

1 LATHAM & WATKINS LLP  
 Daniel M. Wall (Bar No. 102580)  
 2 Alfred C. Pfeiffer, Jr. (Bar No. 120965)  
 Christopher S. Yates (Bar No. 161273)  
 3 Sadik Huseny (Bar No. 224659)  
 505 Montgomery Street, Suite 2000  
 4 San Francisco, California 94111-6538  
 Telephone: (415) 391-0600  
 5 Facsimile: (415) 395-8095  
 Email: [Dan.Wall@lw.com](mailto:Dan.Wall@lw.com)  
 6 Email: [Al.Pfeiffer@lw.com](mailto:Al.Pfeiffer@lw.com)  
 Email: [Chris.Yates@lw.com](mailto:Chris.Yates@lw.com)  
 7 Email: [Sadik.Huseny@lw.com](mailto:Sadik.Huseny@lw.com)

8 Attorneys for Defendant  
 APPLE INC.

9

10

UNITED STATES DISTRICT COURT

11

NORTHERN DISTRICT OF CALIFORNIA

12

13 IN RE APPLE & AT&TM ANTI-TRUST  
 LITIGATION

14

CASE NO. C 07-5152 JW

15

**DEFENDANT APPLE’S NOTICE OF  
 MOTION AND MOTION TO COMPEL  
 ARBITRATION AND FOR  
 DECERTIFICATION**

16

Date: October 3, 2011  
 Time: 9:00 a.m.  
 Place: Courtroom 15, 18<sup>th</sup> Floor

17

18

The Honorable James Ware

19

20

21

22

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

|  | <b><u>Page(s)</u></b> |
|--|-----------------------|
| I. INTRODUCTION .....  | 1                     |
| II. STATEMENT OF ISSUES TO BE DECIDED .....  | 2                     |
| III. RELEVANT PROCEDURAL HISTORY .....   | 2                     |
| IV. <i>CONCEPCION</i> ESTABLISHES THAT THE ARBITRATION CLAUSE IN<br>PLAINTIFFS’ WIRELESS SERVICES CONTRACT IS ENFORCEABLE.....   | 4                     |
| V. EQUITABLE ESTOPPEL MANDATES ARBITRATION OF<br>PLAINTIFFS’ CLAIMS AGAINST APPLE .....  | 5                     |
| A. Legal Standard .....  | 5                     |
| B. Plaintiffs Are Equitably Estopped from Refusing to Arbitrate Their<br>Voice and Data Claims Against Apple .....   | 7                     |
| 1. Plaintiffs’ Antitrust Claims Against Apple Rely Upon and<br>Presume the Existence of the Wireless Services Contract.....  | 7                     |
| 2. Plaintiffs’ Antitrust Claims Against Apple Allege<br>Interdependent and Concerted Misconduct by Apple and<br>ATM Intertwined With the Wireless Services Contract..... | 8                     |
| 3. Plaintiffs’ Arguments That Their Claims Against Apple<br>Should Go Forward In This Court Are Meritless .....  | 11                    |
| C. Plaintiffs’ Applications Aftermarket Class Claims Must Also Be<br>Sent to Arbitration.....  | 14                    |
| D. In the Alternative, This Court Should Stay All of Plaintiffs’ Claims<br>Against Apple Pending the Arbitration Against ATM.....  | 15                    |
| VI. THE COURT MUST DECERTIFY THE CLASS APPROVED ON JULY<br>7, 2008.....  | 16                    |
| VII. CONCLUSION.....   | 19                    |

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

*Am. Bankers Ins. Group v. Long*,  
453 F.3d 623 (4th Cir. 2006) ..... 6, 12

*Amisil Holdings Ltd. V. Clarium Cap. Mgmt. LLC*,  
622 F. Supp. 2d 825 (N.D. Cal. 2007) ..... 7, 9

*Boston Tel. Group, Inc. v. Deloitte Touche Tohmatsu*,  
278 F. Supp. 2d 1041 (N.D. Cal. 2003) ..... 9

*Bryant v. Serv. Corp. Int’l*,  
2011 U.S. Dist. LEXIS 74805 (N.D. Cal., July 12, 2011)..... 14

*CD Partners, LLC v. Grizzle*,  
424 F.3d 795 (8th Cir. 2005) ..... 6

*CMAX, Inc. v. Hall*,  
300 F.2d 265 (9th Cir. 1962) ..... 15

*Comer v. Micor, Inc.*,  
36 F.3d 1098 (9th Cir. 2006) ..... 5

*Culpepper v. Irwin Mortg. Corp.*,  
491 F.3d 1260 (11th Cir. 2007) ..... 17

*Discover Bank v. Superior Court*,  
36 Cal. 4th 148 (2005) ..... 2, 12, 13, 14

*Doctor’s Assocs. v. Stuart*,  
85 F.3d 975 (2d Cir. 1996)..... 12

*Estrella v. Freedom Fin.*,  
2011 U.S. Dist. LEXIS 71606 (N.D. Cal., July 5, 2011)..... 14

*Fisher v. A. G. Becker Paribas, Inc.*,  
791 F.2d 691 (9th Cir. 1986) ..... 12, 13

*Fujian Pac. Elec. Co. v. Bechtel Power Corp.*,  
2004 U.S. Dist. LEXIS 23472 (N.D. Cal. Nov. 19, 2004)..... 7, 11, 16

*Garcia v. Stonehenge, Ltd.*,  
1998 U.S. Dist. LEXIS 23565 (N.D. Cal., March 2, 1998)..... 9

*Grigson v. Creative Artists Agency, L.L.C.*,  
210 F.3d 524 (5th Cir. 2000) ..... 6

*Hawkins v. KPMG LLP*,  
423 F. Supp. 2d 1038 (N.D. Cal. 2006) ..... 8, 11

*Hoffman v. Deloitte & Touche, LLP*,  
143 F. Supp. 2d 995 (N.D. Ill. 2001) ..... 11, 17

1 *Hughes Masonry Co., Inc. v. Greater Clark County Sch. Bldg. Corp.*,  
659 F.2d 836 (7th Cir. 1981) ..... 6

2

3 *In re Cal. Title Ins. Antitrust Litig.*,  
2011 U.S. Dist. LEXIS 71621 (N.D. Cal., June 27, 2011) ..... 14

4 *In re Currency Conversion Fee Antitrust Litig.*,  
361 F. Supp. 2d 237 (S.D.N.Y. 2005)..... 17

5 *In re Universal Serv. Fund Tel. Billing Practices Litigation*,  
300 F. Supp. 2d 1107 (D. Kan. 2003)..... 11

6

7 *In re Wholesale Grocery Products Antitrust Litig.*,  
No. CV-09-00983 (D. Minn., July 5, 2011)..... 6

8 *Javitch v. First Union Securities, Inc.*,  
315 F.3d 619 (6th Cir. 2003) ..... 8

9

10 *Jones v. Deutsche Bank AG, et al.*,  
No. C 04-05357 JW (N.D. Cal., April 26, 2007)..... 5, 7, 8, 11

11 *Leff v. Deutsche Bank AG*,  
2009 U.S. Dist. LEXIS 41713 (N.D. Ill., May 15, 2009)..... 10

12

13 *Letizia v. Prudential Bache Secur., Inc.*,  
802 F.2d 1185 (9th Cir. 1986) ..... 12, 13

14 *Miller v. Equifirst Corp. of WV*,  
2006 U.S. Dist. LEXIS 63816 (S.D.W.Va., Sept. 5, 2006) ..... 11

