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 DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(7)

INTRODUCTION

Once again, Apple has completely misconstrued Plaintiffs' theories of liability in this action – not because it does not understand Plaintiffs' theories, but because it would rather engage in tactics to confuse the Court as to the true nature of Plaintiffs' claims against it.

Yet regardless of Apple's disingenuous strategy, the fact remains that Plaintiffs' theories of liability against Apple are **not** "predicated on the contents of their Wireless Service Agreement with AT&T," do **not** require an interpretation of the WSA, do **not** require that Plaintiffs prove breach of contract on the part of AT&T, and are **not** dependent upon any misconduct and/or impropriety on the part of AT&T. Indeed, only one of Plaintiffs' theories of liability even references AT&T's WSA and the reference is only made so as to "provide the underpinnings" of the Plaintiffs' actions against Apple. *U.S. Marine, Inc. v. U.S.*, 2008 WL 4443054 (E.D. La. 2008) (denying motion to dismiss for failure to join an absent party under Rule 19 because *inter alia* the plaintiff's claim was not one for breach of contract, did not require an interpretation of the contract and only referenced the contract so as to "provide the underpinnings" of the plaintiff's action against defendant); *see also Weisblatt v. Apple, Inc.*, 2010 WL 4071147, *4 (finding that Plaintiffs' actions against Apple, while related to the data plan provided to them by AT&T, centered around the misconduct of Apple without regard to the intent, knowledge or liability of AT&T and were, thus, independently actionable).

Thus, the prejudice that Apple alleges AT&T will suffer if they are not joined is nonexistent. As such, joinder of AT&T in this action is **not** required for the fair and complete resolution of the dispute at issue. *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003)(affirming district court's denial of defendant's motion to dismiss finding that the outcome of the litigation would "not affect, let alone adversely affect, the rights of [the absent parties]").

Moreover, any and all prejudice Apple alleges will occur if AT&T is not joined can best be eliminated by Apple impleading AT&T into this action under Federal Rule of Civil Procedure 14. Accordingly, Apple's motion to dismiss should be denied.

FACTUAL BACKGROUND

As set forth in great detail in their opposition to Apple's motion to compel arbitration, Plaintiffs' claims against Apple are based upon the following three theories:

(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 included MMS service, but that the MMS service would not actually be provided on the iPhone 3G and 3GS.

Plaintiffs' first theory of liability clearly does not implicate AT&T and/or its WSA at all. Plaintiffs' allegations under this theory depend solely on the actions of Apple for their success. Specifically, Plaintiffs allege under this theory that Apple engaged in fraudulent, deceptive and/or otherwise unlawful marketing activity in the Spring and Summer of 2009, prior to the availability of MMS on the iPhone 3G and 3GS, when Apple affirmatively misrepresented that MMS was available when it was not. Plaintiffs further allege under this theory that Apple's micro-type "disclosures" contradicting the availability of MMS on the iPhone 3G and 3GS were inadequate in light of the overall impression left by the marketing materials. It is these actions that Plaintiffs complain of and which serve as the basis for Plaintiffs' first theory of liability against Apple. Thus, Plaintiffs remain perplexed as to how Apple can seriously argue that this theory of liability "depends on plaintiffs' allegations against AT&T" and/or an interpretation of the WSA.

Plaintiffs' second theory of liability, while referencing AT&T and the fact that it charged Plaintiffs monthly for MMS prior to its availability, is not founded upon, nor does is rely upon, the terms of and/or obligations imposed by the WSA. Indeed, Apple's liability under this theory is by virtue of obligations triggered by law (i.e. consumer protection statutes) and does not arise out of contract at all, especially not the WSA.

To illustrate, to prove Plaintiffs' claims against Apple under this theory, Plaintiffs will have to show (1) that MMS was not available on the iPhone 3G or 3GS prior to September 25, 2009; (2) that prior to this date, Plaintiffs were line-item charged by AT&T via their monthly billing statements for MMS on their 3G and/or 3G-S iPhones; (3) Plaintiffs paid their monthly billing statements; (4) Apple knew that Plaintiffs were being charged for MMS and not receiving it; (5) Apple had a duty to disclose this material fact to Plaintiffs; and (6) Apple failed to do so.

