IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re Apple & AT&TM Antitrust Litigation

NO. C 07-05152 JW

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OR TO CERTIFY FOR INTERLOCUTORY APPEAL; CERTIFYING FOR INTERLOCUTORY APPEAL RE. THE ASSERTION OF EQUITABLE ESTOPPEL BY A NON-SIGNATORY DEFENDANT AGAINST A SIGNATORY PLAINTIFF; STAYING CASE

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Presently before the Court is Plaintiffs' Motion for Leave to File Motion for Reconsideration or to Certify for Interlocutory Appeal.[1] The Court finds it appropriate to take the Motion under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS in part and DENIES in part Plaintiffs' Motion for Leave to File Motion for Reconsideration or to Certify for Interlocutory Appeal. The Court CERTIFIES for interlocutory appeal solely as to the issue of whether a non-signatory defendant may assert equitable estoppel against a signatory plaintiff.

[1] (Plaintiffs' Notice of Motion and Motion for Leave to Seek Reconsideration and/or in Addition to Amend the Order to Certify for Immediate Interlocutory Appeal; Memorandum of Points and Authorities in Support Thereof, hereafter, "Motion," Docket Item No. 554.)

A. Background

A detailed outline of the background and procedural history of this case may be found in the Court's October 1, 2008 Order.[2] The Court reviews the relevant procedural history as it relates to the present Motion.

On October 1, 2008, the Court denied Defendant ATTM's motions to compel arbitration and to dismiss, on the ground that Defendant ATTM's arbitration agreement with Plaintiffs was unconscionable under state law.[3] (See October 1 Order at 7-10.) The Court also denied Defendant ATTM's motion to dismiss, on the ground that the state laws in question were not preempted by the Federal Arbitration Act ("FAA"). (See id. at 11.) Finally, the Court granted in part and denied in part Defendant Apple's motion to dismiss. (See id. at 12-30.) In particular, the Court denied Defendant Apple's motion to dismiss Plaintiffs' antitrust claims under Section 2 of the Sherman Act, on the ground that Plaintiffs had adequately alleged that Defendant Apple had sufficient market power in certain aftermarkets.[4] (See id. at 12-18.)

On July 8, 2010, the Court granted Plaintiffs' motion for class certification.[5]

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[2] (See Order Denying Defendant AT&TM's Motion to Compel Arbitration and to Dismiss; Denying Defendant AT&TM's Motion to Stay Discovery; Granting in part and Denying in part Defendant Apple's Motion to Dismiss, hereafter, "October 1 Order," Docket Item No. 144.)

[3] In particular, the Court found that it was "undisputed that Plaintiffs signed an Arbitration Agreement" with Defendant ATTM which included a waiver specifying that "class arbitrations and class actions are not permitted" under the Agreement. Id. at 6. However, the Court found that this class action waiver was unconscionable and thus unenforceable, on the grounds that it violated the "Discover Bank standard" articulated by the California Supreme Court. See id. at 7-10 (citing Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005)).

[4] In finding that Plaintiffs had adequately alleged their antitrust claims against Defendant Apple, the Court relied upon a Ninth Circuit opinion which held that there "can be a legally cognizable aftermarket in a single brand's products, even if that market is created by a contractual relationship." (Id. at 14 (citing Newcal Indus., Inc. v. IKON Office Solution, 513 F.3d 1038, 1048-50 (9th Cir. 2008)).) Thus, the Court found that even though the "alleged aftermarket [was] predicated on an initial contractual relationship between Defendants and iPhone purchasers," Plaintiffs' Complaint was still adequate under Newcal. (Id. at 14-15.)

[5] (See Order Granting Defendant Apple's Motion for Summary Judgment; Granting in part Plaintiffs' Motion for Class Certification; Denying Folkenflik & McGerity's Motion for Appointment as Co-Lead Counsel, hereafter, "July 8 Order," Docket Item No. 466.)

On September 15, 2010, the Court stayed proceedings in this case, on the grounds, *inter alia*, that Defendants had raised "significant legal questions as to the proper interpretation of Newcal Indus., Inc. v. IKON Office Solution," and because "Newcal's implications for the type of class action claim at issue" in this matter "may be a case of first impression."[6] On December 9, 2010, the Court continued the stay in this case on different grounds, namely, the fact that the Supreme Court's then-pending decision in AT&T Mobility LLC v. Concepcion "could likely simplify the legal questions [in this case] and conserve judicial resources."[7] On April 27, 2011, the Supreme Court issued its decision in Concepcion.[8]

On December 1, 2011, the Court granted Defendants' Motions to Compel Arbitration and Motions to Decertify Class. (hereafter, "December 1 Order," Docket Item No. 553.)

