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APPLE INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

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

CASE NO. C 07-5152 JW (PVT)

**DEFENDANT APPLE INC.'S NOTICE OF
MOTION AND MOTION TO STAY
PROCEEDINGS**

Date: November 29, 2010

Time: 9:00 a.m.

Place: Courtroom 8, Fourth Floor

The Honorable James Ware

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NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS

NOTICE IS HEREBY GIVEN that on November 29, 2010, at 9:00 a.m., or as soon thereafter as counsel can be heard, in Courtroom 8, Fourth Floor, of the United States District Court for the Northern District of California, San Jose Division, 280 South First Street, San Jose California, before The Honorable James Ware, Defendant Apple Inc. (“Apple”) will, and hereby does, move this Court for a stay of proceedings pending the Ninth Circuit’s ruling on Defendants’ Rule 23(f) Petition for permission to appeal the Court’s class certification order.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Sadik Huseny and attached exhibit, the pleadings in this action, and such other matters and argument as the Court may consider at the time of the hearing.

Apple has noticed this Motion for a hearing date of November 29, 2010 because that is the earliest hearing date available pursuant to the Court’s online calendar. Pursuant to the Civil Local Rules of this Court and the San Jose Division Standing Order Regarding Case Management in Civil Cases, the parties have met and conferred as to the hearing date and briefing schedule regarding this motion. Apple is filing a simultaneous Unopposed Motion to Shorten Time requesting that the Court set this Motion to Stay for briefing and hearing at the Court’s earliest convenience.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

On July 22, 2010, Defendants Apple Inc. (“Apple”) and AT&T Mobility LLC (“ATTM”) filed a Rule 23(f) Petition with the Ninth Circuit seeking permission to appeal the Court’s July 8, 2010 order granting class certification (Docket No. 466) (the “Order”). By the instant motion, Apple respectfully requests that the Court stay further proceedings in this case pending the Ninth Circuit’s ruling on the Rule 23(f) Petition. Defendants’ Petition raises serious questions regarding (i) the interpretation of the Ninth Circuit’s decision in *Newcal v. IKON Office Solutions*, 513 F.3d 1038 (9th Cir. 2008), and its implications on class certification, and (ii) whether Plaintiffs met their burden of establishing each element of Rule 23. Should the Ninth Circuit grant Defendants’ Petition, its ruling on appeal could very well reverse or modify the Court’s order certifying a class. The parties, the Court and the millions of consumers affected by the Court’s class certification order thus have much to lose, and little to gain, by proceeding with this litigation while the Ninth Circuit’s decision is pending. As merits discovery is currently stayed under the Court’s earlier rulings, the practical effect of the Court granting the instant motion is to stay the dissemination of Class Notice to millions of consumers for a few months, until the Ninth Circuit rules. This short delay would serve judicial economy and the public interest by preventing the waste of resources and serious confusion that would be caused to the Class Members if a Class Notice is disseminated, and then certification is reversed or modified.

II. BACKGROUND

On December 12, 2008, the Court bifurcated class and merits discovery and stayed merits discovery in this case (Docket No. 164). Following class discovery and class certification briefing, the Court in its July 8, 2010 Order certified a class of “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.” Order at 25. It further ordered that the parties file “a proposed form of class notice and a joint proposal for dissemination of notice.” *Id.*

1 Apple and ATTM jointly filed their Petition for interlocutory review of the Court's
 2 certification order on July 22, 2010, pursuant to Federal Rule of Civil Procedure 23(f).
 3 Declaration of Sadik Huseny, ¶ 3, Ex. 1. The parties filed their Joint Submission on Form and
 4 Proposal for Dissemination of Class Notice on July 27, 2010 (Docket No. 471) ("Joint
 5 Submission"). Because the Court has already stayed merits discovery and the logistics of Class
 6 Notice appear to be the only pending matter before this Court, Defendants respectfully requested
 7 in the Joint Submission, and formally move here, that the Court await the Ninth Circuit's 23(f)
 8 ruling before ordering the dissemination of Class Notice or conducting any further proceedings.

9 III. LEGAL STANDARD

10 Courts examine the following factors when considering a motion for a stay pending
 11 appeal:

12 (1) whether the stay applicant has made a strong showing that he is
 13 likely to succeed on the merits; (2) whether the applicant will be
 14 irreparably injured absent a stay; (3) whether issuance of the stay
 will substantially injure the other parties interested in the
 proceeding; and (4) where the public interest lies.

15 *Golden Gate Restaurant Assoc'n v. San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting
 16 *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The Ninth Circuit employs "two interrelated
 17 legal tests" that "represent the outer reaches of a single continuum": the moving party can show
 18 either "a probability of success on the merits and the possibility of irreparable injury," or that
 19 "serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.*
 20 at 1115-16 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). Where the motion to
 21 stay is filed with the district court, the movant "need not persuade the court that it is likely to be
 22 reversed on appeal," but instead, it must show that "the appeal raises serious and difficult
 23 questions of law in an area where the law is somewhat unclear." *Costco Wholesale Corp. v.*
 24 *Hoehn*, No. C04-360P, 2006 U.S. Dist. LEXIS 65774 at *2-3 (W.D. Wash. Sept. 14, 2006).