Notably, the first three elements of proof are currently undisputed facts, which can easily be proven without any reference to AT&T's WSA. First, it is not disputed that MMS was not available on any iPhone prior to September 25, 2009. Second, it is also undisputed that AT&T line-item charged Plaintiffs via their monthly billing statements for MMS on their 3G and/or 3GS iPhones. An example of this line-item charge can be found in the *Carbine* complaint at paragraph 56. Thus, to prove this element of their claim all Plaintiffs have to introduce into evidence is their billing statement containing this indisputable fact. Third, the fact that Plaintiffs paid their monthly billing statements is not only undisputed but can readily be proven via Plaintiffs' purchase records.[1]

[1] In the future, Plaintiffs may need to seek discovery from AT&T to obtain their personal purchase records and/or to determine the exact number of iPhone 3G and/or 3GS users who paid for MMS prior to September 25, 2009. Yet, the need to obtain discovery from an absent party is not a factor for determining whether that party is an indispensable party under Rule 19. *See Evans v. Home Depot, Inc.*, 2003 WL 1193656, *2 (E.D. La. 2003)(noting that parties' absence would in no way bar their participation in discovery or as trial witnesses); *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035, 1044 (D.C. Cir. 1981)("Rule 19 of the Federal Rules of Civil Procedure does not list the need to obtain evidence from an entity or individual as a factor bearing upon whether or not a party is necessary

The remaining three elements Plaintiffs need to prove to support their second theory of liability all focus on Apple, its obligation to Plaintiffs imposed by law, its breach of this obligation and Apple's overall misconduct. Contrary to what Apple has argued, what Plaintiffs do not have to prove is that AT&T owed Plaintiffs an obligation, by law or by contract, that AT&T breached its obligation, that AT&T's conduct was improper and/or that the WSA was unlawful. In other words, AT&T is an unnecessary party to Plaintiffs' action against AT&T.

Plaintiffs' third theory of liability is similar yet distinguishable from Plaintiffs' second theory. This theory, unlike Plaintiffs' other two theories, does mention the data plan contained within AT&T's WSA. But this theory, just like Plaintiffs' second theory, does not require that Plaintiffs prove misconduct on the part of AT&T nor does it require that Plaintiffs show that AT&T breached its WSA in order for Plaintiffs to prove their case against Apple. Moreover, Plaintiffs' theory does not even depend on an interpretation of the terms of the WSA.

Rather, all that Plaintiffs need to show to prove their claim is (1) that MMS was not available before September 25, 2009; (2) that prior to this date, AT&T's data plan stated that MMS would be provided; (3) Plaintiffs paid for a data plan; (4) Apple knew that AT&T would not provide MMS; (5) Apple had a duty to disclose this material fact to Plaintiffs; and (6) Apple failed to do so.

Again, the first three elements which Plaintiffs need to prove to support this theory of liability are currently undisputed facts, which can be easily be proven without the need for an interpretation of the WSA or without the need to address any misconduct on the part of AT&T.

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or indispensable to a just adjudication"); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1498 (10th Cir. 1983)("We have found no cases which approve of the use of rule 19 simply to allow greater discovery, and we can discern no policy which such an expansion of the rule would promote."); *Johnson v. The Smithsonian Institution*, 189 F.3d 180, 189 (2d. Cir. 1999) (same). Indeed, if the rule were otherwise, then any person suing a manufacturer of a pharmaceutical drug needing their purchase records would have to file an action against the pharmacy which dispensed the drug or any person suing a manufacturer of an automobile needing their purchase records would have to sue the dealer where they purchased the car. This is, simply put, nonsensical.

Regarding the data plan, all Plaintiffs have to show is that at the time Plaintiffs purchased their data plan, AT&T's data plan included MMS. The data plan is not disputed and not subject to interpretation. It could be found on AT&T's publicly available website during the relevant time periods. It is immaterial whether AT&T's non-provision of MMS constitutes a legal breach of its contract—what matters is whether Apple knew that MMS would not be provided even though the data plan included it. The *legal* claim against Apple does not hinge on satisfying the elements a breach of contract claim against AT&T. In other words, it is a fact that can be proven without the need to join AT&T as a party. *See e.g. Orix Credit Alliance, Inc. v. Taylor Machine Works, Inc.*, 844 F. Supp. 1271, 1275 (N.D.Ill. 1994) (rejecting defendants argument that absent party who defaulted on a loan contract was an indispensable party under Rule 19 because whether the absent party defaulted and whether plaintiff needed to foreclose the security interest and seek enforcement of the absent party's personal guarantees before bringing an action against guarantor of loan were questions which could be decided without the absent party being joined as a party).

As to the remaining elements of proof under Plaintiffs' third theory of liability, just like with Plaintiffs' second theory of liability, these three elements focus on Apple's liability in failing to disclose material facts, which it was under a legal obligation to disclose. AT&T's liability is not at issue.

