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

SURREPLY TO DEFENDANT APPLE INC.'S
MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

Plaintiffs file this surreply to address recent rulings raised by Apple in its Reply in support of its Motion to Compel Arbitration. (Dkt. No. 267.) These rulings are *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") and *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) ("iPhone 3G Products Liability Litigation"). Both were issued after Plaintiffs' Opposition (Dkt. No. 264) was filed on November 23, 2011. On their face, these three cases appear similar as they have the same defendants and the claims relate to iPhones. However, Plaintiff takes this opportunity to distinguish those cases to the extent Apple has mischaracterized their similarities with and applicability to this case.

II. THE CLAIMS IN THIS LITIGATION ARE DISTINGUISHABLE FROM THOSE IN THE TWO RECENT RULINGS.

A. This Litigation is Different from the iPhone 3G Products Liability Litigation.

Apple argues the ruling in the iPhone 3G Products Liability Litigation should be persuasive as to the ruling on Apple's motion to compel arbitration here. Apple's allusions to the iPhone 3G Products Liability Litigation are misleading because the substantive claims in that case are quite different from the allegations in this case, and are based on its mischaracterizations of Plaintiffs' claims. The iPhone 3G Products Liability Litigation is, as its heading indicates, a products liability case based on the quality of AT&T's network, i.e., the inability of AT&T Mobility's ("AT&T") 3G network to permit the iPhone 3G to perform at the speed promised. The iPhone 3G's performance on the AT&T 3G network was a function of AT&T's network infrastructure combined with the hardware and software in the iPhone 3G. As the court held, adjudication of any claims against Apple required a determination of the sufficiency of AT&T's 3G network. *See iPhone 3G Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 138532, at *9-10. Stated another way, the claim was that the iPhone 3G was defective, and determining whether it was defective required a determination of how the performance of AT&T's 3G network

contributed to the alleged defectiveness. In contrast, the issues involving AT&T in this case do not require delving into the technical shortcomings of AT&T's slow network. Rather, AT&T's failure to provide a singular, promised service, are merely background to the allegations that Apple's **failures to disclose** and **affirmative misrepresentations** fell short of its obligations required under the law. (Opp'n at 3.) Unlike the iPhone 3G Products Liability Litigation, this is "Marketing and Sales Practices Litigation." Plaintiffs' claims are based on Apple's failures to disclose and affirmative misrepresentations in its marketing and sales, which do not require a judicial determination of the quality of AT&T's network or services. The facts that AT&T's data plan required the inclusion of MMS and AT&T billed iPhone users for MMS but did not provide it are not in dispute. The issue is not *why* MMS wasn't provided. Rather, the question is just a simple one of what Apple knew and whether it misrepresented or failed to disclose information to consumers based on its own knowledge.

Moreover, the ruling in the iPhone 3G Products Liability Litigation was on the basis of AT&T as a necessary party,[1] not on any basis found at issue here. For this reason as well, Apple's citation to the ruling in the iPhone 3G Products Liability Litigation is inapt.

B. This Litigation is Different from the Antitrust Litigation.

Apple also overstates the similarities between the Antitrust Litigation and this case. The plaintiffs' allegations in the Antitrust Litigation center on an agreement between AT&T and Apple as to the exclusivity of AT&T as the wireless service provider on Apple's iPhone for a five-year period, and that the agreement requires iPhone purchasers who want voice and data services to sign a two-year service contract with AT&T. The crux of the case is violations of antitrust law stemming from the separate exclusivity agreement between AT&T and Apple. The plaintiffs in that case sought, and were granted, a single unified class of "all persons who purchased or acquired an iPhone in the United States and entered into a two-year agreement with [Defendant ATTM] for iPhone voice and data service [at] any time from June 29, 2007, to the

[1] This will be addressed in Plaintiffs' response to Apple's 12(b)(7) Motion to Dismiss.

present." *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 18539, at *26-27. The claims against Apple and AT&T in that case cannot be separated, as they are on their face about an agreement between those two parties.

