UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ZACK WARD, ET AL.,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. 12-cv-05404-YGR

ORDER GRANTING IN PART DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 78, 126

Plaintiffs Ward and Buchar bring this putative class action against defendant Apple Inc. alleging violations of Section 2 of the Sherman Act for a conspiracy to monopolize trade in the market for iPhone voice and data services. (Dkt. No. 1, "Comp.")

On December 15, 2015, the Court denied Apple's motion to dismiss, but indicated that it would entertain a motion for summary judgment solely on the issue of the existence of a relevant market for antitrust purposes. (Dkt. No. 72.) Apple filed such motion on February 2, 2016. (Dkt. No. 78.) The Court heard oral arguments on the motion on March 29, 2016, and ordered the parties to conduct additional discovery, deferring ruling thereon. (Dkt. Nos. 97, 100.) With the benefit of additional discovery, the parties filed supplemental briefs in September and October of 2016. (Dkt. Nos. 112, 118.)[1]

[1] On November 21, 2016, plaintiffs filed an administrative motion to supplement the summary judgment record and file a sur-reply. (Dkt. No. 126.) Having considered such motion, and for good cause appearing, the Court **GRANTS** plaintiffs' administrative motion.

Having considered the pleadings, the papers and exhibits submitted on the motion, and oral arguments held on January 31, 2017, and for the reasons set forth more fully below, the Court finds that plaintiffs have raised sufficient facts to show the existence of an antitrust market, albeit more narrow than plaintiffs contemplate. Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Apple's motion for summary judgment.[2]

I. BACKGROUND

Plaintiffs seek to represent a class of persons who purchased iPhones and paid for voice and data service from AT&T between October 19, 2008 and February 3, 2011 (the "Class Period"). Plaintiffs bring a single claim against Apple under Section 2 of the Sherman Act, alleging that Apple conspired with AT&T to monopolize an aftermarket for iPhone voice and data services. For purposes of the instant motion, Apple contends that no such illegal antitrust aftermarket exists under applicable laws and economic theories. The following undisputed facts are relevant to such argument and plaintiffs' claims to the contrary:

Apple launched its original cellular telephone, the iPhone 2G, on June 29, 2007. (Dkt. No. 83-8, Fenger Decl. ¶ 8.) Prior to such launch, Apple and AT&T entered into an agreement by which AT&T would be the exclusive provider of cellular voice and data service for the iPhone in the United States (the "Agreement"). (*Id.* at ¶ 9.)[3] By the terms of the Agreement, the exclusivity period was to end five years after the effective date of the Agreement, i.e. August 10, 2011. (Dkt. No. 83-9 at 2, 5.) The Agreement also allowed either party to terminate the Agreement for convenience and upon notice, prior to the second anniversary of the iPhone's commercial launch. (*Id.* at 19.) Thus, given that the iPhone's commercial launch was June 29, 2007 (Fenger Decl. ¶ 8), AT&T was only guaranteed to be the exclusive provider for the iPhone until June 29, 2009.

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[2] In connection with the parties' filings on this motion, they submitted administrative motions to file parts of their briefs and certain exhibits under seal. (Dkt. Nos. 83, 90, 111, 117, and 125.) The Court addresses each of those motions by separate order.

[3] During the periods relevant to the instant action, similar exclusivity provisions between cellular phone manufacturers and service and data providers were common in the industry, at least for limited periods of time. (*See* Fenger Decl. ¶¶ 2–3; Dkt. No. 111-8, Wilkie Decl. ¶ 27.)

In June 2008, around the time the second generation of iPhones was being released (the iPhone 3G), Apple and AT&T modified the Agreement to include a different and specific termination date, namely December 31, 2010. The amendment to the Agreement also provided for a significant change to the manner in which Apple earned revenues from the sales of the iPhone. Under the original Agreement, Apple shared in the revenues earned by AT&T from its sales of voice and data service for iPhones. (Dkt. No. 83-9 at 6–7.) The amendment eliminated revenue sharing and replaced it with a subsidy model, through which AT&T agreed to subsidize the cost of the iPhone if the buyer agreed to enter into a two-year service contract. (Dkt. No. 83-10 at 3–5.)[4]