In sum, Plaintiffs' actions against Apple stem from the aforementioned three theories of liability and are not predicated upon nor dependent upon AT&T or its WSA such that AT&T can be deemed a necessary party, let alone an indispensable one. Plaintiffs have an action against Apple that is independent of AT&T and, therefore, Apple's motion to dismiss for failure to join AT&T must be denied.

ARGUMENT

A. Because Apple May Implead AT&T Pursuant to Rule 14, AT&T Cannot be Deemed an Indispensable Party under Rule 19

Rule 19 of the Federal Rules of Civil Procedure sets forth the criteria which a Court must analyze in determining whether a party is a necessary and/or indispensable party to a particular action. Fed. R. Civ.P.19; *Boone v. General Motors Acceptance Corporation*, 682 F.2d 552, 553 (5th Cir. 1982). However, before the Court even ventures to undertake a rule 19 analysis, an important and potentially dispositive question that the Court must first address is whether the allegedly indispensable absent party can be impleaded under Rule 14 by the party moving for dismissal under Rule 12(b)(7). If the answer is yes, then the moving party's motion to dismiss should be denied because the threat of prejudice – the foundation behind which Rule 19 was enacted – is reduced substantially, if not totally eliminated. *See Boone*, 682 F.2d at 553 (denying motion to dismiss under Rule 12(b)(7) noting that movants could protect their interests by joining the absent party and diversity jurisdiction would not be destroyed); *Lacoste Builders, L.L.C. v. Croft Metals, Inc.*, 2001 WL 1255887, *1 (E.D.La. Oct 17, 2001) (denying motion to dismiss under Rule 12(b)(7) noting that "[t]here is no impediment to the defendants bringing a third-party complaint against [the absent party], if warranted by the facts."); *Pasco International (London) Limited v. Stenograph Corp.*, 637 F.2d 496 503-505 (7th Cir. 1980) ("the existence of the Rule 14 provisions demonstrates that parties such as [the absent party] who may be impleaded under Rule 14 are not indispensable parties within Rule 19(b)"); *Associated Dry Goods Corporation v. Towers Financial Corporation*, 920 F.2d 1121, 1124-1125 (2d Cir. 1990) ("we view as dispositive [movant's] ability to avoid all prejudice to itself by asserting a compulsory counterclaim against [plaintiff] pursuant to Rule 13(a) and adding [absent party] as a party to the counterclaim under Rule 13(h)... we believe that the 'Rule 19(b) notion of equity and

good conscience contemplates that the parties actually before the court are *obliged to pursue* any avenues for eliminating the threat of prejudice.'") (citations omitted).

In this case, there is nothing in the record that shows Apple cannot implead AT&T into this action. Thus, if Apple is concerned about any prejudice it may suffer and/or that AT&T may suffer as a result of Plaintiffs' failure to join AT&T in this action, then Apple may eliminate these threats of prejudice by impleading AT&T under Rule 14. As such, there is no need for this Court to even address whether AT&T is a necessary and indispensable party under Rule 19.

B. Because AT&T Is Not a Necessary Party under Rule 19(a), Apple's Motion to Dismiss Must Be Denied.

Before an absent party can be designated an indispensable party under Rule 19 such that dismissal is warranted, the Court must first decide whether the absent party is a necessary party under Rule 19(a). Fed. R. Civ. P. 19(a); *August v. Boyd Gaming Corp.*, 135 Fed. Appx. 731, 732 (5th Cir. 2005). Rule 19(a)(1) provides for three scenarios in which an absent party may be deemed a necessary party: "(1) the inability to accord complete relief among those already parties, (2) the absent party claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest or (3) the absent party claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." *James v. Valvoline, Inc.* 159 F. Supp. 2d 544, 550 (S.D. Tex 2001); Fed. R. Civ. P. 19(a).

In cases requiring interpretation of the rights and obligations imposed by a contract and/or challenging the validity of the contract itself, parties to that same contract are generally found to be necessary parties under Rule 19(a). *See e.g. Sch. Dist. v. Sec'y of the U.S. Dep't of*

Educ, 584 F.3d 253, 303 (6th Cir. 2009). However, in cases in which a Court is not being asked to interpret a contract and Plaintiffs reference a contract in their pleadings so as to "provide the underpinnings" of their claims against the named defendant, the absent party to the referenced contract is not a necessary party under Rule 19(a). *See U.S. Marine, Inc.*, 2008 WL 4443054, *3 (discussed *infra*); *Jonesfilm v. Lion Gate International*, 299 F.3d 134, 141 (2d Cir. 2009) (denying motion to dismiss for failure to join an indispensable party because there was no dispute as to whether the absent party to the contract had met its contractual obligations); *Gibbs Wire and Steel Company, Inc. v. Johnson*, 255 F.R.D. 326, 330 (D. Conn. 2009) (noting that the rule that a party to a contract is generally a necessary party under Rule 19(a) is a descriptive rule not a prescriptive one and denying defendants' motion to dismiss where defendants had failed to show that the absent party to the contract was a necessary party under the three scenarios of Rule 19(a)).

