

**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

**DEFENDANT APPLE INC.’S MOTION TO DISMISS
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(7)**

NOW INTO COURT, through undersigned counsel, comes Defendant, Apple Inc. (“Apple”), who respectfully submits its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(7). For the reasons set forth more fully in the attached memorandum in support, plaintiffs’ claims must be dismissed with prejudice under Rule 12(b)(7) unless they join AT&T Mobility LLC (“ATTM”), an indispensable party under Rule 19.

Plaintiffs’ claims in this action are predicated on the contents of their Wireless Service Agreement (“WSA”) with ATTM. Plaintiffs allege that ATTM breached that agreement when it failed to provide plaintiffs with MMS services prior to September 25, 2010, and that ATTM billed plaintiffs for the MMS services that were allegedly not provided. Plaintiffs argue that they may proceed against Apple for its failure to disclose these alleged breaches by ATTM. Plaintiffs cannot, however, litigate the meaning of ATTM’s agreement and ATTM’s supposed breaches of

that agreement without ATTM as a party to this lawsuit. ATTM is an indispensable party under Rule 19(a), without whom this litigation may not proceed under Rule 19(b). In fact, the United States District Court for Northern District of California reached a similar conclusion in a case involving the same two defendants (Apple and ATTM) and a similar attempt by plaintiffs to remove ATTM from a case to avoid arbitration with Apple. *In re Apple iPhone 3G Prod. Liab. Litig.*, MDL No. C 09-02045 JW, 2011 U.S. Dist. LEXIS 138532 (N.D. Cal. Dec. 1, 2011) Consequently, Rule 12(b)(7) and Rule 19 preclude plaintiffs from adjudicating the meaning of ATTM's WSA and the propriety of ATTM's alleged conduct without ATTM.

WHEREFORE, Defendant, Apple Inc., respectfully requests that its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(7) be granted, and Plaintiffs' claims against Apple be dismissed.

Respectfully submitted,

/s/ Quentin F. Urquhart

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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 to all counsel of record.

/s/ Quentin F. Urquhart