Prior to, and during the Class Period, Apple and AT&T advertised both that AT&T would be the exclusive provider of voice and data service for the iPhone (at least in the United States) and that consumers were required to purchase a two-year contract with AT&T to activate the iPhone. (Dkt. No. 80-1 at 2.) Such information also appeared in the following: (i) the box in which the iPhone was sold (Dkt. No. 80-2 at 2); (ii) certain websites related to Apple and AT&T (Dkt. No. 120-4); and (iii) a pop-up screen during the iPhone activation process (Dkt. No. 79-1 at 3). In light of these disclosures and the subsidy model in place during the Class Period, the iPhone was essentially sold bundled together with a two-year service plan through AT&T.[5] Relevant here, the two-year service plan contracts entered into between consumers and AT&T allowed consumers to terminate their plans with AT&T upon payment of a $175 termination fee. (Dkt. No. 82-3 at 11.) Additionally, in such a case, the contract allowed AT&T to recover "any handsets and accessories purchased with" the service plan. (*Id.*)

[4] During the Class Period, the parties agree that such a subsidy model was the industry standard by which "virtually all cellular phones" have been sold in the United States. (Dkt. No. 111-6 at 7, Issue 1, Fact 17.)

[5] Plaintiffs submitted evidence suggesting that, at least in some circumstances, gaps existed between when consumers purchased an iPhone and when they activated or purchased AT&T service for the same. (*See, e.g.*, Dkt. No. 111-2 at 2 (indicating that the average delay between purchase and activation for iPhones from June through September 2007 was two days).) However, for the reasons stated herein, the Court finds such gaps irrelevant for the purposes of determining whether a relevant antitrust market exists for iPhone voice and data services.

Notwithstanding the foregoing, plaintiffs have also produced evidence suggesting that the unlock codes for the iPhones, necessary to enable the iPhone's use with other carriers, were not released by AT&T until April 2012. (Dkt. No. 113-9 at 2.) Notably, until the exclusivity agreement formally ended in December 2010, iPhones were produced to function only on the Global System for Mobile communication network ("GSM"). (Fenger Decl. ¶ 7.) At the time, two major United States networks existed for cellular service, namely the GSM network and the Code Division Multiple Access network ("CDMA"). (*See* Dkt. No. 111-8, Wilkie Decl. at ¶¶ 10–11.) During the Class Period, generally, phones built to operate on the GSM network were limited to AT&T or T-Mobile as providers while those built to operate on the CDMA network were limited to using either Sprint or Verizon. (*Id.*) Thus, some evidence suggests that consumers who purchased a GSM-compatible iPhone prior to December 31, 2010 still had to remain on the AT&T network until April 2012, or else purchase a new phone.[6] Additionally, an open factual question remains as to whether iPhone purchasers were aware that AT&T and Apple would refuse to unlock their phones for purposes of international travel.[7]

II. LEGAL FRAMEWORK FOR SUMMARY JUDGMENT

Summary judgment is appropriate when no genuine dispute as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings, depositions, discovery responses, and

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[6] A dispute of fact exists as to whether the GSM-compatible iPhones could fully operate on the T-Mobile network during the Class Period. However, such dispute is not material to the Court's ruling on Apple's motion, and thus, the Court need not address the same at this time. (*See* Dkt. No. 111-6 at 3, Issue 1, Fact 6.)

[7] In this regard, Dr. Wilkie opined thus: "Cellular carriers, including ATTM, customarily unlock a GSM phone when a customer travels overseas. This allows customers to replace the SIM card with a card from a local cellular carrier and thus avoid international roaming fees. However, ATTM has refused to unlock iPhones. Consumers who paid anticompetitive foreign roaming charges to ATTM suffered a common impact. I understand that ATTM has developed a methodology that it has used to compensate some iPhone customers who have paid such foreign roaming charges. I anticipate that, following further discovery, I will be able to evaluate ATTM's methodology and determine how many iPhone customers have been partially or fully compensated by ATTM so that I can calculate the economic damages resulting from ATTM's anticompetitive roaming charges." (Dkt. No. 111-8, Wilkie Decl. ¶ 70.)

affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247–48 (dispute as to a material fact is "genuine" if sufficient evidence exists for a reasonable jury to return a verdict for the non-moving party) (emphases in original).

Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the opposing party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that the opposing party lacks evidence to support its case. *Id.* If the moving party meets its initial burden, the opposing party must then set out "specific facts" showing a genuine issue for trial in order to defeat the motion. *Id.* (quoting *Anderson*, 477 U.S. at 250). The opposing party's evidence must be more than "merely colorable" and must be "significantly probative." *Anderson*, 477 U.S. at 249–50. Further, that party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows a genuine issue of material fact exists for trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000); *Nelson v. Pima Cmty. College Dist.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) ("mere allegation and speculation do not create a factual dispute"); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) ("conclusory allegations unsupported by factual data are insufficient to defeat [defendants'] summary judgment motion").

When deciding a summary judgment motion, a court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011). However, in determining whether to grant or deny summary judgment, a court need not "scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)

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