In *U.S. Marine, Inc.*, 2008 WL 4443054, *1-3, this Court addressed and rejected the same arguments advanced now by Apple regarding the necessity of joining parties to a contract:

> The government claims that VT Halter…is a necessary and indispensable party because they are part owner of the hull design and the counterparty on the DOD contract. The government argues that under Rule 19(a) VT Halter is a necessary party. Further, they argue that VT Halter is an indispensable party under Rule 19(b) and that the case should be dismissed since this Court cannot assert jurisdiction over VT Halter.
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> USMI opposes the motion arguing that they are not suing under a contract theory and that VT Halter is not a necessary and indispensable party. USMI contends that no language in the contract between Halter and DOD needs to be interpreted. Rather, they argue that the language is clear on its face and that the fundamental claim is one that sounds in tort. Secondly, USMI argues that VT Halter is not a necessary party under Rule 19(a). This case is solely an adjudication of the rights of USMI to compensation for misappropriation. Thus, relief can be granted without VT Halter's participation.
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> * * *

> [I]t is clear to the Court that while the Halter-DOD contract will be discussed in this case, it is not the basis of USMI's cause of action. This is not a breach of contract case and USMI is not even a party to the subject contract. While the Halter-DOD contract will play a role in this case to demonstrate how DOD came to possess the design and to provide the underpinnings of USMI's state law trade secret argument, this Court is not being asked to interpret the contract.

In this case, just like in *U.S. Marine, Inc.*, Plaintiffs do not challenge the validity of the WSA they entered into with AT&T nor do they need to prove that AT&T breached its obligations to them under the WSA to maintain their actions against Apple. Rather, all Plaintiffs will have to show to support their actions against Apple is that AT&T line-item charged Plaintiffs on a monthly basis for MMS or that AT&T's data plan included MMS. These simple indisputable facts can be gleaned from the clear language of the monthly billing statements or AT&T's data plan. There is no need for this Court to interpret AT&T's WSA. Thus, the general rule that a party to a contract is a necessary party under Rule 19(a) where that contract's validity or interpretation is at issue is inapplicable to Plaintiffs' action against Apple.

To this end, the question still remains whether one of the three scenarios identified in Rule 19(a)(1) exists so as to justify a finding that AT&T is a necessary party. The answer is simple – no.

The first scenario under Rule 19(a)(1) requires a finding that proceeding without AT&T will not affect the ability of the Court to accord complete relief to those who are already parties. This is clearly not the case here as Plaintiffs can be afforded complete relief from Apple should a jury find in their favor and, conversely, Apple can be dismissed from all liability should a jury find in its favor. Notably, Apple has not argued that this scenario exists. As such, AT&T is not a necessary party under the first scenario set forth in Rule 19(a)(1).

The second scenario under Rule 19(a)(1) requires a showing that AT&T has an interest

relating to the subject of the action and is so situated that disposing of the action in its absence would impair or impede its ability to protect its interest. Apple has argued that this scenario exists but its argument is without merit for the following reasons.

First, Apple does not have a right to claim an interest on behalf of AT&T. Rather only AT&T itself has the right to assert an interest in the subject of this action and Apple has not done so. *See Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1308, 1310 (5th Cir. 1986) (noting that the Court must decide whether the absent parties claim an interest relating to the subject matter of the litigation); *Johnson v. The Smithsonian Institution*, 189 F.3d 180, 189 (2d. Cir. 1999) (finding absent party not to be a necessary party where the absent party had not appeared and asserted that it had interests that could not be protected without its presence as a party); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 2007) (finding that defendant had offered no reason why the court should second-guess the absent party's assessment of its own interests); *Powers v. The City of Seattle*, 242 F.R.D. 566, 567-568 (W.D. Wash 2007) (finding that Rule 19(a)(2) did not apply because the absent party had not claimed an "interest relating to the subject of the action").

Second, AT&T does not have an interest in the subject matter of this litigation. As set forth in great detail herein, Plaintiffs' actions against Apple arise out of Apple's own liability in misrepresenting the availability of MMS on the iPhone 3G and 3GS and in failing to disclose that Plaintiffs were being charged or promised MMS which they were not receiving. Plaintiffs' actions do not allege any misconduct on the part of AT&T, do not require an interpretation of AT&T's WSA and do not require that Plaintiffs prove that AT&T breached any obligations owed to Plaintiffs. Thus, because Plaintiffs' claims against Apple are not predicated on AT&T's WSA or its liability thereunder, AT&T has no interest in this action against Apple.