Conversely, as has been argued throughout this litigation (*see, e.g.*, Opp'n at 2-4, 28-29), the allegations against Apple here do not relate to an agreement between Apple and AT&T, and are not based on actions Apple took in conjunction with AT&T. Apple continues to try to argue that the Plaintiffs' claims against Apple here are similar to the Antirust Litigation, in that they rely on the Wireless Service Agreement ("WSA"). However, Plaintiffs' claims do not depend on the WSA, no matter how Apple tries to spin it. Plaintiffs' claims are based on actions Apple independently performed when it affirmatively misrepresented MMS availability on its iPhone 3G and 3GS, and failed to disclose important information about MMS service to iPhone 3G and 3GS customers. This is a clear and important distinction which Apple has glossed over. Apple's reliance on the holding in the Antitrust Litigation for its arguments is therefore improper and misleading.

C. If the Court Applies the Fifth Circuit Test for Equitable Estoppel, Apple Still Cannot Show the Plaintiffs' Claims are Intertwined with AT&T's WSA, Even After the Antitrust Litigation Holding.

In addition to the clear factual distinctions, there are legal distinctions that make the cases inapposite. In the iPhone 3G Products Liability Litigation, the ruling was on the issue of AT&T as a necessary party to that litigation. As noted above, this is not at issue in Apple's motion, and so there are no legal arguments from the case that are relevant here.

The Antitrust Litigation ruling does address some of the issues raised in Apple's present motion, including equitable estoppel. The Antitrust Litigation ruling was decided under Ninth Circuit law, which differs from Fifth Circuit standards on equitable estoppel, as Apple acknowledges. (Reply at 8.) Regardless of what Judge Ware found, Apple still does not meet the standard for equitable estoppel under prevailing California state law or Fifth Circuit federal law, as argued in Plaintiffs' Opposition brief. (Opp'n at 20-32.)

As to the element of the "intertwining" of the claims, Apple has vastly overstated the "intertwined-ness" of the claims in this litigation. Apple correctly points out that Judge Ware found the claims in the Antitrust Litigation to be intertwined based on the plaintiffs contending throughout the "litigation that their antitrust and related claims against Defendant [AT&T] and Defendant Apple arise from their respective [AT&T] service contracts." *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 18539, at *26. Apple again tries to equate those facts with the facts of this case, but the comparison is unavailing. Where claims do not meet the "intertwined" standard, courts deny motions to compel arbitration. (Opp'n at 23-27.) Apple ignores the clear factual distinctions between the Antitrust Litigation and this case, as discussed above. Whereas the Antitrust Litigation claims relate directly to the WSA, Plaintiffs' theories in this case do not.

All issues involving AT&T and the WSA in this litigation are merely background to the allegations of Apple's wrongdoing. Just because the claims are related in some way does not mean they are "inextricably intertwined." *See Goldman v. KPMG LLP*, 92 Cal. Rptr. 3d 534, 540 (Cal. Ct. App. 2009); *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 912-13 (5th Cir. 2011). Moreover, just because the same parties and the same WSA are involved does not make this case's claims similarly "intertwined." The facts of this case are much more analogous to *Weingarten*, as argued in Plaintiffs' Opposition, than to the facts of the Antitrust Litigation. (Opp'n at 24-26.) Like in *Weingarten*, mere reliance by the plaintiff upon the fact that AT&T was not abiding by its contract does not automatically make the marketing claims against Apple "so intertwined with and dependent on the [agreement containing the arbitration clause] that arbitration should be compelled under the exceptional principle of equitable estoppel." *Weingarten*, 661 F.3d at 913.

Indeed, the Tenth Circuit recently found that just because a contract containing an arbitration clause is "factually significant" to the plaintiff's claims does not mean that it is inextricably intertwined with those claims. *See Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, No. 11-1251, 2011 WL 5545420, at *6 (10th Cir. Nov. 15, 2011). In *Lenox*, the defendants moved to compel the plaintiff to arbitrate its antitrust claims against them even though none of

the defendants signed the distribution and licensing agreement containing the arbitration provision. *Id.* at *1. The Tenth Circuit found that the agreement was "factually significant" to the plaintiff's claims because it "provided the opportunity for the [] defendants to engage in the anticompetitive conduct alleged." *Id.* at *6. Nevertheless, the Tenth Circuit found that was not enough. It held that the agreement did not form the legal basis for the plaintiff's claims, and thus denied the defendants' motion. *Id.*

Apple also points to the Antitrust Litigation where Judge Ware found a sufficient "relationship" between AT&T and Apple. *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 138539, at *27. As Apple points out, the "relationship" requirement is not part of Fifth Circuit law. (Reply at 8.) Moreover, for the same reasons as discussed above, the "relationship" between AT&T and Apple in this case is much less than that in the Antitrust Litigation. In the Antitrust Litigation, the relationship is integral to the agreement underlying the claim–the five-year agreement which caused the iPhone purchasers to be locked into using AT&T after the expiration of their initial two-year service contracts. On the other hand, the allegations in this case do not relate to that specific five-year agreement between AT&T and Apple, and so the same "relationship" is not present in this case.