15

16 *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*,  
460 U.S. 1 (1983)..... 5, 15

17 *MS Dealer Serv. Corp. v. Franklin*,  
177 F.3d 942 (11th Cir. 1999) ..... 6, 7, 10, 11

18

19 *Mundi v. Union Sec. Life Ins. Co.*,  
555 F.3d 1042 (9th Cir. 2009) ..... 5, 6, 11

20 *Nesslage v. York Secur., Inc.*,  
823 F.2d 231 (8th Cir. 1987) ..... 12

21 *Noodles Dev., L.P. v. Latham Noodles, LLC*,  
2009 U.S. Dist. LEXIS 81773 (D. Ariz., Aug. 26, 2009)..... 6

22

23 *Officers for Justice v. Civil Serv. Comm’n*,  
688 F.2d 615 (9th Cir. 1982) ..... 16

24 *Paladin Assocs. v. Montana Power Co.*,  
328 F.3d 1145 (9th Cir. 2003) ..... 10

25

26 *Progeny Advanced Genetics, Inc. v. Paragon Seed, Inc.*,  
2006 U.S. Dist. LEXIS 18558 (N.D. Cal., March 2, 2006)..... 5

27 *Roderick v. Mazzetti & Assoc.*,  
2004 U.S. Dist. LEXIS 22911 (N.D. Cal., Nov. 9, 2004)..... 15

28

1 *Rodriguez v. West Publ’g Corp.*,  
563 F.3d 948 (9th Cir. 2009) ..... 17

2

3 *Shearson/American Express, Inc. v. McMahon*,  
482 U.S. 220 (1987)..... 5

4 *Shroyer v. New Cingular Wireless Services*,  
498 F.3d 976 (9th Cir. 2007) ..... 2, 13

5 *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration Intern., Inc.*,  
198 F.3d 88 (2d Cir. 1999)..... 6

6

7 *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*,  
526 F.3d 38 (1st Cir. 2008)..... 6

8

9 *Sparling v. Hoffman Constr. Co.*,  
864 F.2d 635 (9th Cir. 1988) ..... 17

10 *Stiener v. Apple Computer, Inc.*,  
556 F. Supp 2d 1016 (N.D. Cal. 2008) ..... 2, 13

11 *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*,  
368 F.3d 1053 (9th Cir. 2004) ..... 17

12

13 *Thomas S. by Brooks v. Flaherty*,  
902 F.2d 250 (4th Cir. 1990) ..... 18

14 *United Steel, Paper & Forestry, Rubber, Manuf. Energy, Allied Indus. & Serv.*  
*Workers Int’l Union v. ConocoPhillips Co.*,  
593 F.3d 802 (9th Cir. 2010) ..... 17

15

16 *Villegas v. Us Bancorp*,  
2011 U.S. Dist. LEXIS 65032 (N.D. Cal., June 20, 2011) ..... 14

17

18 *Wal-Mart Stores, Inc. v. Dukes*,  
2011 U.S. LEXIS 4567 (June 20, 2011) ..... 19

19 *Wolf v. Langmeier*,  
2010 U.S. Dist. LEXIS 87017 (E.D. Cal., Aug. 24, 2010) ..... 16

20

21 **RULES**

22 9 U.S.C. §§ 1-16 ..... 5

23 Federal Rule of Civil Procedures § 23(c)(1)(C) ..... 17

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on October 3, 2011, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, Courtroom 15 at 450 Golden Gate Ave., San Francisco, CA 94110, before the Honorable James Ware, Defendant Apple Inc. will, and hereby does, move to compel arbitration of plaintiffs' claims against Apple and decertify the class certified in this Court's July 8, 2010 order. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and authorities cited therein, the pleadings on file in this action, and upon such other matters presented to the Court at the time of the hearing.

**RELIEF SOUGHT**

Defendant Apple Inc. seeks an order compelling plaintiffs to arbitrate their claims against Apple, decertifying the class previously approved by the Court in its July 8, 2010 order, and dismissing the claims in this action against Apple.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs in this case all entered into a wireless service contract with AT&T Mobility LLC (“ATTM”) that contained an arbitration provision—a provision held by this Court three years ago to be unenforceable under then-controlling law. That law has been overturned by the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Because the arbitration provision is enforceable, the claims against ATTM must be arbitrated. The well-established principles of equitable estoppel require that plaintiffs’ claims against Apple Inc. (“Apple”) be sent to arbitration as well. Claims against non-signatories to a contract must be arbitrated where *either* of the following exists: the claims rely on the contract that contains the arbitration clause or the plaintiff alleges substantially interdependent and concerted misconduct by the non-signatory and a signatory to the contract. Both grounds for the application of equitable estoppel apply here.

As to the first ground—reliance on the contract—plaintiffs successfully opposed defendants’ motions to dismiss and then obtained certification of a class by claiming that (1) each class member’s identical wireless service contract for the iPhone allegedly did not provide adequate information as to the length of ATTM’s iPhone exclusivity, and (2) the Court need only look to that service contract to determine whether consumers agreed to give defendants monopoly power in the claimed antitrust aftermarkets. They framed their “aftermarket” allegations to depend entirely upon what is said (or allegedly not said) in the wireless service contract: “[I]t could not be clearer [that] the definition of the aftermarket in this case depends upon whether Plaintiffs or any other members of the Class entered into binding written contracts that obligated them to use ATTM for voice and data service for the life of the iPhones.” Pls. Reply Mem. In Supp. of Class Cert., Dkt. No. 422 at 7-8; *see also id.* at 10. Plaintiffs even *defined the class* by referring to the wireless service contract:

All persons who purchased or acquired an iPhone in the United States and entered into a two-year agreement with ATTM for iPhone voice and data service any time from June 29, 2007, to the present.

Pls. Mot. for Class Cert., Dkt. No. 240 at 1.

1 As to the second ground—substantially interdependent and concerted misconduct—  
2 plaintiffs’ central “conspiracy to monopolize” claim against Apple alleges essentially identical  
3 conduct by ATTM and Apple, conduct intertwined with the service contract containing the  
4 arbitration provision. Plaintiffs claim that Apple is liable for conspiring with ATTM to give  
5 ATTM an allegedly unlawful aftermarket monopoly in iPhone voice and data services,  
6 notwithstanding the provisions in the service contract that allegedly led consumers to believe they  
7 could use their iPhone with another wireless service provider. Their allegations against Apple are  
8 essentially indistinguishable from those against ATTM, and their entire theory rests on a single,  
9 unified course of conduct by the defendants. This is, by definition, substantially interdependent  
10 and concerted misconduct.

11 Plaintiffs have wrapped themselves for years in the service contract and in allegations of a  
12 single ATTM-Apple conspiracy to survive motions to dismiss and obtain class certification. They  
13 cannot run from those theories now. Plaintiffs’ claims against ATTM and Apple should be sent to  
14 arbitration, and the class should, accordingly, be decertified.

## 15 **II. STATEMENT OF ISSUES TO BE DECIDED**

16 Whether plaintiffs must arbitrate their claims against Apple rather than proceed before this  
17 Court, and whether the class approved by the Court in its July 8, 2010 order must be decertified.