Moreover, AT&T's actions to date in this litigation prior to its dismissal (i.e. filing various motions to dismiss Plaintiffs' actions against it and opposing all of Plaintiffs' requests for discovery) clearly evidence a lack of interest on the part of AT&T in the subject matter of this litigation. *See e.g. Northrop Corp.*, 705 F.2d at 1043 (noting that "the record reflects that the [absent party] has meticulously observed a neutral and disinterested posture"). Accordingly, Apple's argument that AT&T has an interest in the subject matter of this litigation is not supported by the record.

Third, to the extent that the Court finds that AT&T does have an interest in this matter, AT&T is not so situated that disposing of the action in its absence would impair or impede its ability to protect its interest. Indeed, to the extent that AT&T has an interest to protect, it can intervene in this action to protect its interest pursuant to Federal Rule of Civil Procedure 24. *In re Chinese Manufactured Drywall Products Liability Litigation*, 273 F.R.D. 380, 386 (E.D.La. 2011) (rejecting defendants argument that absent parties had an interest that needed to be protected because the interest was that of the absent party which could be protected by that party intervening in the action); *see also Abbott v. BP Exploration and Production Inc.*, 781 F. Supp. 2d 453, 468 (S.D. Tex. 2011) (finding absent party's interest not to be impaired because the absent party maintained its ability to protect its interests by intervening as of right).

In sum, because AT&T does not have an interest relating to the subject of this action and has not claimed such an interest and because AT&T is not so situated that disposing of the action in its absence would impair or impede its ability to protect any interest it may have, AT&T is not a necessary party under the second scenario set forth in Rule 19(a)(1).

The third scenario under Rule 19(a)(1) requires a showing that AT&T has an interest relating to the subject of the action and is not so situated that the disposition of the action in its

absence will leave Apple subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. For the same reasons discussed above, AT&T does not have an interest in the subject of the action and Apple does not have the right to assert an interest on AT&T's behalf. Additionally, disposing of this action in AT&T's absence will not leave Apple subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations and Apple has not argued that it would. As such, AT&T is not a necessary party under the third scenario set forth in Rule 19(a)(1).

Accordingly, because not one of the three scenarios provided by Rule 19(a) exists, AT&T is not a necessary party under Rule 19(a), regardless of its status as a party to the WSA, and Apple's motion to dismiss must be denied in its entirety.

C. Even if the Court were to Find that AT&T Is a Necessary Party under Rule 19(a), Apple's Motion Should Be Denied Because AT&T Is Not an Indispensable Party under Rule 19(b).

Should this Court find that AT&T is a necessary party under Rule 19(a) and that joinder is feasible, it must order that AT&T be joined. Fed. R. Civ. P. 19(a)(2). However, should this Court find that AT&T is a necessary party and joinder is not feasible, then it must next determine whether AT&T is an indispensable party under Rule 19(b) such that dismissal is warranted. Fed. R. Civ. P. 19(a)(2); *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 394 (5th Cir. 2006). In making this determination, this Court should apply the "equity and good conscience" test set forth in Rule 19(b) to determine whether this action may proceed without AT&T. *Id.*

A Rule 19 inquiry is "highly practical" and "fact-based." *Pulitzer-Polster*, 784 F.2d at 1309. Factors to be considered by the Court in applying the "equity and good conscience" test include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

a. protective provisions in the judgment;
b. shaping the relief; or
c. other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. Proc. 19(b).

Here, because not one of the equitable considerations under Rule 19(b) weighs in favor of dismissal, Apple should not be deemed an indispensable party such that dismissal is warranted.

First, a judgment rendered in AT&T's absence will not prejudice Plaintiffs, Apple or AT&T. If Plaintiffs prevail on their claims against Apple, then Apple will be required to pay Plaintiffs the value of damages attributable to Apple because Plaintiffs' action focuses only on Apple as the liable party. Conversely, if Apple prevails, then Apple will be relieved of liability. AT&T will suffer no prejudice under either judgment because a decision can be made as to Apple's liability without the need for a finding of liability on the part of AT&T.

Because the case law is not in its favor, Apple does not argue that it will be prejudiced by failure to join AT&T. *See e.g. Boone*, 682 F.2d at 553 (any prejudice defendant argues it will suffer as a result of the absent party not being made a party can be avoided by defendant impleading the absent party). Rather, Apple focuses its argument on the prejudice that AT&T will allegedly suffer should judgment be entered in Plaintiffs' favor. Again, Apple's support for this argument comes from its erroneous position that Plaintiffs' claims against it rely upon AT&T, an interpretation of the WSA and a finding of liability on the part of AT&T. Because Apple's position is incorrect, Apple's argument of prejudice is incorrect.

