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 Actions***	**CIVIL ACTION** **MDL No. 2116** **SECTION "J"** **JUDGE BARBIER** **MAGISTRATE JUDGE WILKINSON**

APPLE'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE NOTICE OF RECENT DECISION

Defendant Apple Inc. ("Apple") respectfully submits the following response to plaintiffs' motion for leave to file a notice of the Second Circuit's recent decision in *In re: American Express Merchants' Litigation*, No. 06-1871-cv (2d Cir. Feb. 1, 2012). For the reasons set forth below, the *American Express* decision is inapposite; it is not relevant to the arbitration and equitable estoppel issues before this Court.

In *American Express*, the Second Circuit addressed the question whether a mandatory arbitration provision is enforceable where plaintiffs are seeking to enforce federal statutory rights. *In re Am. Express Merchs. Litig.*, No. 06-1871-cv, 2012 U.S. App. LEXIS 1871, at *24-25, 28-33 (2d Cir. Feb. 1, 2012). *American Express* purports to distinguish *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), on the ground that *Concepcion* did not involve federal statutory rights. *Id*. The present litigation, like *Concepcion*, involves *only* state law claims which were filed in federal court pursuant to the Class Action Fairness Act of 2005; plaintiffs here allege no federal claims. (*See, e.g.*, Dkt. No. 71, *Carbine* FAC ¶¶ 69-126) Accordingly, *American Express* is irrelevant and *Concepcion* is controlling here.

Indeed, the ATTM arbitration provision at issue in the present cases is identical to that upheld by the United States Supreme Court in *Concepcion* (*See* Dkt. No. 235 at 3; Dkt. No. 259 at 2) *Concepcion* thus is binding on this Court with respect to the enforceability of the arbitration clause in ATTM's wireless service agreement.[1]

[1] *American Express* does not address the issue of equitable estoppel. Thus, plaintiffs' purpose in drawing the *American Express* decision to the Court's attention can only be an effort to relitigate the enforceability of ATTM's arbitration clause. That effort directly undermines plaintiffs' argument that this MDL can proceed in the absence of ATTM. (*See* Apple's Motion to Dismiss Pursuant to Rule 12(b)(7), Dkt. Nos. 268, 275)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been electronically filed on February 9, 2012, with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing.

/s/ Quentin F. Urquhart