Presently before the Court is Plaintiffs' Motion for Leave to File Motion for Reconsideration or to Certify for Interlocutory Appeal.

B. Standards

Pursuant to Civil Local Rule 7-9(b), a party moving for leave to file a motion for reconsideration must specifically show the following:

> (1) At the time of the filing the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order;
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civ. L.R. 7-9(b). A motion for leave to file a motion for reconsideration may not repeat any oral or written argument previously made with respect to the interlocutory order that the party now seeks to

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[6] (See Order Granting Defendants' Motion to Stay Proceedings at 5-6, Docket Item No. 493.)

[7] (Order Vacating Case Management Conference and Staying Proceedings Pending the Supreme Court's Decision in AT&T Mobility v. Conception [sic] at 1, Docket Item No. 499.)

[8] 131 S. Ct. 1740 (2011).

have reconsidered. Id. 7-9(c). "A party who violates this restriction shall be subject to appropriate sanctions." Id.

Title 28 U.S.C. § 1292(b) provides, in pertinent part, that a district judge may certify an order for immediate interlocutory appeal if the judge is "of the opinion" that: (1) the order involves "a controlling question of law"; (2) there "is substantial ground for difference of opinion" as to the resolution of that question; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation[]." Even if all three of these requirements are satisfied, "a district court still has the discretion in deciding whether or not to grant a party's motion for certification." In re LDK Solar Sec. Litig., 584 F. Supp. 2d 1230, 1258 (N.D. Cal. 2008). Certification should "be used only in extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation." U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966).

C. Discussion

Plaintiffs move for leave to file a motion for reconsideration as to the issue of whether it was equitable to allow Defendant Apple to demand that Plaintiffs arbitrate their claims, even though the iTunes contract between Plaintiffs and Defendant Apple states that Plaintiffs must bring all their claims against Defendant Apple "only in court." (Motion at 5-7.) Alternatively, Plaintiffs move the Court to certify for immediate appeal whether: (1) Plaintiffs must arbitrate their individual antitrust claims against Defendant Apple, in light of the iTunes contract; and (2) Defendant Apple is permitted to invoke equitable estoppel against Plaintiffs, even though it is a non-signatory defendant to the agreement in this case which provides for arbitration. (Id. at 7-11.) Finally, Plaintiffs move the Court to certify for immediate appeal whether Defendant ATTM abandoned its right to arbitrate Plaintiffs' claims. (Id. at 11-15.) Defendant Apple responds that the Court should neither reconsider, nor certify for immediate appeal, any issue involving the iTunes contract, on the grounds that Plaintiffs' case was based on a different contract–namely, Defendant ATTM's Wireless Service

Agreement–which means that the iTunes contract is "irrelevant" to this case.[9] Further, Defendant Apple responds that the Court should not certify for immediate appeal the question of whether it is permitted to invoke equitable estoppel as a non-signatory defendant, on the ground that Plaintiffs cannot show that there is "substantial ground for difference of opinion" as to this issue. (Id. at 10-11.) Finally, Defendant ATTM responds that the Court should not certify for immediate appeal the question of whether it abandoned its right to arbitrate, on the ground that Plaintiffs cannot show that there is "substantial ground for a difference of opinion" concerning the conclusion that it did not waive its right to compel arbitration.[10] The Court considers each issue in turn.

1. The iTunes Contract

At issue is whether the Court should reconsider whether it was equitable to allow Defendant Apple to demand that Plaintiffs arbitrate their claims, despite the iTunes contract between Plaintiffs and Defendant Apple which provides that Plaintiffs must bring their claims against Defendant Apple in court.

As a threshold matter, the Court observes that this issue was before the Court at the time it issued its December 1 Order.[11] At that time, the Court considered and rejected this argument, though it did not address the argument in its December 1 Order.[12] For the sake of completeness, however, the Court briefly addresses the argument here.

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[9] (Defendant Apple Inc.'s Opposition to Plaintiffs' Motion for Leave to File Motion for Leave to Seek Reconsideration and/or in Addition to Amend the Order to Certify for Immediate Interlocutory Appeal at 1-10, hereafter, "Apple Opp'n," Docket Item No. 558.)

[10] (Defendant AT&T Mobility LLC's Opposition to Plaintiffs' Motion to Amend the Order to Certify for Immediate Interlocutory Appeal at 1-8, hereafter, "AT&T Opp'n," Docket Item No. 557.)