D. Apple's Remaining Comparisons to the Antitrust Litigation and iPhone 3G Products Liability Litigation are Similarly Misguided.

Apple invokes the Antitrust Litigation and iPhone 3G Products Liability Litigation numerous other times throughout their Reply, but none of these instances is legitimate either. As argued above, the facts of those cases are substantially different, and drawing tenuous parallels with draconian results is not appropriate.

i. Continuing the Suit with Non-Signatory Defendant

Apple attempts to compare the case to the iPhone 3G Products Liability Litigation, where the court found AT&T to be a necessary party and the plaintiffs could not proceed against Apple alone, stating Judge Ware "rejected such tactics." (Reply at 8.) Again, however, the facts in front of Judge Ware were very different than those in this case, and so he rejected the claim

based on the facts, not on the procedural tactics used by plaintiffs.[2] Similarly, Apple relies on *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (5th Cir. 2000), a case which Plaintiffs noted in their Opposition memorandum has been called into serious question, as well as has been limited to its facts. (Opp'n at 23 n.10). While the procedure in the cases is similar, in that they involve proceeding in court against the non-signatory defendant, the scope of the allegations is not. The basis for affirming the decision to apply equitable estoppel was that the plaintiffs' claims in *Grigson* were "so intertwined with and dependent upon the [agreement containing the arbitration clause]." (Reply at 9, citing *Grigson*, 210 F.3d at 530). In this case Plaintiffs' claims are not so intertwined with the WSA, and so *Grigson* and cases like it do not call for the same result here.

ii. Apple is Not an Authorized Party to the WSA

Apple states that the Antitrust Litigation held the fact that Apple is not an "authorized party" to the WSA is "irrelevant." (Reply at 2.) This is false. Judge Ware did not address the issue in the Antitrust Litigation order because it was not raised in the briefing and so was not at issue. The argument that Apple is not an "authorized party" to the WSA was not ruled on and to claim that fact was held irrelevant is misleading.

iii. Plaintiffs' Two Separate Agreements with Apple

Apple argues that Judge Ware rejected the reliance of the plaintiffs in the Antitrust Litigation on the iTunes Terms of Service ("TOS"), which does not contain an arbitration provision. (Reply at 2, 6, 11.) While it is true that the argument is based on the same iTunes agreement (*see* Reply at 6 n.4), the crux of the claims is completely different, and so the applicability of the TOS is not necessarily the same. The claim in the Antitrust Litigation specifically centers on the signing of the two-year WSA with AT&T, and its relation to the five-year agreement between AT&T and Apple. *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 18539, at *4-5. Conversely, Plaintiffs' claims do not depend on the WSA, but rather Apple's conduct

[2] Again, Plaintiffs will address the "necessary party" argument in their response to Apple's 12(b)(7) Motion to Dismiss.

directed at its customers, and so the TOS with Apple is still relevant. Moreover, the iPhone Software License Agreement (*see* Opp'n at 5-7) was not even at issue in the Antitrust Litigation, an important point which Apple glosses over.

iv. Apple Has Waived its Right to Compel Arbitration

Finally, Apple points to the Antitrust Litigation ruling on the basis of waiver. Again, while the parties in the cases are the same, the law (Ninth Circuit) and the facts are not. Waiver is an extremely fact-specific issue that depends on the facts of each case. *Burton-Dixie Corp. v. Timothy McCarthy Construction Co., Inc.*, 436 F.2d 405, 408 (5th Cir.1971). The court should look carefully at the facts surrounding Apple's waiver in this particular case, not that of the Antitrust Litigation. (*See* Opp'n at 9-12.)