Additionally, because an interpretation of the WSA and/or a finding of liability on the part of AT&T will **not** be necessary, no decision by this Court should influence or even be applicable to future arbitration proceedings, where the issue of AT&T's liability would likely be raised. *See Pulitzer-Polster*, 784 F.2d 1310 (noting that while Rule 19 case law recognizes "that the establishment of a negative precedent can provide the requisite prejudice to the absentee," this "possibility of a precedent-setting effect…would be unimportant…if the state and federal suits were so different that any federal precedent established would be inapplicable to the state suit."); *U.S. Marine, Inc.*, 2008 WL 4443054 at *3 (denying motion to dismiss after noting that "a decision in this case would not have significant weight in a later action because here [plaintiff] seeks money damages under an FTCA and state tort law theory, while [absent party] would be forced to press their case in the Court of Federal Claims under applicable federal procurement law.")

Because AT&T will not suffer any prejudice should a decision be rendered in its absence, the second factor of Rule 19(b) (i.e. the extent to which any prejudice could be lessened or avoided) need not be analyzed.

The third factor under Rule 19(b) clearly does not support a finding that AT&T is an indispensable party because a judgment rendered in AT&T's absence would be adequate. Plaintiffs' actions against Apple arise out of Apple's own misconduct and, thus, Apple is liable to Plaintiffs for the full extent of their damages.

The fourth and final factor under Rule 19(b) also supports a finding that AT&T should not be joined. If Plaintiffs' action against Apple should be dismissed for failure to join an indispensable party, Plaintiffs will have no other remedy against anyone for injuries they sustained as a result of Apple's misconduct.

Nevertheless, Apple argues that Plaintiffs would have an adequate remedy in arbitration against both Apple and AT&T if their actions were dismissed. The first problem with Apple's argument is that it assumes that this Court already has ordered Plaintiffs' to arbitrate their claims against Apple. Currently, Plaintiffs are under no obligation to arbitrate their claims against Apple because they never contracted to do so. In fact, Apple would have a very good argument to dismiss any arbitration filed against it, as Apple has no agreement to arbitrate claims with Plaintiffs.

The second problem with Apple's argument is that it assumes that Plaintiffs will receive adequate redress for Apple's misconduct regarding its marketing of the 3G and 3GS iPhones in arbitration with AT&T. But this is not the case. Should Plaintiffs chose to arbitrate their claims with AT&T, then the arbitration will focus on AT&T's misconduct, not that of Apple. Their duties and conduct are different. Thus, it remains that Plaintiffs will have no adequate remedy should their case against Apple be dismissed.

Accordingly, because not one of the factors set forth in Rule 19(b) exist, AT&T is not an indispensable party and Apple's motion to dismiss must be denied in its entirety.

D. Jude Whyte's Decision in *Weisblatt v. Apple, Inc.* Provides Persuasive Authority for a Finding that Plaintiffs' Claims against Apple are Independent of Their Claims Against AT&T Such that Joinder is Not Required

Of the various actions that have been brought against Apple and AT&T arising out of a product manufactured by Apple, the one with the facts most similar to the present litigation can be found in *Weisblatt*, 2010 WL 4071147. There, Plaintiffs, purchasers of Apple's iPads, brought suit against Apple arising out of Apple's fraudulent, deceptive and otherwise unlawful marketing of the iPad. *Id.* at *1-2. Specifically, as to Apple, it was alleged that Apple made representations regarding the *availability of an unlimited data plan provided by AT&T*, when

Apple in fact knew that AT&T's unlimited data plan would not be available or would not remain available for long. *Id.*

In *Weisblatt*, Plaintiffs had also alleged separate, independent causes of action against AT&T regarding its own marketing of its unlimited data plan. *Id.* Shortly after filing, AT&T moved to compel arbitration or, in the alternative, to stay the action pending the U.S. Supreme Court's decision in *Concepcion*. *Id.* at *3. The Court in *Weisblatt* denied AT&T's motions to compel arbitration without prejudice, reasoning that the Supreme Court's holding in *Concepcion* would provide guidance for how to decide its motion in the future. *Id.* While the Court further denied AT&T's motion to stay the litigation, the Court recognized that Plaintiffs' claims against AT&T would likely be affected by *Concepcion* such that it made little sense to begin discovery against AT&T. *Id.* at *4. However, the court ordered that the parties commence written discovery relevant to Plaintiffs' claims *against Apple*, correctly reasoning as follows:

