13-3857

United States Court of Appeals for the Second Circuit

STATE OF TEXAS, et al.,

Appellees-Respondents,

v.

PENGUIN GROUP (USA) INC., et al.,

Appellants

On Appeal from the United States District Court
for the Southern District of New York
No. 12-03394 (DLC)

REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY PENDING APPEAL

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INTRODUCTION

It would be deeply prejudicial to Apple and inefficient for all parties involved, as well as the judiciary, to proceed to trial in the class and *parens patriae* actions while the entire predicate for *all* plaintiffs' claims—the district court's erroneous injunction decision from July 2013—is on appeal to this Court. That is doubly true given that this Court is presently deciding whether to review the district court's class certification order.

The States claim that their case should proceed irrespective of Apple's pending 23(f) petition because the class certification order does not apply to their claims, but this ignores their total reliance on the injunction order that is on appeal, their use of the exact same evidence and expert testimony as the class action, and the common due process concerns that cut across both actions. Indeed, both the States and class plaintiffs have vigorously argued to the district court that their cases are inextricably entwined and must be tried together.

Apple filed its emergency motion with this Court days after the district court certified a class action—it could not have acted more quickly, and plaintiffs' claim that Apple has waived the right to a stay should therefore be rejected out of hand.

Pressing forward with class notice and a trial now makes no sense from a standpoint of fairness, judicial economy, or consumer confusion. This Court should stay the proceedings in the district court pending Apple's appeals.

ARGUMENT

I. A Stay of the Damages Trial Is Warranted While This Court Rules on Apple's Pending Appeals

A stay is warranted because Apple is likely to succeed on the merits of its appeals, it will suffer irreparable harm absent a stay, and there will be no harm to plaintiffs or the public from a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010). Apple clearly satisfies each of these elements.

First, Apple has exceedingly strong arguments on appeal from the district court's judgment and injunction and the district court's certification order, as explained in Apple's opening brief and 23(f) petition. Dkt. 151, Exs. A & B. Indeed, if Apple prevails on *either* appeal, the damages trial will be mooted or, at a minimum, the entire landscape of this litigation will radically change.

Second, Apple will be irreparably harmed absent a stay in both the States' action and the class actions, because both sets of plaintiffs seek to immediately send notices to a large class of consumers. Notifying millions of Apple customers that they are part of a class purportedly injured by a price-fixing scheme will undoubtedly and irreparably injure Apple's reputation and goodwill. Dkt. 151, at 17-18. In addition, the notices remind consumers of their "rights to sue Apple on [their] own" and compel them to make a decision on whether to exercise that right. 11-md-2293, Dkt. 587, at 3. "[C]ourt[s] should ordinarily stay the dissemination

of class notice to avoid the confusion and the substantial expense of renotification that may result from appellate reversal or modification after notice dissemination." Manual for Complex Litigation (4th) § 21.28; *see also, e.g.*, *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 183 (3d Cir. 2006); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 286 F.R.D. 88, 94 (D.D.C. 2012); *Apple Inc. v. Superior Court*, 2013 Cal. LEXIS 2577 (Mar. 27, 2013).

Significantly, both the States and the class plaintiffs plan to send a common notification to Apple's customers regarding their respective actions. *See* 11-md-2293, Dkt. 621, at 8 ("A short, half-page notice is to be sent by e-mail to class members *and to customers in the States* who purchased the Publisher Defendants' e-books during the class period") (emphasis added). Contrary to the States' suggestion, then, it would make no sense to stay the class actions to prevent irreparable harm to Apple due to the premature and prejudicial class notifications, and then permit the States to go forward and disseminate the exact same notices.

Plaintiffs are wrong that these class notices cannot hurt Apple's reputation simply because different notifications were previously sent to class members regarding the pre-trial settlements with the publisher defendants. 14-1092, Dkt. 25, at 5. Those notices related only to the *publishers*' claims, mentioned Apple only to say that Apple was continuing to litigate its claims, and did not state that Apple was found to have engaged in a price-fixing conspiracy. *Id.* at 5-6.

Third, plaintiffs have failed to articulate any tangible harm that will befall them or the public by staying the damages trial pending Apple's appeals. Plaintiffs do not—and cannot—dispute that they have already received the majority of the alleged damages and that Apple is operating under consent decrees and injunctions. The absence of any harm to plaintiffs or the public warrants a stay.