25 Courts routinely grant stays pending decision on Rule 23(f) petitions. *See In re*
 26 *Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1 (D.D.C. 2002) (granting stay pending
 27 23(f) petition); *Bristow v. Lycoming Engines*, 2008 WL 2561105, at *1 (E.D. Cal. June 24, 2008)
 28 (same); *Chavez v. IBP, Inc.*, 2002 WL 32145647, at *1 (E.D. Wash. Dec. 23, 2002) (same). The

1 dissemination of Class Notice, in particular, should ordinarily be stayed in order to avoid the risk
 2 of significant confusion and the substantial expense of re-notifying the class. Manual for
 3 Complex Litigation (4th) § 21.28 (“the district court should ordinarily stay the dissemination of
 4 class notice to avoid the confusion and the substantial expense of renotification that may result
 5 from appellate reversal or modification after notice dissemination.”) (citing *Ramirez v. DeCoster*,
 6 203 F.R.D. 30, 40 (D. Me. 2001)); *see also Jenkins v. Hyundai Motor Fin. Co.*, 2008 U.S. Dist.
 7 LEXIS 43785 at *12-14 (S.D. Ohio, June 2, 2008) (staying actual dissemination of class notice
 8 pending Rule 23(f) ruling); *In re Urethane Antitrust Litig.*, 2006 U.S. Dist. LEXIS 80425 at *24-
 9 25 (D. Kan. Oct. 23, 2006) (same).

10 **IV. DISCUSSION**

11 This litigation presents a paradigm case for a stay pending a decision on
 12 Defendants’ Rule 23(f) petition. First, much of the case is already stayed. Second, Defendants
 13 have raised serious and difficult questions regarding certification of Plaintiffs’ proposed class of
 14 the millions of consumers who purchased iPhones. Finally, the “balance of hardships” weighs
 15 entirely in favor of a brief stay: sending the Class Notice now risks confusing millions of
 16 consumers, harming Defendants’ relationships with their customers and spending hundreds of
 17 thousands of dollars needlessly (which Plaintiffs must bear, under controlling law); by contrast,
 18 waiting for the Ninth Circuit to rule harms no one. Proceeding with dissemination of Class Notice
 19 now—rather than waiting to see if the Ninth Circuit grants permission to appeal—simply makes
 20 no sense.

21 **A. Defendants’ Rule 23(f) Petition Raises Serious and Difficult Questions of Law** 22 **on Appeal**

23 Defendants have sought permission to appeal the Court’s Order based in part on
 24 the Court’s interpretation of *Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038 (9th Cir.
 25 2008) and its effect on the burden Plaintiffs bear in showing that aftermarket monopolization
 26 claims based on nondisclosure/deception are susceptible to class treatment. In its 2008 ruling on
 27 Apple’s motion to dismiss, the Court permitted Plaintiffs’ aftermarket claims to survive under
 28 *Newcal* because of Plaintiffs’ allegations that “*unknown to consumers*, the companies had agreed

1 to technologically restrict voice and data service in the aftermarket for continued voice and data
2 services, i.e., after the initial two-year service period expired.” *In re Apple & AT&TM Antitrust*
3 *Litig.*, 596 F. Supp. 2d 1288, 1294 (N.D. Cal. 2008) (emphasis added). However, in ruling on
4 Plaintiffs’ motion for class certification, the Court held that *Newcal* “did *not* require that an
5 inquiry into whether consumers ‘knowingly’ entered into de facto commitments to be
6 monopolized must be determined on an individual basis rather than a class-wide basis.” Order at
7 16 (emphasis in original). It consequently held that “the issue of whether consumers of iPhones
8 ‘knowingly’ entered into de facto commitments to be monopolized can be analyzed on a class-
9 wide basis” by virtue of the form ATTM service contracts into which iPhone customers entered,
10 and that the Court “can analyze whether the purchase of an iPhone constitutes a binding
11 contractual agreement to consume Apple-approved applications and ATTM’s voice and data
12 services in the aftermarket.” *Id.* at 17.

