶ 2, 7-9, 51, 53-59, 76, 93, 97) and by dozens of earlier representations plaintiffs made to the Court. (Mot. at 3-6) "Plaintiffs' primary claims for relief" relate to "Apple['s] and AT&T['s] fail[ure] to disclose that AT&T would be *obligated* by contract to provide messaging services to iPhone users," "Apple['s] and AT&T['s] fail[ure] to inform that AT&T would actually *charge* iPhone users purchasing a messaging plan for video and picture messaging services," and Apple's "failure to inform its 3GS customers that its exclusive partner AT&T would be obligated to provide picture and video messaging and would charge for it." (*See* Dkt. No. 204 at 9 (italics in original)) Plaintiffs' claims against Apple are not "independently actionable"; rather, they are entirely dependent on ATTM and the WSA.

Plaintiffs cite three "theories" of liability, and contend that they are unrelated to ATTM and the WSA. But these are the same three theories that plaintiffs have urged since the start of the case. Now, however, faced with the reality that claims intertwined with and dependent upon their contract with ATTM are subject to arbitration, plaintiffs conspicuously omit direct references to ATTM's WSA.

Plaintiffs' three theories depend on an interpretation of the terms of the WSA and on rights and obligations under the WSA. Plaintiffs' theory that "Apple failed to disclose that AT&T's data plan required MMS but that service would not be provided to Plaintiffs" necessarily requires that this Court interpret the terms and obligations of the WSA. Plaintiffs contend that they "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." (Opp'n at 4) Plaintiffs miss the point. The merits of this theory require determination of an arbitrable issue: whether "AT&T's service agreement expressly included the obligation of AT&T to provide MMS" and whether ATTM breached *its* duties and obligation to plaintiffs under the WSA. (*See* Dkt. No. 40 at 3) Unless ATTM breached its contract, this theory fails.

Moreover, plaintiffs have urged repeatedly that because Apple "required" customers to enter into the WSA with ATTM, Apple bears responsibility for ATTM's breach of its "promises and obligations" under that agreement. Thus, plaintiffs allege:

- **"AT&T's promises and obligations concerning its general data plans are directly applicable to all iPhone customers.** Apple is directly responsible for putting its customers in that position. Thus, **Apple bears a responsibility** to inform its customers that AT&T was going to violate its own contract with iPhone purchasers and would charge iPhone purchasers for MMS services they would not be receiving." (*See* Dkt. No. 204 at 24 (bolding added))
- "Apple ***required*** Plaintiffs to enter into service contracts with AT&T, . . . Apple knew AT&T was obligated to provide MMS to Plaintiffs and other captive customers but that MMS would not be provided, and . . . Apple knew Plaintiffs would be charged for MMS services . . . ." (*See id.* at 68 (italics in original))
- "Apple . . . required consumers to purchase the AT&T service package that included MMS service — a service available to AT&T's other customers — but not made available to iPhone customers, even though they were contractually promised and paid for MMS service." (*See id.* at 1)

Plaintiffs' alternative theory is that Apple is liable for failing to disclose that AT&T was allegedly billing customers for MMS services that they were not receiving. (Opp'n at 4) Plaintiffs argue that this theory is "not founded upon, [and does not] rely upon, the terms or obligations of AT&T's WSA," and that because "bills were not contracts, but notifications to consumers that payment was due," "the Court need not examine the terms of the WSA in order to determine whether Apple failed to disclose these facts to Plaintiffs." (Opp'n at 3) Plaintiffs are wrong. They have already acknowledged that breach of the WSA underlies this theory. Plaintiffs' earlier argument regarding this legal theory is telling:

> *Breach of Contract*: AT&T was contractually obligated to provide MMS. However, AT&T did not provide MMS. Therefore, Plaintiffs and putative Class Members were charged for that service, despite never receiving it during the class period.

(*See* Dkt. No. 40 at 3 (italics in original); *see also* Dkt. No. 33 at 3 (same)) Plaintiffs have thus conceded that Apple's purported liability for its alleged failure to disclose ATTM's charges arises from ATTM's "contractual[] obligat[ion]" to provide MMS, its alleged breach of that obligation, and its resulting improper billing practices.