[11] (See Plaintiffs' Opposition to Defendant Apple's Motion to Compel Arbitration and Stay Case at 4-7, hereafter, "Plaintiffs' Apple Opp'n," Docket Item No. 515.)

[12] See, e.g., Morse v. ServiceMaster Global Holdings Inc., Nos. C 10-00628 SI, C 09-05152 SI, 2011 WL 3476525, at *1 (N.D. Cal. Aug. 9, 2011) (explaining the court's decision to deny a motion for leave to file a motion for reconsideration by noting that the court had not "fail[ed] to consider [an] argument" raised by the plaintiff, but instead had "concluded that [the] argument was insufficient to demonstrate [the proposition for which the plaintiff raised the argument]").

In its December 1 Order, the Court explained at length the reasons for its finding that Defendant Apple is permitted, under the doctrine of equitable estoppel, to compel Plaintiffs to arbitrate their claims against it. (December 1 Order at 8-14.) In particular, the Court explained that "Plaintiffs themselves have contended throughout this litigation that their antitrust and related claims against [both] Defendant ATTM and Defendant Apple arise from their respective ATTM service contracts."[13] Further, the Court explained that "[a]t Plaintiffs' request, the Court [had] certified a single unified class as follows: '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 present.'"[14] Thus, the Court explained that the relevant contract, for purposes of equitable estoppel, is Plaintiffs' agreement with Defendant ATTM, which–as discussed above–contains an arbitration provision.

Moreover, the Court finds that the cases on which Plaintiffs rely for the proposition that the iTunes contract should preclude the Court from applying equitable estoppel in this situation are inapposite.[15] First, in Hawkins v. KPMG LLP,[16] the court considered an agreement between a plaintiff and a corporation which contained an arbitration provision. Id. at 1041-42. The court went on to deny a motion to compel arbitration brought by defendants who were "not parties to" the agreement containing the arbitration provision. Id. at 1049. In denying that motion, however, the court emphasized that the plaintiff's claims against those defendants "[did] not depend in any way on the content of [the agreement containing the arbitration provision]." Id. In particular, in considering defendants' equitable estoppel argument, the court found that the doctrine of equitable estoppel was not applicable because the "plaintiff's claims [did] not rely on the content of [the agreement containing the arbitration provision] for their success." Id. at 1051. In this case, by

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[13] (December 1 Order at 12 (citing Plaintiffs' Reply Memorandum of Points and Authorities in Further Support of their Motion for Class Certification at 10, Docket Item No. 422).)

[14] (Id. (citing July 8 Order at 25).)

[15] (Motion at 6; see also Plaintiffs' Apple Opp'n at 5-6.)

[16] 423 F. Supp. 2d 1038 (N.D. Cal. 2006).

contrast, Plaintiffs' claims against both Defendant ATTM and Defendant Apple have relied upon the content of Plaintiffs' agreement with Defendant ATTM, as discussed above. Second, in Hallwood Group Inc. v. Balestri,[17] the Northern District of Texas affirmed a bankruptcy court's denial of a motion to compel arbitration. In that case, however, the district court merely found that a bankruptcy court had not abused its discretion in finding that the "central agreement" to a dispute between various parties was one that did not contain an arbitration provision, and that an "arbitration clause in [a separate agreement] should not be invoked." Id. at *3. In this case, by contrast, the Court has expressly found that the central agreement between Plaintiffs and both Defendants is Plaintiffs' agreement with Defendant ATTM.

Thus, the Court does not find good cause to grant Plaintiffs leave to file a motion for reconsideration of whether it was equitable to allow Defendant Apple to demand that Plaintiffs arbitrate their claims, despite the iTunes contract between Plaintiffs and Defendant Apple. Moreover, Plaintiffs' sole argument as to why the Court should certify this question for appeal relies on the two cases discussed above, which Plaintiffs contend create a "split of authority within the [Ninth] Circuit that requires the Ninth Circuit to review [this issue]."[18] However, as discussed above, the Court finds that Hawkins is inapposite, which means that no "split of authority" has been created between the court's decision in that case and this Court's December 1 Order.[19] Therefore, the Court does not find good cause to certify this issue for immediate appeal.

In sum, the Court does not find good cause either to reconsider or to certify for immediate appeal the issue of whether it was equitable to allow Defendant Apple to demand that Plaintiffs arbitrate their claims, despite the iTunes contract between Plaintiffs and Defendant Apple.

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[17] No. 3:10-CV-1198-K, 2010 WL 4274754 (N.D. Tex. Oct. 21, 2010).

[18] (Motion at 8 (contending that "[h]ere, the strength of Plaintiffs' argument . . . is easily demonstrated by the two well-reasoned decisions directly on point (Hawkins and Hallwood) as well as the absence of any contrary authority").)