13 Although Defendants respectfully disagree with the Court’s determination, all that
14 matters for the instant motion is that Defendants’ Rule 23(f) Petition raises serious and difficult
15 questions regarding the proper interpretation of *Newcal*, both on its own and as it relates to the
16 criteria for class certification under Rule 23. Defendants believe that *Newcal* does *not* hold that
17 the durational term of a contract alone can resolve questions of consumer knowledge, reasonable
18 expectations, and whether some market imperfection or behavior “prevent[ed] consumers from
19 realizing that their choice in the initial market will impact their freedom to shop in the
20 aftermarket,” without reference to inherently individualized issues that preclude class
21 certification. *Newcal*, 513 F.3d at 1049-50. But there is no Ninth Circuit precedent offering an
22 interpretation or explanation of *Newcal*’s implications for class treatment of aftermarket
23 monopolization claims. Indeed, there is no Ninth Circuit decision interpreting *Newcal* in the
24 context of Rule 23 class certification at all; *Newcal* itself had nothing to do with class
25 certification. Thus, Defendants’ Rule 23(f) Petition squarely raises “serious and difficult
26 questions of law in an area where the law is somewhat unclear,” warranting a stay pending the
27 Ninth Circuit’s decision on whether it will clarify these issues.

28

1 **B. The Balance of Hardships Tips in Favor of a Stay of Proceedings**

2 Plaintiffs and Defendants both stand to *benefit* from the issuance of a stay of
3 proceedings pending the Ninth Circuit’s ruling on Defendants’ Petition in the next few months.
4 Because merits discovery is currently stayed, dissemination of the Class Notice remains the only
5 upcoming proceeding before the Court. Plaintiffs, of course, bear the financial burden of the
6 issuance of the Class Notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178-79 (1974).¹ Given
7 the size of the class as currently certified—the millions of consumers who purchased an iPhone in
8 the United States and entered a two-year service agreement with ATTM—and the procedures
9 necessary to effect electronic mail (“email”) notice as proposed in the parties Joint Submission,
10 Plaintiffs’ Notice Administrator estimates that the total Notice costs will be approximately
11 \$370,000. Joint Submission at 9. Thus, in weighing (i) the significant costs associated with the
12 dissemination of Notice, the harm to Defendants’ relationships with their customers that a Class
13 Notice would cause, and the very real possibility that the Notice might be nullified or significantly
14 modified by a decision of the Ninth Circuit on appeal, against (ii) the brief delay associated with
15 awaiting the Ninth Circuit’s ruling, it is clear that the balance of hardships weighs strongly in
16 favor of issuing a stay.² This case has been litigated for several years (due in large part to
17 significant delay associated with the dispute amongst different plaintiffs’ attorneys over lead
18 counsel status), and waiting for the Ninth Circuit to decide whether to take the appeal harms no
19 one.

20 **C. A Brief Stay Is In the Public Interest**

21 Finally, staying dissemination of the Class Notice pending the Ninth Circuit’s
22 decision on Defendants’ Rule 23(f) Petition also serves the public interest because it conserves

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24 ¹ Plaintiffs contend in the parties’ Joint Submission that the Court should shift the cost of
25 disseminating notice to Defendants in this case. Joint Submission at 10. For the reasons
26 discussed by Defendants in the Joint Submission, Plaintiffs’ suggestion is groundless. Joint
27 Submission at 10-11. The only instance in which the Ninth Circuit has held that it may be
28 appropriate to impose substantial notice costs on a class action defendant is after “liability on
the merits has been determined in the first instance.” *Hunt v. Imperial Merchant Servs.*, 560
F.3d 1137, 1143-1144 (9th Cir. 2009).

² This remains true even if, as Plaintiffs erroneously contend, Defendants must bear the burden
of the Class Notice dissemination costs.

1 judicial resources and avoids expenditures of time and resources in the interests of achieving the
 2 proper legal result. *See In re Lorazepam*, 208 F.R.D. at 6 (“[T]he public interest really is rooted
 3 in the *proper* resolution of the important issues raised in this case, and a two-month stay to
 4 conserve the resources of all parties and the Court, resulting in no real prejudice to anyone, in
 5 order to ensure the proper legal result in this case is best aligned with that interest.”).

6 A stay also serves to avoid the risk of significantly confusing—and causing
 7 needless waste of time and money by—millions of consumers. Absent a stay, class members
 8 receiving the Class Notice will assume they are members of a certified class and may expend time
 9 and resources learning about the case, seeking out separate legal counsel, and potentially opting
 10 out of the certified class. In the event that the Ninth Circuit either decertifies or modifies the
 11 class, some or all of these class members will then need to be re-notified that they are *not*
 12 members of a certified class. This second notice may in turn prompt another wave of inquiry by
 13 former class members as to their membership or exclusion from a class. Premature dissemination
 14 of a Class Notice would result in the needless waste of time and resources on the part of Class
 15 Members and could leave them in serious doubt as to the scope of their rights. Particularly given
 16 the short delay associated with waiting for the Ninth Circuit’s decision on Defendants’ Petition,
 17 the Court should avoid that outcome.

18 **V. CONCLUSION**

19 For the foregoing reasons, Apple respectfully requests that the Court grant its
 20 motion to stay proceedings in the above-captioned matter pending the Ninth Circuit’s ruling on
 21 Defendants Rule 23(f) Petition.

22 Dated: July 29, 2010

Respectfully submitted,

LATHAM & WATKINS LLP

25 By _____/s/ Sadik Huseny
 26 Sadik Huseny
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