Moreover, plaintiffs have expressly acknowledged that ATTM sent monthly bills, which plaintiffs were obliged to pay, pursuant to the terms of the WSA. (*See, e.g.*, Dkt. No. 40 at 6 ("Apple had a duty to disclose . . . . [that] customers purchasing a text messaging package ***would be charged*** **for MMS by virtue of their contracts with AT&T.**" (italics in original; bolding added))) In short, plaintiffs' theory depends on a determination of whether ATTM's billing practices were permissible under the terms of the WSA.

Plaintiffs' final theory — that "Apple made affirmative misrepresentations to Plaintiffs regarding MMS availability on the iPhone 3G and 3GS" — similarly depends on the WSA and must be arbitrated. (Opp'n at 2) As plaintiffs concede, Apple never represented that the iPhone 3G had MMS capability, and Apple's representations regarding the iPhone 3GS expressly disclosed when MMS would be available.[3] Plaintiffs' response was to argue that their "claims against Apple . . . have very little to do with Apple's advertising." (*See* Dkt. No. 204 at 8-9) Rather, plaintiffs argued that their "primary claims for relief" related to ATTM's supposed obligation to provide MMS under the WSA and its alleged billing for MMS. (*See id.* at 9)

Finally, plaintiffs argue that they have not alleged joint activity by Apple and ATTM. (Opp'n at 4) To the contrary, plaintiffs' underlying complaints make repeated references to "defendants'" marketing campaign (*see, e.g.*, *Carbine* FAC ¶¶ 2, 9, 75, 76), as well as to Apple and ATTM's "well orchestrated and omnipresent marketing plan." (*See Carbine* FAC ¶ 29; *see also* Mot. at 12-13) Indeed, the first sentence of plaintiffs' own summary of their factual allegations in their opposition to Apple's motions to dismiss states: "Defendants Apple and AT&T worked in tandem to promote and advertise the iPhone 3G and 3GS." (Dkt. No. 204 at 2)

### B. Plaintiffs' Belated Dismissal of ATTM Is Cosmetic Gamesmanship

Plaintiffs' eleventh-hour dismissal of their claims against ATTM is a cosmetic maneuver that does not alter their obligation to arbitrate these claims. Plaintiffs have dropped ATTM as a

---

[3] *See* Mot. at 1; *see also* Dkt. No. 132 at 5-9; Dkt. No. 204 at 4 (plaintiffs note that Apple's first representation regarding MMS was made in connection with the iPhone 3GS launch); Dkt. No. 204 at 8-9 (plaintiffs note that advertising claims relate to the summer 2009 time frame).

defendant and, in their Opposition, have mischaracterized claims that are alleged against *both* Apple and ATTM in the underlying complaints. But those allegations remain unchanged. Plaintiffs have not even sought leave to amend their complaints. Plaintiffs' attempt to avoid the arbitration clause in their WSA is futile.

## III. THE ITUNES AND SOFTWARE LICENSE AGREEMENTS PROVIDE NO BASIS FOR AVOIDING ARBITRATION

Plaintiffs purport to rely on the iTunes T&C and the Software Licensing Agreement ("SLA") because neither contains an arbitration provision. (Opp'n at 4-8) But neither document is relevant to plaintiffs' claims about MMS.

The first sentence of the iTunes T&C agreement plainly states: "THE LEGAL AGREEMENTS SET OUT BELOW GOVERN YOUR USE OF THE ITUNES STORE, MAC APP STORE, APP STORE, AND IBOOKSTORE SERVICES." (*See* Dkt. No. 225-1 at 4; *see also* http://www.apple.com/legal/itunes/us/terms.html#GIFTS (last visited December 7, 2011)) Moreover, the iTunes T&C defines "iTunes store service" as the "purchase or rent[al of] digital content ('iTunes Products')." (Dkt. No. 225-1 at 5) MMS is not an iTunes Store product; it is not purchased from or provided by the iTunes Store; and it is not "digital content" that plaintiffs "purchase[d] or rent[ed]." (*Id.*) Rather, MMS is a service provided by ATTM under the WSA, not by Apple under the iTunes T&C. While the iTunes program is the vehicle used to download free software updates to the iPhone, and MMS was included in the September 2009 update, MMS operates independently from iTunes and is not an iTunes Store service or product. Plaintiffs do not and cannot dispute that MMS is an ATTM service.[4]

Plaintiffs' arguments regarding the SLA are equally meritless. (Opp'n at 6) The SLA and the California choice-of-law provision it contains apply only to disputes regarding the

---

[4] The plaintiffs in the Antitrust Litigation made exactly the same argument — based on exactly the same language from exactly the same iTunes agreement — as plaintiffs here do. Judge Ware rejected the argument and granted Apple's motion to compel arbitration.

software license itself. (Dkt. No. 261-3 at 8) MMS is not software covered by the SLA, and this litigation is not a dispute respecting the SLA.