> Unlike other cases where courts have completely stayed proceedings pending a decision in *Concepcion*, this case involves a defendant and claims that are not inseparable from the claims against ATT[]. Moreover, Apple's reliance on *Steiner* is misplaced. In that case, the court issued a *sua sponte* stay after the plaintiff contended that a stay with regard to ATT[] and not Apple would create "a chaotic state of affairs." Plaintiffs make no such contention here. Rather, plaintiffs note that ATT[] is not an indispensable party. Specifically, plaintiffs argue that the "claims here center around *specific misrepresentations made by each Defendant, each of which is independently actionable* against the party that made them, without regard to the intent, knowledge, or liability of the other Defendant." To be sure, plaintiffs' claims are related to ATT[]'s iPad data plans. But that does not mean that plaintiffs' claims involving *Apple's* alleged conduct and misrepresentations should be stayed pending a decision in *Concepcion.* Because plaintiffs' claims against Apple are not subject to the ATT[] arbitration agreement and appear to be independently actionable, a stay with respect to Apple is unwarranted.

Id. (*emphasis* added; citations omitted).

Here, similar to *Weisblatt*, Plaintiffs, purchasers of Apple's iPhones, brought suit against Apple arising out of Apple's fraudulent, deceptive and otherwise unlawful marketing of the

iPhone. Specifically as to Apple, Plaintiffs allege that Apple made representations regarding the availability of MMS, when Apple in fact knew that MMS would not be available. Plaintiffs further allege that Apple failed to disclose that Plaintiffs were being charged for and promised MMS in their data plan and not receiving it. Thus, while Plaintiffs' claims against Apple relate to AT&T's data plan, they are still independently actionable such that they should be allowed to continue without the joinder of AT&T. Thus, Apple's motion to dismiss should be denied.

E. Judge Ware's Recent Decisions Relied Upon by Apple Do Not Provide Persuasive Authority for a Finding that Apple is an Indispensable Party Under Rule 19

In support of its motion to dismiss, Apple heavily relies upon two recently rendered decisions issued by Judge James Ware of the Northern District of California, only one of which is relevant to the present motion. In *In re Apple iPhone 3G Prod. Liab. Litig.*, 2011 U.S. Dist. LEXIS 138532 (N.D. Cal. Dec. 1, 2011) ("iPhone 3G Products Liability Litigation"), Judge Ware found AT&T to be an indispensable party under Rule 19(b) and ordered that AT&T be joined in the action. In *In re Apple & AT&TM Antitrust Litig.*, No. C 07-05152 JW, 2011 U.S. Dist. LEXIS 138539 (N.D. Cal. Dec. 1, 2011) ("Antitrust Litigation"), Judge Ware granted Apple's motion to compel arbitration finding that the Plaintiffs' claims against Apple were intertwined with their claims against AT&T.

The facts of the iPhone 3G Products Liability Litigation and the facts of the Antitrust Litigation are similar to the facts of this case *only* insofar as they involve the same Defendants and relate to iPhones. However, these cases are clearly distinguishable from the present case and Apple has mischaracterized any similarities that these cases may have with the present one.

1. Unlike the iPhone 3G Products Liability Litigation, AT&T Is Not an Indispensable Party to the Present Litigation.

As set forth in great detail herein, Plaintiffs' actions against Apple focus on Apple's fraudulent, deceptive or otherwise unlawful conduct in its marketing of the MMS availability of the iPhone 3G and 3GS and in its failing to disclose to Plaintiffs that they would be charged for or promised MMS but would not be provided it. Plaintiffs' action does not require that they prove AT&T's misconduct or that AT&T breached any obligations it may have to Plaintiffs. Indeed, AT&T's failure to provide MMS is a simple, undisputed fact that can be proven without the need to join AT&T as a party. Thus, AT&T is not a necessary party, let alone an indispensable one.

In contrast, the iPhone 3G Products Liability Litigation involved products liability claims in which it was alleged that the poor quality of AT&T's network prevented the iPhone 3G from performing at the speed promised by Apple. It was further alleged that the hardware and software in the iPhone 3G was defective such that when it was combined with the poor performance of AT&T's network infrastructure the iPhone 3G would be prevented from performing at the speed promised by Apple. Thus, to prove Apple's liability in this case would have required the Court to make a determination as to the technical sufficiency of AT&T's 3G network and how the actual performance of AT&T's 3G network contributed to the alleged defectiveness of the iPhone 3G.[2] In other words, the sufficiency of AT&T's network and how it