[19] Inasmuch as Hallwood is a decision of the Northern District of Texas, it necessarily cannot create a "split of authority within the [Ninth] Circuit."

2. Equitable Estoppel

At issue is whether the Court should certify for immediate appeal the issue of whether Defendant Apple is able to assert the doctrine of equitable estoppel against Plaintiffs, even though it is a non-signatory defendant to the agreement in this case which provides for arbitration.

Upon review, the Court finds good cause to certify this issue for immediate appeal. In its December 1 Order, the Court considered Mundi v. Union Security Life Insurance Co.,[20] the controlling Ninth Circuit case addressing the circumstances under which a non-signatory may compel a signatory to arbitrate.[21] As the Court explained, in Mundi the Ninth Circuit considered whether "a nonsignatory [defendant] to [an] arbitration agreement . . . can require [a signatory plaintiff] to arbitrate her claims against [the defendant]."[22] The Court went on to explain that the court in Mundi determined that prior Ninth Circuit cases had failed to "address[] [that] precise situation," and therefore looked to other circuits for guidance.[23] Finally, following the Second Circuit decision[24] to which the court in Mundi had looked for guidance, the Court concluded that a non-signatory defendant may "compel a signatory to arbitrate based on estoppel," so long as two requirements–namely, that the subject matter of the dispute is "intertwined" with the contract, and that there is a sufficient "relationship" between the parties–are met. (Id. (citations omitted).)

Thus, in concluding that Defendant Apple is able to assert the doctrine of equitable estoppel against Plaintiffs, even though it is a non-signatory defendant to the agreement providing for arbitration, the Court followed the Ninth Circuit's opinion in Mundi. The Court further explained that a "similar conclusion regarding the ability of a non-signatory defendant to compel a signatory plaintiff to arbitrate its claims under the doctrine of equitable estoppel has been reached, post-

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[20] 555 F.3d 1042 (9th Cir. 2009).

[21] (See December 1 Order at 9-13.) The parties agree that Mundi is controlling, though they differ as to their interpretation of the case. (See Motion at 10-11; Apple Opp'n at 10-12.)

[22] (December 1 Order at 9-10 (citing Mundi, 555 F.3d at 1044).)

[23] (Id. at 10 (citing Mundi, 555 F.3d at 1046).)

[24] Sokol Holdings, Inc. v. BMB Munai, Inc., 542 F.3d 354 (2d Cir. 2008).

Mundi, by other district courts in the Ninth Circuit."[25] However, the Court recognized that the Mundi court stated that it saw "no basis for extending the concept of equitable estoppel of third parties in an arbitration context beyond the very narrow confines delineated" in the Ninth Circuit's previous cases in this area.[26] Given the fact that the Court's December 1 Order was premised on an interpretation of Mundi which required the Court to undertake an extensive analysis of both that opinion itself and the Second Circuit caselaw to which the Mundi court looked for guidance, and given the language in Mundi which indicates that the Ninth Circuit did not mean to extend the "concept of equitable estoppel of third parties" beyond the "very narrow confines" delineated in previous cases, the Court finds that a substantial difference of opinion exists as to this issue.[27]

Accordingly, the Court finds good cause to certify for immediate appeal the issue of whether Defendant Apple is able to assert the doctrine of equitable estoppel against Plaintiffs, even though it is a non-signatory defendant to the agreement providing for arbitration.

3. Waiver of ATTM's Right to Compel Arbitration

At issue is whether the Court should certify for immediate appeal the issue of whether Defendant ATTM abandoned its right to demand arbitration by failing to appeal the Court's October 1 Order to the Ninth Circuit.

Upon review, the Court does not find good cause to certify this issue for immediate appeal, because Plaintiffs do not show that there is any "substantial ground for difference of opinion" as to the Court's finding with regard to this issue. In its December 1 Order, the Court explained that if there was "no existing right to arbitration" because the "then-prevailing law of [the] circuit" would

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[25] (December 1 Order at 10 n.20 (citing ValueSelling Assocs., LLC v. Temple, No. 09 CV 1493 JM, 2009 WL 3736264, at *6-7 (S.D. Cal. Nov. 5, 2009).)

[26] (Id. at 11 (citing Mundi, 555 F.3d at 1046).)