II. The States' Case Is Substantively Identical to the Class Actions and Should Therefore Be Stayed as Well

It would make no sense to stay the class actions but allow the States' case to proceed, as the States' claims contain the same underlying flaws that are on appeal, and rely on the exact same evidence as the class actions.

The States attempt to distinguish their claims by arguing that States' "enforcement authority … is broader than private plaintiffs' rights under Rule 23" and that there may be circumstances in which they may litigate their case against Apple "even if a Rule 23 class cannot." Dkt. 163, at 1-2. But they entirely miss the point. *Both* the States' case and the class actions are based on the same underlying order that is currently being appealed and is likely to be reversed. *See* 13-3471, Dkt. 157 (Apple's Opening Brief). *Both* the States and the class plaintiffs represented to the district court that they would rely on the district court's findings from the DOJ case in their upcoming damages trial. *See* 11-md-2293, Dkts. 410, 411; *see also* 12-cv-3394, Dkt. 510, at 12. Because both sets of plaintiffs have pinned their entire theory of liability to the injunction order on appeal, a reversal of that

decision would indisputably moot the damages trial for both sets of plaintiffs.

Because the States' and class plaintiffs' damages claims rely on the same evidence and methodology, it would be grossly inefficient to stay one action involving 23 States and territories and try the other action involving the other 33 jurisdictions. Indeed, the States and class plaintiffs have vigorously resisted the suggestion that the two actions should be tried separately, pointing to the resources they have already expended preparing for a joint trial. When Apple requested that actions transferred by the Judicial Panel for Multidistrict Litigation be remanded after the completion of pretrial proceedings, both sets of plaintiffs successfully opposed Apple's request by arguing that "Apple's proposed change of course would impose an unfair detriment on the State and Class Plaintiffs, who have made many decisions and expended resources based in whole or in part on the pending joint second-phase trial in this jurisdiction." 12-cv-3394, Dkt. 460, at 15.

Plaintiffs cited the "numerous strategic decisions" they made based on the belief that they would try their cases together, including "[e]ngaging a single, shared damages expert" and "[c]oordinating the development of responsibilities and strategy for the joint, second-phase trial to accommodate the interests of both the Class Plaintiffs and State Attorneys General." 12-cv-3394, Dkt. 460, at 7-8; *see also id.* at 2-3 ("the Class and State Plaintiffs retained a joint expert for summary judgment and trial, made a host of other decisions and expended substantial

resources based on all parties' understanding that a joint, second-phase trial would occur in this forum"). Plaintiffs even argued that these coordinated efforts "to accommodate the interests of both the Class Plaintiffs and State Attorneys General" "*cannot be undone*." *Id.* at 7-8, 15 (emphasis added).

The district court, in siding with plaintiffs, noted that "[f]or almost two years, the class plaintiffs and the States have coordinated their efforts in both discovery and motion practice to prepare for the single trial. They have retained a single expert on damages. And they have jointly litigated the Daubert motions." 12-cv-3394, Dkt. 510. The court articulated what it called "the many complexities that arise from a suggestion that there should be two damages trial[s]," including "the collateral estoppel impact on the second trial on damages from the rulings and decisions made in the first damages trial" and the resulting "risk of inconsistent verdicts[.]" *Id.* at 33.

Furthermore, Apple has filed a motion seeking certification for interlocutory review the district court's denial of Apple's request to dismiss the States' *parens patriae* claims, and Apple's likelihood of success on appeal from that order is yet another reason to stay the States' case. 12-cv-3394, Dkt. 508.

The States, like the class plaintiffs, seek hundreds of millions of dollars in damages on behalf of millions of consumers. The parallel nature of these actions—whereby the State and class plaintiffs purport to represent consumers in 33

and 23 jurisdictions, respectively—makes clear that the States' *parens patriae* action is, functionally, a class proceeding. Because "Rule 23 provides a one-size-fits-all formula for deciding the class-action question," the rule "automatically applies" to the States' representative action. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399-400 (2010). Rule 23's requirements are "grounded in due process" (*Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)), and are "designed to protect absentees by blocking unwarranted or overbroad class definitions" (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)) and ensure that defendants can fairly and adequately defend themselves in a class trial. These due process protections are not contingent on the identity of the plaintiff; indeed, the district court rejected Apple's due process arguments with respect to the *parens patriae* claims for the same reasons it denied class certification. Mot. at 13.