## IV. EQUITABLE ESTOPPEL MANDATES ARBITRATION AGAINST APPLE

### A. Equitable Estoppel Principles Mandate Arbitration of Plaintiffs' Claims

This case is indistinguishable from the Antitrust Litigation, where Judge Ware held that Apple is entitled to arbitrate under the WSA. Plaintiffs concede that equitable estoppel applies "where plaintiffs have attempted to hold non-signatories [*sic*] liable pursuant to the duties or obligations imposed by the agreements containing the arbitration clause."[5] (Opp'n at 22-23) Like the plaintiffs in the Antitrust Litigation, that is precisely what plaintiffs attempt here.

In the Antitrust Litigation, Judge Ware considered the plaintiffs' allegations that they "would be required to sign a cellular service agreement with ATTM," and that contrary to plaintiffs' understanding, "Apple and ATTM had agreed . . . to make ATTM the exclusive provider of voice and data services for the iPhone for five years." *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 138539, at *5. Because "[p]laintiffs themselves have contended throughout [the] litigation that their antitrust and related claims against . . . ATTM and . . . Apple arise from their respective ATTM service contracts," Judge Ware held that "[p]laintiffs are now estopped from contending otherwise." *Id.* at *26-27.

Here, as set forth above, each "theory" of liability against Apple, like those in the Antitrust Litigation, hinges on ATTM's WSA. This case thus falls squarely under the first prong of the equitable estoppel test: "when the signatory to a written agreement containing an arbitration clause . . . rel[ies] on the terms of the written agreement in asserting its claims against

---

[5] Plaintiffs argue that, based on the iTunes T&C and the SLA, California state law applies to the equitable estoppel analysis. As discussed in Section III *supra*, those agreements are entirely unrelated to the issues here, and the choice-of-law provisions plaintiffs promote are expressly limited to, respectively, disputes regarding iTunes service and the software license. Plaintiffs' argument is further undermined by their underlying complaints and Joint Opposition to Apple's Motions to Dismiss, which allege and argue that this dispute is governed by a dozen states' laws, and never mention either agreement.

the nonsignatory." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. Tex. 2000) (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

After determining that the Antitrust plaintiffs' claims were intertwined with the WSA, Judge Ware looked at the "relationship" between ATTM and Apple and found that "inasmuch as Plaintiffs' claim against Defendant Apple centers on their allegations that . . . purchasers of the iPhone would 'be locked into using ATTM after the expiration of their initial two-year service contracts,'" equitable estoppel applied. *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 138539, at *27. The "relationship" requirement is not part of the Fifth Circuit standard for equitable estoppel. Nonetheless, plaintiffs here make nearly identical allegations which readily satisfy the test:

- "As a result of Defendants' [ATTM and Apple's] 'exclusivity agreement,' when purchasing an iPhone during the Class period, Defendants required all Class members to obtain wireless service, including messaging plans, for their iPhones exclusively from AT&T." (*Carbine* FAC ¶ 2; *see also* Dkt. No. 33 at 8 ("Defendants are parties to an exclusive contract to provide iPhone service to customers in the United States"))
- "Apple shares liability for damages because, by virtue of Apple's exclusive bargain with AT&T, Plaintiffs and Class Members could not receive services, including MMS, from other providers." (Dkt. No. 33 at 3)
- "[I]n light of [Apple's] contractual arrangement that made AT&T the exclusive phone and texting service provider for that unique phone," Apple was required to disclose to plaintiffs ATTM's contractual obligation to provide MMS and its practice of billing for it. (Dkt. No. 204 at 20-21) "[T]hat is *precisely* what Apple got itself into by choosing AT&T to be iPhone's exclusive provider of phone service." (*Id.* at 24 (italics in original))
- "Apple ***required*** Plaintiffs to enter into service contracts with AT&T," and as a result "Plaintiffs . . . [were] captive [ATTM] customers." (*Id.* at 68 (italics in original))