[27] In addition, the Court finds that this is a "controlling question of law," inasmuch as the issue of whether Defendant Apple may compel arbitration in this case is governed by the Court's interpretation of Mundi. Further, the Court finds that "immediate appeal [on this issue] may materially advance the ultimate termination of the litigation," as it avoids the possibility that the Ninth Circuit might reverse the Court's December 1 Order upon an appeal by Plaintiffs following arbitration, which would render such arbitration nugatory.

have rendered an attempt to compel arbitration "futile," there can be no waiver of the right to arbitration.[28] The Court went on to explain that as of October 2008, when the Court denied Defendant ATTM's motion to compel arbitration, "the prevailing law of the Ninth Circuit held that arbitration agreements of the type at issue in this case were unconscionable."[29] Thus, the Court concluded that in October 2008 it would have been futile for Defendant ATTM to appeal the Court's denial of its motion to compel arbitration to the Ninth Circuit, from which it followed that Defendant ATTM did not waive its right to arbitration by failing to appeal. (Id.)

Here, Plaintiffs do not contend that there is any substantial ground for difference of opinion as to whether a party waives its right to arbitrate, if appealing a denial of arbitration would have been "futile" under then-prevailing circuit law. Indeed, Plaintiffs cite no case holding that a party may abandon its right to arbitrate where such an appeal would have been futile under then-prevailing circuit law; nor is the Court aware of any such case. Instead, Plaintiffs rely entirely on cases in which it would *not* have been futile for a party to appeal the denial of a motion to compel arbitration.[30] However, the Court finds that those cases do not stand for the proposition that a party may waive the right to arbitrate by failing to appeal an order denying a motion to compel arbitration, *even if* such an appeal would have been futile. Rather, they state that a party may waive its right to arbitrate by failing to take an immediate appeal of a denial of arbitration–when such an appeal would not be futile–because a party may not proceed to trial and then later "seek arbitration on appeal if the trial goes badly instead of appealing [the denial of a motion to compel arbitration]

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[28] (See December 1 Order at 5 (citing Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1187 (9th Cir. 1986).)

[29] (Id. at 6 (citing Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976, 981-84 (9th Cir. 2007).)

[30] See, e.g., Cotton v. Slone, 4 F.3d 176, 180 (2d Cir. 1993) (finding waiver of a right to arbitrate because of a party's failure to take a timely appeal of an order denying a motion to compel arbitration, but *not* stating that such an appeal would have been futile under then-prevailing circuit law); Transamerica Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, Nos. 93-55490, 93-55498, 1994 WL 712173, at *1-2 (9th Cir. Dec. 19, 1994) (same).

immediately."[31] Here, by contrast: (1) any appeal to the Ninth Circuit of the Court's October 1 Order would have been futile, as discussed above; and (2) Defendant ATTM did not proceed to trial and then seek arbitration on appeal "if the trial [were to go] badly," but instead brought another motion to compel arbitration once the prevailing law of the circuit had changed so as to render such a motion non-futile.

Further, the Court finds that Plaintiffs' contention that Defendant ATTM abandoned its right to arbitrate in this case because had a "statutory right to appeal" the October 1 Order, and because it appealed from similar orders in eight other cases, is misguided. (Motion at 12-14.) Plaintiffs offer no authority for the proposition that because a defendant chooses to appeal the denial of motions to compel arbitration in certain cases, even if those appeals were futile under then-prevailing circuit law, it therefore waives its right to arbitrate in a case where it does not take a futile appeal. Nor is the Court aware of any case standing for that proposition.

Accordingly, the Court does not find good cause to certify for immediate appeal the issue of whether Defendant ATTM abandoned its right to demand arbitration by failing to appeal the Court's October 1 Order to the Ninth Circuit.

D. Conclusion

The Court GRANTS in part and DENIES in part Plaintiffs' Motion for Leave to File Motion for Reconsideration or to Certify for Interlocutory Appeal.

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[31] Colon v. R.K. Grace & Co., 358 F.3d 1, 4 (1st Cir. 2003) (citing Cotton, 4 F.3d at 180). As the court in Colon explained, the Second, Fifth and Eighth Circuits have held that the "failure to promptly appeal [a denial of a motion to compel arbitration] may by estoppel foreclose the demanding party's right to arbitration," on the ground that "it is wasteful to have a full trial and then determine by a post-trial appeal that the whole matter should have been arbitrated and so start again." Id.

The Court CERTIFIES its December 1 Order for interlocutory appeal solely as to the issue of whether a non-signatory defendant may assert equitable estoppel against a signatory plaintiff.

In light of this Order, the Court STAYS its December 1 Order compelling arbitration as to both Defendants.

Dated: February 1, 2012

JAMES WARE
United States District Chief Judge

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Dated: February 1, 2012

Richard W. Wieking, Clerk

By: /s/ JW Chambers
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