## 18 **III. RELEVANT PROCEDURAL HISTORY**

19 On June 27, 2008, ATTM filed a motion to compel arbitration and to dismiss, based on the  
20 arbitration provision contained in the wireless service contract between ATTM and each plaintiff.  
21 Dkt. No. 115. Plaintiffs opposed the motion, arguing that the arbitration provision in the wireless  
22 service contract was unconscionable and therefore unenforceable under California, Washington  
23 and New York State law. By Order dated October 1, 2008, the Court denied ATTM’s motion,  
24 holding the arbitration provision unenforceable. Order Denying Def. AT&TM’s Mot. to Compel  
25 Arbitration and to Dismiss, Dkt. No. 144 at 7-10 (citing, among other cases, *Discover Bank v.*  
26 *Superior Court*, 36 Cal. 4th 148 (2005); *Shroyer v. New Cingular Wireless Services*, 498 F.3d  
27 976, 983 (9th Cir. 2007); *Stiener v. Apple Computer, Inc.*, 556 F. Supp 2d 1016, 1026 (N.D. Cal.  
28 2008)). The Court rejected ATTM’s argument that the Federal Arbitration Act preempted the

1 application of state unconscionability law. *Id.* at 11.

2 Plaintiffs' claims in this case have since been narrowed into two sets, based on: (i)  
3 allegations that Apple and ATTM monopolized, attempted to monopolize and/or conspired to  
4 monopolize the "iPhone voice and data services aftermarket," and (ii) allegations that Apple  
5 monopolized and attempted to monopolize the "iPhone applications aftermarket."<sup>1</sup>

6 Plaintiffs made clear in opposing defendants' motions to dismiss, and in moving for class  
7 certification, that the wireless service contract was the lynchpin of their antitrust voice and data  
8 claims. The wireless service contract formed the basis of plaintiffs' market definition and market  
9 power arguments, as well as the claimed common issue justifying certification. As plaintiffs put  
10 it:

- 11 • **"What this case is about is as follows: every member of the class signed a two-year service contract with AT&T that was completely identical in all material respects."** Tr. of Proceedings, Hearing on Motion for Class Certification, May 24, 2010 at 31:19-32:20 (emphasis added);
- 14 • **"[T]he gist of the case is that dispute, the two-year contracts, the two-year service contracts that the consumers signed with the right to terminate...."** *Id.* at 37:20-38:6 (emphasis added);
- 16 • **"Plaintiffs and all other members of the Class entered into identical two-year voice and data service contracts with ATTM that were terminable at any time, upon payment of a \$175 early termination fee.** Plaintiffs and all other Class members have not agreed to use ATTM for more than two years, and have not agreed to forego their rights to terminate their service plans with ATTM at any time and switch to another cellular service provider." Joint Case Management Statement, Dkt. No. 495 at 4. (emphasis added);

21 <sup>1</sup> In its October 1, 2008 Order, the Court granted Apple's motion to dismiss plaintiffs' 43 separate state  
22 unfair and deceptive trade practices claims on the grounds that "Plaintiffs make no allegations that  
23 their choice to purchase an iPhone and enroll in ATTM's service plan would have been any different  
24 had Defendants made the relevant disclosures." Order, Dkt. No. 144 at 27:26-28:1 (*see also id.* at  
25 28:14-16: no "allegation that any of the Plaintiffs would not have bought an iPhone" if they knew facts  
26 allegedly not disclosed.). Plaintiffs never re-plead those claims, abandoning them. On July 8, 2010,  
27 the Court granted Apple's motion for summary judgment as to plaintiffs' Computer Fraud and Abuse  
28 Act, California Computer Crime Law, Breach of Warranty and Trespass to Chattels claims for the  
alleged "bricking" of iPhones via software update iOS 1.1.1. Order, Dkt. No. 466. The Court held that  
no plaintiff had suffered injury adequate to pursue their "bricking" claims against Apple, and that  
"even if Plaintiffs could establish standing, they have not produced sufficient evidence to show that  
Defendant Apple acted with an intent to damage Plaintiffs' iPhones with the 1.1.1 Software. ... [and]  
"have not produced any evidence that they were required to download and install the 1.1.1 Software.  
Instead, they each voluntarily installed it." *Id.* at 11-12.

- 1 • “The iPhone consumers have a valid basis for their claim: (i) *every*
- 2 *identical ATTM service contract provided for a two-year term*; (ii)
- 3 *every identical ATTM contract* purported to give consumers the
- 4 *right to terminate*; and (iii) those contractual provisions were
- 5 consistent with standard practice in the cell phone market....” Pls.
- 6 Reply Mem. In Support of Class Cert., Dkt. No. 422 at 1
- 7 (introductory paragraph, emphasis in original);
- 8 • “[I]t could not be clearer than the definition of the aftermarket in this
- 9 case depends upon whether Plaintiffs or any other members of the
- 10 Class entered into binding written contracts that obligated them to
- 11 use ATTM for voice and data service for the life of the iPhones. And
- 12 on that critical legal issue, none of the *identical* written service
- 13 contracts with ATTM obligated them to do so.” *Id.* at 7-8 (emphasis
- 14 in original); and
- 15 • “Because Plaintiffs and all other Class members signed the *same*
- 16 *integrated two-year service contracts*, whether they *contractually*
- 17 *agreed* to give monopoly power to Apple and ATTM in the iPhone
- 18 voice and data aftermarket – knowingly and voluntarily or otherwise
- 19 - can and should be answered the same way for everyone.” *Id.* at 10
- 20 (emphasis in original).

21 Plaintiffs’ “applications aftermarket” claims similarly relied on the wireless service

22 contract. Plaintiffs consistently argued for a unified class definition for both sets of aftermarket

23 claims, one that turns on that service contract. *See* Pls. Mot. for Class Cert., Dkt. No. 240 at 5.

24 The Court certified a class for the applications aftermarket claims for the same reasons it certified

25 a class for the voice and data aftermarket claims. Class Cert. Order, Dkt. No. 466 at 19, n. 27.

26 Following plaintiffs’ argument, the Court certified one class to pursue both the voice and data and

27 applications aftermarket claims—a class that makes the wireless service contract its defining

28 characteristic:

All persons who purchased or acquired an iPhone in the United States and entered into a two-year agreement with Defendant AT&T Mobility, LLC for iPhone voice and data service any time from June 29, 2007, to the present.

*Id.* at 25. Thus, each plaintiff—and each class member—raises claims entirely based on the wireless service contract, and there cannot be, by definition, a class member not subject to the arbitration provision the Supreme Court addressed and enforced in *Concepcion*.

#### IV. **CONCEPCION ESTABLISHES THAT THE ARBITRATION CLAUSE IN PLAINTIFFS’ WIRELESS SERVICES CONTRACT IS ENFORCEABLE**

In *Concepcion*, the Supreme Court held that the Federal Arbitration Act preempts California’s rule prohibiting class action waivers in most consumer arbitration agreements.

1 *Concepcion*, 131 S. Ct. at 1749-53. The arbitration provision at issue in the wireless service  
 2 contracts here is identical or materially equivalent to the one addressed in *Concepcion*. *See id.* at  
 3 1744; ATTM August 1, 2011 Mot. to Decertify Class at 3-4; August 1, 2011 Decl. of Richard J.  
 4 Rives. As set forth in greater detail in ATTM’s motion to compel arbitration and supporting  
 5 papers, *Concepcion* establishes that the arbitration provision in those service contracts is valid and  
 6 enforceable, and that the claims against ATTM must be arbitrated.

7 **V.      EQUITABLE ESTOPPEL MANDATES ARBITRATION OF PLAINTIFFS’**  
 8 **CLAIMS AGAINST APPLE**

9           The doctrine of equitable estoppel requires plaintiffs to arbitrate their claims against Apple  
 10 because those claims rely on the wireless service contract, and on alleged concerted misconduct  
 11 between ATTM and Apple intertwined with that contract.