Plaintiffs have belatedly dropped ATTM as a defendant and reworded their "theories" in a blatant attempt to avoid arbitration. Fifth Circuit courts, similar to Judge Ware, have rejected such tactics. In *Grigson*, the plaintiff sued the signatories to a distribution agreement. 210 F.3d at 526. When one of the signatory defendants moved to compel arbitration, the plaintiff voluntarily dismissed the action and (together with the previous signatory defendants) refiled against a nonsignatory. The court held that the plaintiffs' conduct was an "obvious, if not

blatant, attempt to bypass the agreement's arbitration clause." *Id.* at 530. Because the plaintiffs' claims were "so intertwined with and dependent upon, the distribution agreement," the court affirmed the decision to apply equitable estoppel. *Id.* at 528; *see also Bank One of Ariz., N.A. v. Wilton Hurst G.P. Corp.*, No. 3:00-CV-2254-X, 2001 U.S. Dist. LEXIS 3137 (N.D. Tex. Mar. 17, 2001) (applying equitable estoppel where plaintiff dropped claims against signatory after it invoked arbitration clause); *Morselife Found., Inc. v. Merrill Lynch Bank & Trust Co.*, No. 09-81143, 2010 U.S. Dist. LEXIS 83096, at *8 (S.D. Fla. July 21, 2010) (permitting nonsignatory to compel arbitration where plaintiffs eliminated claims against signatory in "tactical ploy" to avoid arbitration). The same rationale applies here.[6]

Plaintiffs' argument that they do not allege concerted misconduct is also squarely contradicted by the allegations of their complaints and their prior admissions. In fact, plaintiffs allege that "Apple and AT&T worked *in tandem* to promote and advertise the iPhone 3G and 3GS." (Dkt. No. 204 at 2 (emphasis added); *see also, e.g.*, *Carbine* FAC ¶ 2 ("Apple and AT&T co-marketed the iPhone with AT&T's wireless network service.")) Likewise, plaintiffs' "undifferentiated allegations" of Apple and ATTM's alleged misconduct — a "well orchestrated and omnipresent marketing plan" to deceive the public about availability of and billing for MMS — show the interdependence of claims regarding Apple, ATTM, and the WSA. (Mot. at 12-13)

---

[6] Seeking to avoid *Grigson*, plaintiffs argue that the Fifth Circuit limited its application in *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003). In *Bridas*, however, unlike *Grigson* and this case, "the estopped party . . . did not sign a contract containing an arbitration provision and never sued Bridas on the agreement." 345 F.3d at 361. Thus, *Bridas* does not apply here. Plaintiffs' reliance on *Weingarten Realty Investors v. Miller*, No. 11-20676, 2011 WL 5142183 (5th Cir. Nov. 1, 2011), is also misplaced. *Weingarten* is inapposite. There, the defendant's obligation to pay under a Limited Guarantee was triggered by the terms of a Loan Agreement (with an arbitration clause) that he did not sign. (Opp'n at 24-25) The *Weingarten* court looked at the terms of the Limited Guarantee, and determined that its terms did not require the plaintiff to claim a breach of the Loan Agreement in order to seek payment under the Limited Guarantee. 2011 WL 5142183, at *6. Here, conversely, unless ATTM breached the WSA by failing to provide MMS or by its billing practices, plaintiffs have no claim against Apple.

Finally, plaintiffs urge the Court to apply a "common law test" for equitable estoppel that "some" California courts have applied. (Opp'n at 20-21) Plaintiffs' argument for application of California law is based on the iTunes T&C and the SLA, both of which, as previously discussed, are inapplicable. In any event, plaintiffs concede that detrimental reliance is at the core of the "common law" test. (Opp'n at 20) In *Grigson*, the court concluded that "detrimental reliance is one of the elements for the usual application of equitable estoppel," and held:

> where . . . a signatory non-defendant is charged with interdependent and concerted misconduct with a non-signatory defendant . . . that signatory [non-defendant], in essence, becomes a party, with resulting loss, inter alia, of time and money because of its required participation in the proceeding. Concomitantly, *detrimental reliance by that [non-defendant] signatory cannot be denied*: it and the signatory-plaintiff had agreed to arbitration in lieu of litigation (generally far more costly in terms of time and expense); but, the plaintiff is seeking to avoid that agreement by bringing the action against a non-signatory charged with acting in concert with that non-defendant signatory.