[2] The court had previously determined that the plaintiffs' "claims were 'based on the core allegation that [Defendants AT&T and Apple] knew that ATT[]'s 3G network was not sufficiently developed to accommodate the number of iPhone 3G users, and that Defendants deceived Plaintiffs into paying higher rates for a service that Defendants knew they could not deliver.' Attached hereto as Exhibit A is the Court's Order dated April 2, 2010. Thus, the Court concluded that Plaintiffs' allegations targeted 'the sufficiency of ATT[]'s network infrastructure and the ability of Apple's iPhone 3G to operate within the network to deliver the promised "twice as fast" performance.' *Id.* The Court went on to consider whether 'Plaintiffs' claims can proceed as to Defendant Apple in the absence of Defendant ATT[],' and concluded that they could not. *Id.* at 14. The basis of this conclusion was the Court's finding that the 'gravamen of [Plaintiffs'] allegations is that any defect in the iPhone 3G merely exacerbated the poor quality of service resulting from ATT[]'s allegedly deficient 3G network infrastructure.' *Id.* The Court thus

contributed to the alleged defectiveness of the iPhone 3G were not simple, undisputed facts that could be proven without the need to join AT&T as a party.

Also important to note is the type of liability being asserted in the iPhone 3G Products Liability Litigation. There, Plaintiffs were alleging a defect in the design of the iPhone's hardware and software and AT&T's network such that their claims were based upon products liability. Here, in the "MMS Marketing and Sales Practices Litigation," Plaintiffs are not alleging that the iPhone and AT&T's network were defective and that that was the reason behind which MMS was unavailable on the iPhone 3G and 3GS. The reason *why* Apple and AT&T did not provide MMS capability on iPhone is completely irrelevant. Rather, Plaintiffs are alleging that Apple made affirmative misrepresentations regarding the availability of MMS on its 3G and 3GS iPhones, when it was in fact unavailable, and failed to disclose that individuals were being charged and promised MMS when it was unavailable. It is the undisputed fact that MMS was unavailable, not *why* it was unavailable, which serves as the basis for Plaintiffs' claims against Apple. Thus, AT&T is not a necessary or indispensable party.

2. Unlike the Antitrust Litigation, Plaintiffs' Claims Against Apple Are Not Intertwined with AT&T's Wireless Service Agreement and Plaintiffs Have Not Alleged a "Relationship" Between Apple and AT&T.

To support its motion to dismiss, Apple further relies upon Judge Ware's opinion in the Antitrust Litigation in which he ordered that Plaintiffs could be compelled via equitable estoppel to arbitrate their claims against AT&T. Not only does Apple once again overstate the similarities between that case and this one, but that case has no relevance to the case at bar because the legal standard applied by the Court in the Antitrust Litigation is a different legal standard than the one

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found that it was 'unable to reasonably separate Plaintiffs' claims to pertain only to Defendant Apple.' *Id.* Therefore, as discussed above, the Court concluded that 'any adjudication of claims as to Defendant Apple would necessarily require a determination of the sufficiency of ATT[]'s 3G network infrastructure.' *Id.* at 15; *see also iPhone 3G Products Liability Litigation*, 2011 U.S. Dist. LEXIS 138532, at *9-11.

this Court will apply under Rule 19. Nevertheless, Plaintiffs address the allegations made in the Antitrust Litigation to demonstrate how distinguishable the facts of that care are from the facts of the current litigation.

In the Antitrust Litigation, the plaintiffs' allegations against Apple center on an agreement entered into between AT&T and Apple which provided that AT&T would be the exclusive provider for wireless voice and data services on Apple's iPhones for a five-year period. Plaintiffs were iPhone purchasers who wanted voice and data services and signed a two-year contract with AT&T believing that their contract would only last for two years. The crux of their action against Apple was violation of antitrust laws stemming from the exclusivity agreement entered into between AT&T and Apple and the terms of AT&T's WSA.

Here, and as argued in great detail herein and in Plaintiffs' Opposition to Apple's Motion to Compel Arbitration, Plaintiffs' allegations against Apple do not arise out of and are not founded upon AT&T's WSA or any agreement entered into between AT&T and Apple. Again, AT&T's liability is not at issue and an interpretation of the WSA is unnecessary, no matter how Apple tries to spin it. Plaintiffs' claims are based upon actions independently performed by Apple when it affirmatively misrepresented MMS availability on its iPhone 3G and 3GS and failed to disclose important information about MMS availability to iPhone 3G and 3GS customers. This is a clear and important distinction which Apple has glossed over in its motion papers. Apple's reliance on the holding in the Antitrust Litigation to support its motion to dismiss is therefore improper and misleading.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court DENY Apple's motion to dismiss pursuant to Rule 12(b)(7).

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 4th day of January, 2012.

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