12 **A.      Legal Standard**

13           The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”), establishes a “federal policy  
 14 favoring arbitration,” and requires that courts “rigorously enforce agreements to arbitrate.”  
 15 *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *see also Moses H. Cone*  
 16 *Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (“as a matter of federal law,  
 17 any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,  
 18 whether the problem at hand is the construction of the contract language itself or an allegation of  
 19 waiver, delay, or a like defense to arbitrability.”). As this Court has held, “the party opposing  
 20 arbitration has the burden of showing that the agreement to arbitrate cannot be interpreted to apply  
 21 to the dispute in question.” *Progeny Advanced Genetics, Inc. v. Paragon Seed, Inc.*, 2006 U.S.  
 22 Dist. LEXIS 18558 at \*13 (N.D. Cal., March 2, 2006) (Ware, J.).

23           The same public policy supports the application of equitable estoppel here. “The Ninth  
 24 Circuit has recognized that equitable estoppel principles may permit nonsignatories to compel  
 25 arbitration.” *Jones v. Deutsche Bank AG, et al.*, No. C 04-05357 JW (N.D. Cal., April 26, 2007)  
 26 (Ware, J.), Dkt. No. 329 at 3 (citing *Comer*, 436 F.3d at 1102); *see also Mundi v. Union Sec. Life*  
 27 *Ins. Co.*, 555 F.3d 1042, 1046-47 (9th Cir. 2009) (explaining that courts have equitably estopped  
 28 plaintiff signatories from refusing to arbitrate their claims against defendant non-signatories where

1 the dispute in question is “intertwined with the contract providing for arbitration” or “arise[s] out  
 2 of or relate[s] to the contract that contained the arbitration agreement,” or there are “allegations of  
 3 collusion or misconduct” involving a signatory to the contract) (citations omitted); *Noodles Dev.,*  
 4 *L.P. v. Latham Noodles, LLC*, 2009 U.S. Dist. LEXIS 81773 at \*9-10 (D. Ariz., Aug. 26, 2009)  
 5 (citing *Mundi*; estopping plaintiff from refusing to arbitrate its claims against non-signatory  
 6 because claims raised “allegations of substantially interdependent and concerted misconduct by  
 7 [non-signatory] and the defendant signatories.”); *In re Wholesale Grocery Products Antitrust*  
 8 *Litig.*, No. CV-09-00983 (D. Minn., July 5, 2011) (Montgomery, J.), Dkt. No. 126 (granting non-  
 9 signatories’ motion to compel arbitration on equitable estoppel grounds on antitrust claims). The  
 10 other Circuit courts are in broad agreement.<sup>2</sup>

11 Courts, including this one, have articulated two independently sufficient bases where  
 12 equitable estoppel serves to prevent signatories to arbitration agreements from opposing  
 13 arbitration against non-signatories.

14 First, equitable estoppel applies where the “signatory to a written agreement containing an  
 15 arbitration clause *must rely* on the terms of the written agreement in asserting its claims against  
 16 the non-signatory. When each of a signatory’s claims against a non-signatory ‘makes reference  
 17 to’ or ‘presumes the existence of’ the written agreement, the signatory’s claims ‘arise[] out of and

18 <sup>2</sup> See, e.g., *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (non-signatory could  
 19 compel arbitration when plaintiff’s claims referred to and presumed an element of the contract  
 20 containing an arbitration provision); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th  
 21 Cir. 2000) (affirming order compelling arbitration in favor of non-signatory; applying “the intertwined-  
 22 claims test formulated by the Eleventh Circuit” in *MS Dealer*); *Am. Bankers Ins. Group v. Long*, 453  
 23 F.3d 623, 627 (4th Cir. 2006), (“a nonsignatory to an arbitration clause may, in certain situations,  
 24 compel a signatory to the clause to arbitrate the signatory’s claims against the nonsignatory despite the  
 25 fact that the signatory and nonsignatory lack an agreement to arbitrate.”); *Hughes Masonry Co., Inc. v.*  
 26 *Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981) (arbitration mandated  
 27 against non-signatory subcontractors because dispute was inherently intertwined with the contract  
 28 containing the arbitration provision); *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38, 48  
 (1st Cir. 2008) (“The fact that the defendants are not signatories is not a basis on which arbitration may  
 be denied. [Plaintiff] is equitably estopped [and is] bound by a written agreement to arbitrate...”);  
*Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration Intern., Inc.*, 198 F.3d 88, 98  
 (2d Cir. 1999) (affirming order compelling non-signatory arbitration on equitable estoppel grounds  
 where party resisting arbitration had affirmatively relied on the agreement); *CD Partners, LLC v.*  
*Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005) (affirming order granting non-signatory arbitration with  
 signatories under equitable estoppel); see also *Javitch v. First Union Securities, Inc.*, 315 F.3d 619,  
 629 (6th Cir. 2003) (vacating denial of arbitration; explaining that a non-signatory may be bound to  
 arbitrate if it receives a “direct benefit” from the relevant agreement).

1 relate[] directly to the [written] agreement,’ and arbitration is appropriate.” *MS Dealer Serv.*  
 2 *Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *see also Jones v. Deutsche Bank AG, et al.*,  
 3 No. C 04-05357 JW (N.D. Cal., April 26, 2007) (Ware, J.), Dkt. No. 329 at 3; *Amisil Holdings*  
 4 *Ltd. V. Clarium Cap. Mgmt. LLC*, 622 F. Supp. 2d 825, 841 (N.D. Cal. 2007) (Chen, M.J.;  
 5 adopted by Jenkins, J.); *Fujian Pac. Elec. Co. v. Bechtel Power Corp.*, 2004 U.S. Dist. LEXIS  
 6 23472 at \*15 (N.D. Cal. Nov. 19, 2004) (Patel, J).

7 Second, equitable estoppel also applies “when the signatory to the contract containing an  
 8 arbitration clause raises allegations of substantially interdependent and concerted misconduct by  
 9 both the non-signatory and one or more of the signatories to the contract. Otherwise the  
 10 arbitration proceedings between the two signatories would be rendered meaningless and the  
 11 federal policy in favor of arbitration effectively thwarted.” *MS Dealer Serv. Corp. v. Franklin*,  
 12 177 F.3d at 947; *see also Amisil Holdings* 622 F. Supp. 2d at 841; *Fujian*, 2004 U.S. Dist. LEXIS  
 13 23472 at \*15. This Court has noted that, under the second strand, “the alleged misconduct must  
 14 be *intertwined with the agreement* that the estopped party signed.” *Jones*, No. C 04-05357 JW  
 15 (N.D. Cal., April 26, 2007), Dkt. No. 329 at 4 n.2 (emphasis in original).

16 Both circumstances are present here, and each independently demands arbitration of  
 17 plaintiffs’ claims against Apple.