Moreover, the States, who purport to sue as *parens patriae*, must demonstrate an injury to their quasi-sovereign interests to satisfy Article III's injury-in-fact requirement. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 335 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011). Such quasi-sovereign interests are "public or governmental interests that concern the state as a whole" (*Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (citation and internal quotation marks omitted)), and are "wholly apart from recoverable injuries to individuals residing within the state" (*West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079,

1089 (2d Cir. 1971)). As the Supreme Court clarified just last year, "mere authorization to represent a third party's interests is [in]sufficient to confer Article III standing," because the litigant himself must demonstrate a "personal, particularized injury." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665-67 (2013).

The States are seeking damages on behalf of *individuals* in their States, and do not themselves argue that they paid higher prices for ebooks as a result of Apple's entry into the market. The States thus do not have the same interest and have not suffered the same injury they allege on behalf of absent individuals. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011); *Amchem*, 521 U.S. at 626. As a result, the States may not sue as *parens patriae*; they lack standing to do so, and would in any event be required to satisfy Rule 23's requirements and concomitant due process standards before representing and collecting damages on behalf millions of consumers to compensate them for their alleged individual injuries.

In short, the States here are acting just like named plaintiffs in a class action, not as quasi-sovereigns, and it would be absurd to allow a representative trial of consumer claims in 33 States to go forward if the class certification order is reversed. If, as Apple contends in its pending 23(f) petition, individual issues predominate over common issues and plaintiffs are impermissibly relying on a "Trial-by-Formula" approach barred by *Dukes* and *Comcast*, then the States' case is doomed for failure for the same reasons as the class actions and it makes no sense

to proceed in any of those actions without further guidance from this Court.

III. Apple Did Not Delay in Bringing Its Stay Motion

Apple filed its stay motion in the district court and its emergency motion in this Court within days of the district court's class certification order, and therefore did not waive its right to relief.

The district court certified the class on March 28, 2014. At a hearing three days later, Apple requested a stay of the damages trial pending its 23(f) petition, and the district court set a briefing schedule with Apple's motion due April 4. 11-md-2293, Dkt. 593. Apple moved for a stay on April 4 (11-md-2293, Dkt. 603); on April 23, the district court denied the motion (11-md-2293, Dkt. 618); and *that same day* Apple moved for a stay in this Court (Dkt. 151). Apple's motion in this Court came *within eight days* of the district court's April 15 order denying Apple's motion to dismiss the States' Clayton Act claim. 12-cv-3394, Dkts. 340, 500.

Plaintiffs' contention that Apple is not entitled to a stay *now* because it declined to ask this Court for a stay in August 2013—eight months *before* the class was certified—is a specious non sequitur. There was no legal requirement that Apple move this Court for a stay at that point, and plaintiffs cite no authority to support their waiver argument. Had the court denied class certification and required the States to satisfy the standing and due process requirements before representing their citizens, Apple would have had no need to burden this Court with an

emergency motion. Indeed, had Apple moved this Court for a stay before the district court ruled on these issues and class notice and trial were imminent, plaintiffs no doubt would have argued that the motion was premature and that it was unnecessary for this Court to act until the district court resolved the class certification and *parens patriae* issues.

Nor is it true that the effort expended by plaintiffs since the July 2013 order was wasted. If Apple does not prevail on appeal, then the district court proceedings will pick up precisely where they left off, as a result of all the briefing and argument in support of class certification and the *parens patriae* actions.

Over the course of one month the district court certified a class action, allowed the *parens patriae* claims to proceed, and denied Apple's request for a stay. Apple exercised the utmost diligence in moving for a stay following this dramatic change in the procedural posture of the case, and a stay makes sense from the standpoint of all concerned, including the parties, the judiciary, and consumers.

CONCLUSION

For all the reasons stated herein and in Apple's motion, this Court should stay all proceedings in the district court, including class notice and trial in both the States' case and the class actions, pending Apple's appeals.

Dated: May 12, 2014 /s/ Theodore J. Boutrous, Jr.

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