III. THE EQUITIES STILL REQUIRE HOLDING FOR PLAINTIFFS.

One big issue that remains open, and that Judge Ware did not address, is that *Concepcion* did not change the equities of arbitration in relation to Apple. *Concepcion* was a case involving a claim solely against AT&T. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011). In regards to the arbitration provision between the plaintiffs and AT&T alone, Judge Ware noted that "the Supreme Court has specifically considered the very arbitration agreement at issue in this case, and has determined that it is enforceable, on the grounds that the agreement 'essentially guarantee[d]' that 'aggrieved customers who filed claims' would 'be made whole.'" *Antitrust Litigation*, 2011 U.S. Dist. LEXIS 18539, at *17 (quoting *Concepcion*, 131 S. Ct. at 1753). However, this was only held in the context of the AT&T arbitration proceedings providing a "whole" remedy to AT&T customers alleging wrongs under the agreement they entered into directly with AT&T. It was important in *Concepcion* that the parties had agreed to arbitrate the claims in the AT&T agreement. *Concepcion*, 131 S. Ct. at 1752 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."). Therefore, it was equitable in *Concepcion* to force consumers to seek their remedy through arbitration, in accordance with their expectations.

On the contrary, it is not equitable to take the next step and apply equitable estoppel to the Plaintiffs in this case regarding their claims against Apple. Like in *Concepcion*, Plaintiffs had the choice to enter an agreement which contained an arbitration clause, and that agreement was entered into solely with AT&T. Plaintiffs therefore knew that their only remedy against AT&T was likely to be found in arbitration. No such expectation existed as to claims against Apple–this attempted forcing into arbitration of the claims solely against Apple has come out of the blue to Plaintiffs. As the Supreme Court stated in *Concepcion*, "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." 131 S. Ct. at 1749. Plaintiffs entered a contract with AT&T whereby they agreed to certain specific terms of arbitration, which were tailored by AT&T to claims solely involving AT&T and enumerated parties. Such terms of arbitration were not designed to encompass third parties such as Apple, and therefore the logic of *Concepcion* falls apart at this point.

Moreover, as to claims against third parties like Apple, *Concepcion* did not consider whether the arbitral forum would provide an adequate remedy. So while the Supreme Court in *Concepcion* acknowledged that a plaintiff suing AT&T might be better off in arbitration than in a class action, a plaintiff suing Apple will likely not be. It is in no way clear that Plaintiffs in this litigation will adequately be protected in the same way by AT&T's arbitration clause, and so the holding of *Concepcion* is not as persuasive as to Apple.[3] It may be the case that plaintiffs suing Apple will do far worse under the terms of the AT&T arbitration clause than they would in a class action suit in a court of law.

[3] *See, e.g.*, *Feeney v. Dell, Inc.*, No. MICV 2003–01158, 2011 WL 5127806, at *8 (Mass. Super. Ct. Oct. 4, 2011) (affirming invalidation of Dell's arbitration clause after *Concepcion*, finding, unlike the clause in *Concepcion* "which had so many pro-consumer incentives that an individual consumer might be better off in arbitration than in class litigation," the Dell clause did not sufficiently protect consumers such that they would not be better off in a court of law).

Concepcion does not provide a "get out of jail free card"[4] to parties who provided services in conjunction with AT&T. Apple would have the court believe it is immune from litigation in court as to any iPhone user who signed the WSA with AT&T, leaving consumers with the uncertain option of pursuing arbitration against Apple under the AT&T arbitration clause. While the Court in *Concepcion* believed AT&T customers would be likely better off in arbitration and therefore likely to bring a suit under AT&T's clear "pro-consumer" arbitration terms, that is not the case as to Apple. As there exists no arbitration clause between Plaintiffs and Apple, Plaintiffs do not know how their claims against Apple will be treated under the terms of the AT&T arbitration clause.

Despite the Supreme Court's belief to the contrary in *Concepcion*, these class-arbitration bans provide effective immunity to defendants like AT&T. To extend that immunity to third parties like Apple–who has shown in its own agreements with consumers a desire to litigate claims in court–and leave consumers with no effective remedy is inequitable and unjust.

IV. 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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[4] *See Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1102 (2002).

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 5th day of January, 2012.

/s/Scott R. Bickford
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