18 **B. Plaintiffs Are Equitably Estopped from Refusing to Arbitrate Their Voice and**  
 19 **Data Claims Against Apple**

20 **1. Plaintiffs’ Antitrust Claims Against Apple Rely Upon and Presume**  
 21 **the Existence of the Wireless Services Contract**

22 Plaintiffs cannot deny Apple the right to compel the arbitration mandated by the wireless  
 23 services contract in light of their heavy reliance on that contract to support their voice and data  
 24 aftermarket claims against both Apple and ATTM. *See Amisil*, 622 F. Supp. 2d at 841  
 25 (“[plaintiff’s] claims are related to the Agreement in a way that either refers to or presumed the  
 26 existence of the Agreement. Absent the Operation Agreement, none of these claims would lie.  
 27 *Amisil* cannot use the Agreement as a sword and at the same time choose to ignore it as a shield.  
 28 Arbitration of the claims is warranted on estoppel principles.”); *Fujian*, 2004 U.S. Dist. LEXIS  
 23472 \*18-19 (estopping plaintiff from litigating its claims against non-signatory Bechtel, on the

1 basis of plaintiff’s agreements with Bechtel’s subsidiaries containing arbitration clauses).<sup>3</sup>  
 2 Plaintiffs’ voice and data claims against Apple have the same characteristic that required  
 3 arbitration in these cases—they not only refer to and presume the existence of the contract  
 4 containing the arbitration provision, they affirmatively rely on that contract. Without reference to  
 5 and reliance on the wireless service contract, plaintiffs have no alleged common basis for any of  
 6 their claims—and no aftermarket theory. Whatever else may be said of plaintiffs’ aftermarket  
 7 theory (the sufficiency of which Apple disputes), there is no denying that plaintiffs are depending  
 8 on the contents of the wireless service contract. If anyone was ever estopped from opposing  
 9 arbitration of claims against a non-signatory, it is these plaintiffs.

10 **2. Plaintiffs’ Antitrust Claims Against Apple Allege Interdependent**  
 11 **and Concerted Misconduct by Apple and ATTM Intertwined With**  
 12 **the Wireless Services Contract**

12 The second strand of equitable estoppel also independently mandates arbitration of  
 13 plaintiffs’ voice and data claims against Apple because plaintiffs have alleged substantially  
 14 interdependent and concerted misconduct by both a non-signatory (Apple) and a signatory  
 15 (ATTM) that is intertwined with the ATTM wireless services contract.

16 Plaintiffs have ostensibly asserted three kinds of voice and data aftermarket claims against  
 17 Apple—monopolization, attempted monopolization, and conspiracy to monopolize. Plaintiffs  
 18 have essentially admitted, however, that only the conspiracy to monopolize claim applies since  
 19 only ATTM participates in the voice and data market: “Apple, of course, participates in the

20 <sup>3</sup> Cases *denying* a non-signatory’s motion to compel arbitration under the first strand of equitable  
 21 estoppel also support arbitration of these claims. In *Hawkins v. KPMG*, a case alleging that KPMG  
 22 defrauded plaintiff in the course of his purchase of a tax shelter, Judge Patel rejected KPMG’s  
 23 argument of equitable estoppel under the first strand because plaintiffs’ claims “do not rely on the  
 24 content of the [instrument which created an ownership interest in an offshore entity] for their success...  
 25 [because they] depend only on the sale of the tax shelter as a whole.” *Hawkins v. KPMG LLP*, 423 F.  
 26 Supp. 2d 1038, 1051 (N.D. Cal. 2006). Similarly, in *Jones v. Deutsche Bank*, this Court denied  
 27 Deutsche Bank’s estoppel claims because plaintiff’s allegations against Deutsche Bank did not depend  
 28 upon and barely mentioned the agreement containing the arbitration clause: “It is clear that [plaintiff’s  
 allegation regarding the agreement containing an arbitration clause] is a background allegation  
 describing how Plaintiff heard about the CARDS facility.... Plaintiff’s claim against Deutsche Bank  
 [for RICO violations based upon an alleged enterprise to promote illegal tax shelters] does not rely on  
 the terms of Plaintiffs’ written agreement with myCFO.” *Jones*, Dkt. No. 329 at 4-5. By contrast,  
 plaintiffs here rely *expressly* upon the content of the wireless service agreement (and the duration/early  
 termination fee provisions contained therein) as the basis for their antitrust claims, and the means by  
 which consumers were supposedly harmed by both Apple and ATTM.

1 smartphone market, *not the voice and data aftermarket*,” and that they allege against Apple only  
2 “a conspiracy between Apple and ATTM to monopolize the aftermarket for iPhone voice and data  
3 service, even though only ATTM participates in that market.” *See* Nov. 5, 2010 Joint Case  
4 Management Statement, Dkt No. 495 at 31 (emphasis added); *id.* at 32 (“Apple is not a  
5 participant in the iPhone voice and data aftermarket—or in any cellular voice and data market for  
6 that matter. However, Apple is liable for conspiring with ATTM to give ATTM monopoly  
7 power—indeed, exclusive power—in the iPhone voice and data aftermarket.”). Apple’s supposed  
8 liability thus flows solely from conspiring to make ATTM the monopolist in the so-called iPhone  
9 voice and data service aftermarket. Thus, the voice and data claims involve a single course of  
10 conduct, and have nothing to do with anything that Apple did independently. Not surprisingly,  
11 the vast majority of the allegations against Apple are indistinguishable from those against ATTM.  
12 *See, e.g.*, Revised Consolidated Amended Class Action Complaint (“RCAC”), Dkt. No. 109 at  
13 ¶ 112 (alleging common questions of law and fact, in which parties are nearly interchangeable);  
14 *id.* at ¶¶ 135, 140, 146 (voice and data allegations); *id.* at ¶¶ 77-86 (describing exclusivity  
15 agreement). This more than meets the requirement that the claims involved “substantially  
16 interdependent and concerted misconduct.”

17         Where plaintiffs assert intertwined allegations against signatory and non-signatory  
18 defendants, courts compel arbitration “to avoid denying the signatory the benefit of the arbitration  
19 clause, and in order to avoid duplicative litigation which undermines the efficiency of arbitration.”  
20 *Amisil*, 622 F. Supp. 2d at 840; *see also Garcia v. Stonehenge, Ltd.*, 1998 U.S. Dist. LEXIS  
21 23565 at \*13 (N.D. Cal., March 2, 1998) (Walker, J.) (substantially similar claims alleged against  
22 the estate of Jerry Garcia and two of its agents; granting non-signatory’s motion to compel  
23 arbitration because “it would be unwise to resolve these claims in two different forums.”); *Boston*  
24 *Tel. Group, Inc. v. Deloitte Touche Tohmatsu*, 278 F. Supp. 2d 1041, 1048 (N.D. Cal. 2003)  
25 (White, J.) (“a non-signatory can invoke the protections of an arbitration clause ‘when the  
26 signatory to the contract containing an arbitration clause raises allegations of substantially  
27 interdependent and concerted misconduct by both the non-signatory and one or more of the  
28 signatories to the contract.”). Plaintiffs’ conspiracy to monopolize claim inherently creates the

1 interdependence and concerted action that triggers equitable estoppel. A conspiracy to  
2 monopolize claim is only viable where two or more persons engaged in a common scheme, in  
3 concert, to make one of them a monopolist. *See, e.g., Paladin Assocs. v. Montana Power Co.*, 328  
4 F.3d 1145, 1158 (9th Cir. 2003) (conspiracy to monopolize claim requires the actual “existence of  
5 a combination or conspiracy to monopolize”); ABA ANTITRUST LAW DEVELOPMENTS (SIXTH) at  
6 318 (“The gravamen of a combination or conspiracy to monopolize is ... evidence tending to  
7 show that the alleged conspirators, in their individual capacities, consciously committed  
8 themselves to a common scheme designed to achieve an unlawful objective.”). Here, the core  
9 allegation is that Apple worked with ATTM to give it the alleged aftermarket monopoly through  
10 anticompetitive means. The voice and data claims are not about anything else—or to be more  
11 precise, about anything Apple did independently to harm plaintiffs.