210 F.3d at 528 (emphasis added). That is precisely what would occur here if plaintiffs' WSA-based claims against Apple are not arbitrated: ATTM — the non-defendant signatory entitled to arbitration — would become a party by virtue of its necessary participation in litigation concerning the terms of its WSA and its related duties and obligations. Thus, even if the Court were to adopt the detrimental reliance test, plaintiffs' claims against Apple must be arbitrated.

### B. Plaintiffs' Efforts to Avoid Equitable Estoppel Are Meritless

Plaintiffs argue that because Apple is not among the "enumerated categories of persons and entities" listed in the WSA, it is not "an authorized party" who can enforce arbitration. (Opp'n at 12-14) But Apple does not argue that it is entitled to arbitrate as a *party* to the WSA. Plaintiffs do not and cannot cite law supporting their argument, because courts across the country have recognized and applied equitable estoppel as an *exception* to the rule that "arbitration is a matter of contract and cannot, in general, be required for a matter involving an arbitration agreement non-signatory." *Grigson*, 210 F.3d at 528. That exception is applied in situations precisely such as this one, to promote fairness where a non-signatory defendant is not covered by

the express terms of an agreement that is at the core of claims against it. *See, e.g.*, *id.* ("The linchpin for equitable estoppel is equity — fairness."); *see also* Mot. at 10-13 (citing cases).

None of the cases plaintiffs cite supports the proposition that the Court should not look beyond the terms of the arbitration provision in the WSA.[7] Plaintiffs' reliance on *Mims v. Global Credit & Collection Corp.*, No. 10-2380-CIV, 2011 WL 3586056 (S.D. Fla. Aug. 12, 2011), is misplaced. *Mims* supports application of equitable estoppel here. After the *Mims* court determined that the defendant was not covered under the express terms of the arbitration agreement, it went on to do exactly what plaintiffs argue this Court should not: consider whether equitable estoppel applied. 2011 WL 3586056, at *6-7. Thus, far from suggesting that the Court "should not even . . . consider[]" equitable estoppel, *Mims* confirms that such consideration is appropriate even though Apple is not expressly covered by the WSA.[8]

Plaintiffs next argue that because the iTunes T&C and the SLA exist, the Court should not consider whether equitable estoppel applies to plaintiffs' claims. (Opp'n at 14-17 ("the existence of a separate agreement between [Apple and plaintiffs] precludes equitable estoppel")) Plaintiffs ignore the fact that the iTunes T&C and the SLA are irrelevant to their MMS claims. The plaintiffs in the Antitrust Litigation made the same argument, and Judge Ware compelled arbitration even after acknowledging the existence of a "separate agreement" with Apple. *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 138539, at *6.

---

[7] In two cases, the Fifth Circuit held that the defendants *were* covered by the terms of the arbitration agreement, and *for that reason* the court did not need to determine whether they were entitled to arbitrate under the equitable estoppel exception. *See Sherer v. Green Tree Servicing LLC*, 548 F.3d 379 (5th Cir. 2008); *see also Green v. Serv. Corp. Int'l*, 333 Fed. App'x 9 (5th Cir. 2009). Unlike the defendants in *Sherer* and *Green*, Apple has not asked the Court to order arbitration because it is an "authorized party" under the WSA's terms.

[8] Plaintiffs' other cases are inapposite. *See Fox v. Nationwide Credit, Inc.*, No. 09-cv-7111, 2010 WL 3420172 (N.D. Ill. Aug. 24, 2010) (after the court determined that defendant was not expressly covered under the arbitration agreement, it then considered whether equitable estoppel applied); *Hornicek v. Cardworks Servicing, LLC*, No. 10-3631, 2011 WL 2623274 (E.D. Pa. June 29, 2011) (holding that defendant was covered under the terms of the arbitration agreement; thus, application of equitable estoppel was unnecessary).