12         The claim as a whole, and each of its parts, thus details exactly the kind of substantially  
13 interdependent and concerted misconduct that requires enforcement of the arbitration agreement.  
14 Courts have routinely compelled arbitration based on equitable estoppel where plaintiffs’ claims  
15 included allegations of a conspiracy between a signatory and non-signatory to an arbitration  
16 agreement. In *MS Dealer Service Corp. v. Franklin*, the plaintiff alleged that signatories and non-  
17 signatories to an arbitration agreement “cooperated, conspired and otherwise colluded ... in a  
18 scheme to defraud her in connection with the purchase of a service contract.” 177 F.3d at 948. The  
19 court noted that the claims against the signatory and non-signatory were “inherently inseparable,”  
20 and held the plaintiff equitably estopped from avoiding arbitration. *Id.* Similarly, in *Hansen v.*  
21 *KPMG*, where plaintiff alleged a conspiracy between signatories and a non-signatory to  
22 fraudulently induce participation in an investment transaction, the Central District held the plaintiff  
23 equitably estopped from opposing arbitration against the non-signatory party: “Plaintiff describes  
24 the non-signatory Defendants as one team involved in an single course of misconduct, ... and seeks  
25 to hold them jointly liable for each other’s conduct... Plaintiff’s allegations plead interdependent  
26 and concerted misconduct.” 2005 U.S. Dist. LEXIS 38137 at \*10 (C.D. Cal., March 29, 2005); *see*  
27 *also id.* at \*11. Many other courts have reached the same conclusion regarding conspiracy claims  
28 against signatories and non-signatories. *See, e.g., Leff v. Deutsche Bank AG*, 2009 U.S. Dist.

1 LEXIS 41713 at \*19-21 (N.D. Ill., May 15, 2009); *Miller v. Equifirst Corp. of WV*, 2006 U.S. Dist.  
 2 LEXIS 63816 at \*55-56 (S.D.W.Va., Sept. 5, 2006); *In re Universal Serv. Fund Tel. Billing*  
 3 *Practices Litigation*, 300 F. Supp. 2d 1107, 1139-1140 (D. Kan. 2003); *Hoffman v. Deloitte &*  
 4 *Touche, LLP*, 143 F. Supp. 2d 995, 1005 (N.D. Ill. 2001).<sup>4</sup>

5 Finally, plaintiffs have made it clear that if the Court were to allow this lawsuit to proceed  
 6 against Apple, plaintiffs will seek to conduct aggressive discovery against ATTM as a third  
 7 party—indeed, the *same discovery as if ATTM had remained a defendant in this action*, despite  
 8 whatever discovery limitations may apply in arbitration. See Nov. 5 2010 Case Management  
 9 Statement, Dkt. No. 495 at 2 (plaintiffs stating that “ATTM will be subject to the same discovery  
 10 whether as a party or a non-party to this case.”); *id.* at 16 (plaintiffs stating that “even if this Court  
 11 ultimately concludes that the Supreme Court’s decision in *Concepcion* compels that Plaintiffs’  
 12 claims against ATTM here must be arbitrated, ATTM will be subject to the same discovery from  
 13 Plaintiffs as a non-party on the surviving claims against *Apple*. Thus, regardless of the outcome  
 14 of *Concepcion* in the Supreme Court, there will be no basis to prohibit or even stay discovery  
 15 from ATTM.”). Plaintiffs’ discovery intent, which would serve to undermine the ATTM  
 16 arbitration provision, is yet another reason why arbitration of their claims against both defendants  
 17 is necessary under equitable estoppel grounds. See, e.g., *MS Dealer*, 177 F.3d at 947 (“the  
 18 arbitration proceedings between the two signatories [plaintiffs and ATTM] would be rendered  
 19 meaningless and the federal policy in favor of arbitration effectively thwarted”); *Fujian*, 2004  
 20 U.S. Dist. LEXIS 23472 at \*15 (same).

### 21 3. Plaintiffs’ Arguments That Their Claims Against Apple Should Go 22 Forward In This Court Are Meritless

23 In the May 11, 2011 Status Report, plaintiffs previewed two arguments against the  
 24 arbitrability of their claims as to Apple: (i) plaintiffs “did *not* agree to arbitrate any claims with

25 <sup>4</sup> Again, cases *denying* motions to compel arbitration under the second strand of equitable estoppel  
 26 further support Apple’s motion. These cases rejected a party’s equitable estoppel arguments under the  
 27 second strand either because plaintiffs’ claims were not alleged and could not be asserted against a  
 28 signatory to the agreement (see *Hawkins*, 423 F. Supp. 2d at 1051), plaintiffs were not alleging that the  
 concerted misconduct relied upon or presumed the existence of the agreement (see *Jones v. Deutsche*  
*Bank*, Dkt. No. 329 at 5), and/or plaintiffs’ claims did not allege collusion or misconduct with a  
 signatory to the agreement (see *Mundi*, 555 F.3d at 1047).

1 Apple, much less waive the right to bring a class action [and] [n]o such agreement appears in any  
2 of Apple's terms of service or any "agreement" between Apple and Plaintiffs, nor does it appear  
3 in ATTM's [wireless service contract]"; and (ii) Apple allegedly "waived" the right to request  
4 arbitration. Joint Status Report, Dkt. No. 500 at 3-4. Neither argument has any merit.

5 Plaintiffs' argument that they never agreed to arbitrate claims in any contract with Apple is  
6 irrelevant in this context. Apple is not claiming that they did, nor need it do so. Equitable  
7 estoppel deals specifically with when a signatory to a contract must arbitrate its claims *against a*  
8 *non-signatory*. *Am. Bankers Ins. Group*, 453 F.3d at 626-627 (requiring signatory to arbitrate  
9 claims against non-signatory under equitable estoppel; generally, "a party cannot be required to  
10 submit to arbitration any dispute which he has not agreed so to submit. It is well-established,  
11 however, that a non-signatory to an arbitration clause may, in certain situations, compel a  
12 signatory to the clause to arbitrate the signatory's claims against the non-signatory despite the fact  
13 that the signatory and non-signatory lack an agreement to arbitrate."). It simply does not matter,  
14 under the equitable estoppel doctrine, whether the parties directly agreed to arbitrate. If they had  
15 so agreed, the issue of equitable estoppel would never arise.

16 Plaintiffs' "waiver" argument is frivolous. Waivers of the right to arbitration "are not  
17 favored" and any doubts concerning waiver of arbitrability are resolved in favor of arbitration and  
18 against a finding of "waiver." *See, e.g., Letizia v. Prudential Bache Secur., Inc.*, 802 F.2d 1185,  
19 1187 (9th Cir. 1986); *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 981 (2d Cir. 1996); *Nesslage v.*  
20 *York Secur., Inc.*, 823 F.2d 231, 233-234 (8th Cir. 1987). "Any party arguing waiver of  
21 arbitration bears a heavy burden of proof" to demonstrate "(1) knowledge of an existing right to  
22 compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party  
23 opposing arbitration resulting from such inconsistent acts." *Fisher v. A. G. Becker Paribas, Inc.*,  
24 791 F.2d 691, 694 (9th Cir. 1986). Plaintiffs fail on all counts.

25 First and foremost, there was no "existing right to compel arbitration" prior to *Concepcion*.  
26 Under controlling Ninth Circuit law, Plaintiffs' claims simply were not arbitrable until the  
27 Supreme Court decided on April 27, 2011, that the California Supreme Court's *Discover Bank*  
28 rule was preempted. Indeed, relying on *Discover Bank*, both the Ninth Circuit and multiple

1 Northern District decisions had found that ATTM's arbitration provision was unconscionable and  
2 unenforceable. *See, e.g., Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005); *Shroyer v.*  
3 *New Cingular Wireless Services*, 498 F.3d 976, 983 (9th Cir. 2007) (dealing with earlier version  
4 of the arbitration provision); *Stiener v. Apple Computer, Inc.*, 556 F. Supp 2d 1016, 1026 (N.D.  
5 Cal. 2008) (dealing with same arbitration provision addressed here). Defendant ATTM moved to  
6 compel arbitration in this case, arguing for a change in law involving FAA preemption of state  
7 unconscionability laws. It failed in this Court. It was not until the Supreme Court ultimately  
8 issued its *Concepcion* decision that the right to arbitrate became viable.

9 Plaintiffs argue that Apple was required, on pain of waiver, to have filed a motion to  
10 compel arbitration back in 2008 *regardless* of the absence of authority supporting such an  
11 argument. This is not a good faith position under controlling Ninth Circuit cases. In *Fisher v.*  
12 *A.G. Becker Paribas Incorporation*, the plaintiff raised a similar argument and the Ninth Circuit  
13 rejected it, finding no waiver where the defendant did not have a right, under established law, to  
14 arbitration until after a subsequent Supreme Court decision. As the Ninth Circuit said:

15 [Defendant] has correctly suggested that it would have been futile for it to  
16 make a motion to compel arbitration at the outset of this litigation. ... An  
17 evaluation of existing case law on this subject from 1981 to 1985 would have  
18 indicated to any competent attorney that an agreement requiring arbitration  
19 of disputes involving securities law violations was not enforceable in this  
20 circuit until the Supreme Court's repudiation of the rule in 1985. ... Until the  
21 Supreme Court's decision in *Byrd*, the arbitration agreement in this case was  
22 unenforceable. Therefore, the Fishers have failed to demonstrate that Becker  
23 acted inconsistently with a known existing right to compel arbitration." 791  
24 F. 2d 697.

25 Similarly, in *Letizia v. Prudential Bache Secur., Inc.*, defendants did not seek arbitration  
26 until after the close of discovery, and plaintiff argued that "defendants waived any right they may  
27 have had to arbitrate the dispute because they did not seek arbitration from the earliest point in the  
28 federal litigation." 802 F. 2d at 1187. Again, the Ninth Circuit disagreed: "As in *Fisher*,  
defendants here correctly perceived that a motion to compel arbitration would have been  
futile...Clearly, then, there was no existing right to arbitrate when this suit was filed. Thus, there  
could have been no waiver." *Id.*

1 Under this controlling authority, plaintiffs’ “waiver” argument fails at the first step.  
2 Indeed, plaintiffs’ exact argument has been squarely rejected by Judges Illston, White and  
3 Seeborg of this District, who have all independently found that there was no “waiver” of  
4 arbitration by the failure to move to compel arbitration prior to the Supreme Court’s decision in  
5 *Concepcion*, since existing case law had prevented the argument. *See Bryant v. Serv. Corp. Int’l*,  
6 2011 U.S. Dist. LEXIS 74805 (N.D. Cal., July 12, 2011) (Illston, J.); *Estrella v. Freedom Fin.*,  
7 2011 U.S. Dist. LEXIS 71606 (N.D. Cal., July 5, 2011) (Illston, J.); *In re Cal. Title Ins. Antitrust*  
8 *Litig.*, 2011 U.S. Dist. LEXIS 71621 (N.D. Cal., June 27, 2011) (White, J.); *Villegas v. Us*  
9 *Bancorp*, 2011 U.S. Dist. LEXIS 65032 (N.D. Cal., June 20, 2011) (Seeborg, J.).

10 Second, plaintiffs cannot show prejudice from the timing of Apple’s motion to compel. At  
11 the time plaintiffs argue Apple should have filed its motion to compel, this Court denied ATTM’s  
12 motion to compel arbitration, holding (based on *Discover Bank* and the then-controlling authority)  
13 that the ATTM arbitration provision was unenforceable. The litigation then proceeded forward.  
14 Plaintiffs cannot claim “prejudice” from Apple’s failure to move to compel arbitration unless they  
15 propose that this Court would have granted *Apple’s* motion to compel arbitration even though it  
16 denied *ATTM’s* motion to compel arbitration. Plaintiffs posit no reason why that would have  
17 happened—and there is none. Any claim of “prejudice” does not pass the straight-face test.  
18 This litigation moved forward after ATTM filed its motion to compel arbitration because plaintiffs  
19 argued, and convinced the Court based on the then-controlling law, that the arbitration provision  
20 in the wireless service contract was unenforceable. The Supreme Court has now reversed that  
21 rule. Plaintiffs suffered no prejudice from Apple’s decision not to pursue a futile motion to  
22 compel arbitration in 2008.

### 23 **C. Plaintiffs’ Applications Aftermarket Class Claims Must Also Be Sent to** 24 **Arbitration**

25 In their class certification motion, plaintiffs sought to certify a single class (consisting of  
26 all iPhone purchasers who entered into an ATTM wireless service contract) to pursue both the  
27 voice and data aftermarket claims and the applications aftermarket claims. They made no effort to  
28 distinguish the two sets of claims, but portrayed the applications aftermarket and class

1 certification issues as an *a fortiori* case from whatever analysis pertains to the voice and data  
2 conspiracy claims. *See, e.g.*, Pls. Mot. for Class Cert., Dkt. No. 240 at 20 (“[t]here is no dispute  
3 that Plaintiffs seek declaratory and injunctive relief challenging the lawfulness of Defendants’  
4 conspiracy to monopolize the aftermarket for iPhone voice and data services and iPhone apps.”).  
5 The Court ultimately certified a unified class, adopting plaintiffs’ proposed class definition, to  
6 pursue both sets of claims.

7 Having sought certification of the applications aftermarket claims based on the same  
8 arguments they relied on for their voice and data aftermarket claims, plaintiffs are estopped from  
9 denying Apple’s motion to compel arbitration of those claims. They cannot now reverse course  
10 and claim that their applications aftermarket claims are in fact completely distinct from their voice  
11 and data claims and not related to the wireless service contract. And if the Court permitted them to  
12 try, the Court would have no choice but to decertify the class because it is based on and defined  
13 by the very wireless service contract in question.

14 **D. In the Alternative, This Court Should Stay All of Plaintiffs’ Claims Against**  
15 **Apple Pending the Arbitration Against ATTM**

16 If it determines that the claims against Apple are not arbitrable, the Court should in the  
17 alternative stay litigation of plaintiffs’ claims against Apple pending the arbitration of plaintiffs’  
18 claims against ATTM.

19 Courts have broad discretion to stay litigation during the pendency of arbitration  
20 proceedings involving similar factual or legal issues. *See, e.g., Moses H. Cone*, 460 U.S. at 21 n.  
21 23. Among the factors to be considered in the exercise of this discretion are “the possible damage  
22 which may result from granting the stay, the hardship or inequity which a party may suffer in  
23 being required to go forward, and ‘the orderly course of justice measured in terms of the  
24 simplifying or complication of issues, proof, and questions of law which could be expected to  
25 result from a stay.’” *Roderick v. Mazzetti & Assoc.*, 2004 U.S. Dist. LEXIS 22911 at \*10-11  
26 (N.D. Cal., Nov. 9, 2004) (Patel, J.) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir.  
27 1962)).