Plaintiffs rely on cases involving multiple contracts in which the court concluded that the plaintiffs' claims were based on a contract that did *not* contain an arbitration clause.[9] Here, plaintiffs' claims are indisputably intertwined with the terms of the WSA, which contains the arbitration provision. The mere "existence" of the "separate" iTunes and software agreements thus has no effect on the equitable estoppel analysis.

Plaintiffs rely principally on dicta from *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209 (2009). Rather than starting the analysis with "separate" agreements (as plaintiffs ask this Court to do), the *Goldman* court's analysis began and ended with equitable estoppel. *See id.* at 220-21 ("[I]f a plaintiff relies on the terms of an agreement to assert his or her claims against a nonsignatory defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause of that very agreement . . . ."). The plaintiffs in *Goldman* "d[id] not rely on or use any terms or obligations of [the agreements with arbitration clauses] as a foundation for their claims." *Id.* at 218. Accordingly, the Court did not rely on the existence of the separate engagement letters as a basis for its order. *Id.* at 229-34.[10] Here, the court need not consider the existence of separate agreements because plaintiffs seek to repudiate the arbitration clause of the "very agreement" upon which they rely.

## V. APPLE HAS NOT WAIVED ITS RIGHT TO ARBITRATION

### A. Plaintiffs Ignore Relevant Authority After *Concepcion* Rejecting Waiver

Plaintiffs argue that Apple waived its right to seek arbitration by waiting to bring its motion until the Supreme Court decided *Concepcion.* (Opp'n at 8-12) But plaintiffs ignore the

---

[9] *See Hallwood Group Inc. v. Balestri*, No. 3:10-CV-1198-K, 2010 WL 4274754 (N.D. Tex. Oct. 21, 2010); *Hartford Life Ins. Co. v. Forman*, No. 13-08-00547-CV, 2009 WL 1546924 (Tex. Ct. App. June 3, 2009); *see also In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 195 (Tex. 2007) ("tentative[ly]" holding that equitable estoppel did not apply).

[10] Plaintiffs cling to dicta from the *Goldman* opinion that the "existence of engagement letters" made it "all the more apparent" that equitable estoppel did not mandate arbitration. 173 Cal. App. 4th at 235. (*See also* Opp'n at 15) Whether or not the engagement letters made the court's conclusion on equitable estoppel "more apparent" does not change the fact that the court *first* conducted an equitable estoppel analysis. Here, an equitable estoppel analysis inevitably leads to a vastly different result than it did in *Goldman*, because plaintiffs' claims are inextricably intertwined with the WSA and allege concerted misconduct by ATTM and Apple.

growing line of cases decided after *Concepcion* rejecting that very argument. (Mot. at 16 & n.8 (citing cases); *see also Antitrust Litig.*, 2011 U.S. Dist. LEXIS 138539, at *14 (Apple did not waive its rights by waiting until after *Concepcion* to seek arbitration); *Brown v. Trueblue, Inc.*, No. 1:10-CV-0514, 2011 U.S. Dist. LEXIS 134523 (M.D. Pa. Nov. 22, 2011) (fifteen months into litigation, defendants did not waive rights by waiting until after *Concepcion* to seek arbitration, even though they answered and the parties engaged in discovery and fully briefed class certification)). These cases are squarely on point. As in *Brown*, plaintiffs' "argument in favor of waiver unravels, . . . when one considers the impact of *Concepcion* on the waiver analysis." 2011 U.S. Dist. LEXIS 134523, at *20.

Instead of addressing these cases, plaintiffs argue that Apple "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." (Opp'n at 11) But there is nothing "disingenuous" about Apple's contention: the controlling law in Apple's state of residence and in the Ninth Circuit was precisely the law subsequently overturned in *Concepcion.* Plaintiffs also assert that "nothing prevented Apple from seeking to compel arbitration in jurisdictions other than California even when the *Discover Bank* rule still had vitality." (Opp'n at 12) Plaintiffs miss the point again: jurisdictions well beyond California held class action waivers to be unconscionable before *Concepcion*, and jurisdictions well beyond California have refused to hold that motions to compel arbitration are untimely after *Concepcion*. (*See, e.g.*, Mot. at 15-16 (citing cases); *see also Brown*, 2011 U.S. Dist. LEXIS 134523, at *21 (noting that "other circuits have held that *Concepcion* represented an intervening change in the law justifying enforcement of an otherwise untimely motion to compel arbitration," and citing cases))