28 Plaintiffs do not and cannot dispute that the facts and issues that would be litigated in their  
voice and data claims against Apple are *identical* to the issues that would be resolved in their

1 arbitration of these claims against ATTM. Efficient adjudication of the issues, proof, and  
2 questions of law requires that, should the Court hold that plaintiffs' voice and data claims against  
3 Apple are not arbitrable, the Court should stay the litigation of these claims pending the  
4 arbitration of the claims against ATTM. There is simply no countervailing harm plaintiffs would  
5 suffer: each named plaintiff will be able to proceed with their arbitration, and vindicate their  
6 claims against ATTM, where they each would be made whole should they prevail. That is  
7 especially true here where: (i) ATTM is the alleged monopolist of the supposed voice and data  
8 services aftermarket; (ii) Apple is admittedly not a participant in that aftermarket and is only  
9 alleged to have conspired with ATTM to place ATTM in a monopoly position in that aftermarket;  
10 and (iii) the entire aftermarket turns, under plaintiffs' theory, on what is disclosed (or not  
11 disclosed) in the wireless service contract with the arbitration provision.

12 Courts in this Circuit have routinely stayed the litigation of claims against non-signatory  
13 parties to an arbitration agreement while arbitration is pending between the signatories to the  
14 arbitration agreement. *See, e.g., Fujian*, 2004 U.S. Dist. LEXIS 23472 at \*23 (N.D. Cal., Nov. 19,  
15 2004) (Patel, J.) (staying action against non-signatory defendant pending the arbitration of claims  
16 against signatory subsidiary entities); *Wolf v. Langmeier*, 2010 U.S. Dist. LEXIS 87017 at \*1  
17 (E.D. Cal., Aug. 24, 2010) (staying actions brought by non-signatory plaintiffs pending arbitration  
18 of claims brought by signatory plaintiffs "[i]n light of the similarity of the issues of law and fact  
19 among each Plaintiff's claim and the possibility of inconsistent rulings if the entire action is not  
20 stayed."). The Court should, at a minimum, do the same here.

## 21 **VI. THE COURT MUST DECERTIFY THE CLASS APPROVED ON JULY 7, 2008**

22 The Court's certification of plaintiffs' proposed class cannot stand, regardless of whether  
23 the Court orders plaintiffs to arbitrate their claims against Apple. If the Court orders arbitration,  
24 by definition, the class cannot hold. But even if the Court determined that plaintiffs were not  
25 bound to arbitrate under the equitable estoppel doctrine, plaintiffs would be so changing the  
26 theory on which they had obtained certification that certification must be revisited.

27 The Court plainly has the power to revisit this issue now. "A district court's order  
28 respecting class certification is inherently tentative." *Officers for Justice v. Civil Serv. Comm'n*,

1 688 F.2d 615, 633 (9th Cir. 1982); *see also* Fed. R. Civ. P. 23(c)(1)(C). Prior to final judgment, a  
2 district court retains the “flexibility to address problems with a certified class as they arise,  
3 including the ability to decertify.” *United Steel, Paper & Forestry, Rubber, Manuf. Energy,*  
4 *Allied Indus. & Serv. Workers Int’l Union v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir.  
5 2010); *see also Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (“A district  
6 court may decertify a class at any time.”).

7       Because the claims must all be sent to individual arbitration pursuant to the terms of the  
8 arbitration provision, the certification order is no longer appropriate. The class should be  
9 decertified, and the claims against Apple dismissed. *See, e.g., In re Currency Conversion Fee*  
10 *Antitrust Litig.*, 361 F. Supp. 2d 237, 267 (S.D.N.Y. 2005) (modifying class and subclasses to  
11 exclude members subsequently determined to be subject to arbitration); *Culpepper v. Irwin Mortg.*  
12 *Corp.*, 491 F.3d 1260 (11th Cir. 2007) (affirming summary judgment and decertification of class  
13 where subsequent legal developments required individualized adjudication); *see also Thinket Ink*  
14 *Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004) (affirming district  
15 court’s dismissal, rather than stay, of claims held subject to arbitration); *Sparling v. Hoffman*  
16 *Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (FAA “did not limit the [district] court’s authority  
17 to grant a dismissal”).

18       If plaintiffs now try to backtrack from their years-old reliance on the wireless service  
19 contract in order to evade its arbitration clause—and if the Court allows them to do so—  
20 decertification would still be required because that contract formed the basis for the Court’s entire  
21 prior class certification analysis and ultimate approval of a class *defined by reference to the*  
22 *service contract*.

23       The class definition is at the heart of any certification order. As a leading treatise  
24 describes it:

25             The class definition is often central to class action pleading. It provides the  
26             court with a framework with which to apply Rule 23 criteria and thus to  
27             reach and initial determination whether a class action may be maintained.  
28             ...the class definition of a complaint serves not to demonstrate the existence  
              of a class in the abstract but, as one court observed, of an adequate class  
              definition: “A sufficient basis upon which to determine the scope of the  
              class and the propriety of permitting plaintiffs to represent all or a part of it.”

1 NEWBERG ON CLASS ACTIONS ¶ 6.14 (quoting *Thomas S. by Brooks v. Flaherty*, 902 F.2d 250 (4th  
2 Cir. 1990)); *see also* Manual for Complex Litigation (4th ed.) ¶ 21.222 (definition “is of critical  
3 importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment,  
4 and (3) entitled under Rule 23(c)(2) to the “best notice practicable” in a Rule 23(b)(3) action.”).

5 Plaintiffs knew that the inclusion of the phrase “entered into a two-year agreement with  
6 Defendant AT&T Mobility, LLC” was a critical component of their class definition; they  
7 specifically *added* that component to their class definition during the class certification briefing  
8 period. The RCAC’s proposed class definition made no mention of the wireless service contract.  
9 RCAC, Dkt. No. 109 at ¶ 108. However, by the time plaintiffs moved for class certification, their  
10 theories—and class certification of their claims—rested squarely and fully on what was said and  
11 not said in the wireless service contract. As a result, they added explicit reference to the service  
12 contract to their class definition. Pls. Mot. for Class Cert., Dkt. No. 240 at 1. They also expressly  
13 invited the Court to base its Rule 23 analysis on that contract. Indeed, the Court’s Order first  
14 noted plaintiffs’ argument, as follows:

15 the question of whether iPhone purchasers ‘knowingly’ gave Defendants  
16 market power can be resolved on a class-wide basis by looking to the fact  
17 that purchasers signed a two year contract while Defendants maintained  
18 uniform policy of failing to disclose their five year agreement to purchasers  
19 at the time of sale

20 The Court then accepted that argument:

21 The Court finds that under Newcal the issue of whether consumers of  
22 iPhones “knowingly” entered into de facto commitments to be monopolized  
23 can be analyzed on a class-wide basis. The Court can analyze whether the  
24 purchase of an iPhone constitutes a binding contractual agreement to  
25 consume Apple-approved applications and ATTM’s voice and data services  
26 in the aftermarket.

27 Class Cert. Order, Dkt. No. 466 at 15, 17.

28 Plaintiffs have made their own bed. They chose to ground their claims, and their class  
certification motion, on the wireless service contract. The Court’s class certification order, based  
on that same contract and approving a class defined by reference to that contract, must at a  
minimum be revisited if plaintiffs now claim (and the Court were to accept) that the service  
contract is irrelevant. In such circumstances, plaintiffs would need to start over entirely with (i)