### B. Plaintiffs Have Not Shown and Cannot Show Prejudice

Plaintiffs' waiver argument also fails in light of plaintiffs' "heavy burden [in] demonstrating waiver." *In re Oil Spill*, MDL No. 2179 Section: J, 2011 U.S. Dist. LEXIS 76848, at *9 (E.D. La. July 15, 2011). As this Court has recognized, "waiver (if permissible at all in the context presented) requires both a substantial invocation of the judicial process *and*

either detriment or prejudice." *Consorcio Rive v. Briggs of Cancun, Inc.*, 134 F. Supp. 2d 789, 795 (E.D. La. 2001) (emphasis added). Plaintiffs meet neither requirement.

Most fundamentally, plaintiffs have not shown and cannot show prejudice. Plaintiffs rely on their filing of a brief opposing Apple's motions to dismiss. (Opp'n at 12) But this "prejudice" was self-inflicted. Plaintiffs agreed to stay the case as to ATTM in light of *Concepcion*, but refused to stipulate to a stay as to Apple — even a brief stay to permit the Court to decide whether to extend the stay to Apple. That stay would have obviated plaintiffs' need to file their opposition, as it did with respect to their opposition to ATTM's motion to dismiss. Further, plaintiffs wrote *one* joint opposition to Apple's sixteen motions to dismiss; they cannot seriously contend that this overcomes their "heavy burden." Plaintiffs' gratuitous filing of an opposition brief was not prejudicial.

Plaintiffs' second attempt to show prejudice — that they "have not been able to engage in discovery . . . pending resolution of Apple's motions" — also fails. Nothing in this litigation would have happened differently if Apple, like ATTM, had moved to compel arbitration as well as to dismiss in August 2010. Discovery was stayed as to both defendants. After the Supreme Court granted certiorari in *Concepcion*, plaintiffs were precluded from taking discovery by this Court's stay based upon *Concepcion*, not because of Apple's motions to dismiss.

Nor have plaintiffs shown "substantial" invocation of the judicial process. They point to Apple's motions to dismiss certain of the complaints and argue that they "evidenced an intent to seek resolution of the present MDL proceedings through litigation rather than arbitration." (Opp'n at 9-10) But, as plaintiffs concede (*id.* at 8-9), "[t]he question of what constitutes a waiver of the right of arbitration depends on the facts of each case." *Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 420 (5th Cir. 1985). Here, the facts do not support waiver.

Plaintiffs' reliance on *In re Mirant Corp.* is misguided. The defendant in *In re Mirant Corp.* filed *multiple* rounds of motions to dismiss (as well as answers and discovery) over an *eighteen-month* period. 613 F.3d 584, 591-92 (5th Cir. 2010). The court specifically noted that the defendant had moved to compel arbitration *only after* it had lost part of its last motion to

dismiss, "despite being fully aware of its right to compel arbitration from the outset." *Id.* at 590. The court declined to allow the defendant, "having learned that the district court was not receptive to its arguments, [to have] a second bite at the apple through arbitration . . . ." *Id.* (citations and quotations omitted). Here, Apple filed its motion to compel arbitration at the first available opportunity after the case was stayed — and thus *not litigated* — for nearly a year. Apple sought arbitration as soon as the Supreme Court decided *Concepcion*. This is not a "substantial" invocation of the judicial process. *See Williams v. CIGNA Fin. Advisors, Inc.*, 56 F.3d 656, 661-62 (5th Cir. 1995) (no waiver where defendant sought arbitration once it discovered claims were arbitrable); *see also Tenneco Resins*, 770 F.2d at 420 (no waiver after eight-month delay, answer, engagement in discovery, and motion for protective order); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 576 (5th Cir. 1991) (no waiver after thirteen-month delay).

## VI. CONCLUSION

Apple respectfully requests that the Court grant its motion to compel arbitration.

Respectfully submitted,

*/s/ Quentin F. Urquhart*

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

PENELOPE A. PREOVOLOS (*admitted pro hac vice*)
STUART C. PLUNKETT (*admitted pro hac vice*)
SUZANNA P. BRICKMAN (*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 December 12, 2011, with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing.

*/s/ Quentin F. Urquhart*