Donald M. Falk (CA Bar No. 150256)
dfalk@mayerbrown.com
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Telephone: (650) 331-2000
Facsimile: (650) 331-2060

John Nadolenco (CA Bar No. 181128)
jnadolenco@mayerbrown.com
Lisa W. Cornehl (State Bar No. 232733)
lcornehl@mayerbrown.com
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Attorneys for Defendant
AT&T Mobility LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PATRICK HENDRICKS, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

AT&T MOBILITY, LLC,

Defendant.

Case No. CV 11-00409-CRB

DEFENDANT AT&T MOBILITY LLC'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND TO STAY CASE

Date: September 23, 2011
Time: 10:00 a.m.
Courtroom 8

Honorable Charles R. Breyer

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 23, 2011, at 10:00 a.m., pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), defendant AT&T Mobility LLC ("ATTM") will move and hereby does move this Court for an order compelling plaintiff Patrick Hendricks to arbitrate his claims on an individual basis and to stay this action.

ATTM brings this motion on the ground that the FAA requires Hendricks to pursue his claims in accordance with his arbitration agreement. The motion is supported by the Memorandum of Points and Authorities, the Declarations of Lilian L. Chan, Chenell Cummings, Adam Gill, Senthil Kumar, Romi Manchanda, and Theodore Weiman and all exhibits thereto, any reply memorandum that ATTM may file, and oral argument that ATTM may present at the hearing.

STATEMENT OF ISSUE TO BE DECIDED

Whether the FAA requires Hendricks to pursue his claims against ATTM in accordance with his arbitration agreement.

MEMORANDUM OF POINTS AND AUTHORITIES

When plaintiff Patrick Hendricks signed up for wireless service from ATTM, he agreed to resolve his disputes with ATTM in arbitration. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, requires him to honor his agreement and arbitrate the claims raised in this lawsuit. Accordingly, ATTM respectfully moves this Court for an order that (i) compels Hendricks to arbitrate his claims in accordance with his agreement and (ii) stays these proceedings pending arbitration.

On March 25, 2011, pursuant to the parties' stipulation, the Court stayed this action pending the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*. *See* Dkt. No. 18. The Supreme Court has now spoken, holding that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). Because the FAA preempts state-law rules "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" (*id.* at 1744), the Court reversed *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), which had held the December 2006 version of ATTM's arbitration provision unenforceable under California law.

Hendricks' arbitration provision is even more consumer-friendly than the one involved in *Concepcion*. Despite the Supreme Court's clear holding in *Concepcion*, Hendricks persists in asserting that he is not obligated to arbitrate in accordance with his agreement. In an effort to evade the Supreme Court's decision, he has amended his complaint to assert that ATTM's arbitration provision is an "unjust" and "unreasonable" practice under Section 201(b) of the Federal Communications Act ("FCA"). Hendricks' invocation of the FCA does not excuse him from his obligation to arbitrate. To begin with, Hendricks lacks capacity to pursue his claim in court: the Ninth Circuit has held that a private party may not challenge a carrier's practices as "unreasonable" or "unjust" unless the Federal Communications Commission ("FCC") already has declared them so itself—which is certainly not the case here. Moreover, the Ninth Circuit has held that claims under the FCA are fully arbitrable; Hendricks cannot avoid that holding by suggesting that the FCA somehow mandates the availability of class procedures when the statute says nothing of the sort.

BACKGROUND

A. Hendricks Agrees To Arbitrate His Disputes With ATTM.

Patrick Hendricks is an ATTM customer who resides in California. First Am. Compl. ¶ 5. Hendricks agreed to resolve his disputes with ATTM through arbitration on a number of occasions. On June 3, 2005, Hendricks used ATTM's web site to activate a cellular phone he had purchased for use with ATTM's wireless network. Decl. of Chenell Cummings ¶ 4 & Ex. 1; Decl. of Adam Gill ¶ 5. To complete that transaction, he was required to click both a box and a button labeled "I Accept" appearing next to the statement, "I have read and agree to the Wireless Service Agreement," including the "Terms of Service," which was accessible through a hyperlink on that screen. Decl. of Senthil Kumar ¶ 3. ATTM's Terms of Service required both ATTM and Hendricks to "arbitrate all disputes and claims * * * arising out of or relating to this Agreement" on an individual basis. Gill Decl. Ex. 1 at 18; Decl. of Lilian L. Chan ¶¶ 3-4.

ATTM revised its arbitration provision in early 2009. Pursuant to the change-in-terms provisions of ATTM's Terms of Service, ATTM provided notice of the revised 2009 arbitration provision to Hendricks with his March and May 2009 monthly bills. Cummings Decl. Exs. 4-5. Like the arbitration provision that Hendricks accepted in 2005, the 2009 revised version requires both ATTM and Hendricks to "arbitrate **all disputes and claims** between us" on an individual basis. Decl. of Theodore Weiman Ex. 4 at 2. (emphasis in original).

Most recently, on July 9, 2010, Hendricks purchased an Apple iPhone from a Parrot Cellular store in Berkeley, California and activated the phone for use with ATTM wireless service using an Interactive Voice Response ("IVR") system. Cummings Decl. ¶ 5 & Exs. 2-3. The IVR system required Hendricks to indicate that he accepted his ATTM wireless service agreement—including ATTM's Terms of Service—by pressing a button on the phone's keypad. *Id.* ¶ 6. The Terms of Service included the 2009 version of ATTM's arbitration provision (Decl. of Romi Manchanda Exs. 1-2), which is identical to the one Hendricks received notice of in 2009.

B. The Consumer-Friendly Features Of ATTM's Arbitration Provision.

The U.S. Supreme Court has expressly recognized that ATTM's arbitration provision includes several features that ensure that its customers have "sufficient * * * incentive for the

individual prosecution of meritorious claims that are not immediately settled" and "'essentially guarantee[]'" that aggrieved customers will "be made whole." *Concepcion*, 131 S. Ct. at 1753 (quoting *Laster*, 584 F.3d at 856 n.9). Those features include:

- **Cost-free arbitration:** For consumer claims of $75,000 or less, "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration, and arbitrator fees" unless the arbitrator determines that the claim is "frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))"; [1]
- **$10,000 minimum award if arbitral award exceeds ATTM's settlement offer**: If the arbitrator awards a customer an amount that is greater than ATTM's last "written settlement offer made before an arbitrator was selected," ATTM will pay the customer the greater of $10,000 or the arbitral award.
- **Double attorneys' fees available:** If the arbitrator awards the customer more than ATTM's last settlement offer, then "[ATTM] will * * * pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, * * * that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[2]
- **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in arbitration, [ATTM] agrees that it will not seek such an award [from the customer]";
- **Small claims court option:** Either party may bring a claim in small claims court;
- **No confidentiality requirement:** The parties need not keep the arbitration confidential;
- **Full remedies available:** The arbitrator may award the consumer any form of individual relief (including punitive damages, statutory damages, attorneys' fees, and injunctions) that a court could award;

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[1] In the event that an arbitrator concludes that a customer's claim is frivolous, the AAA's consumer arbitration rules would cap the customer's arbitration costs at $125 for claims of $10,000 or less. *See* Weiman Decl. Ex. 1 (AAA, *Supplementary Procedures for Consumer-Related Disputes* § C-8).

[2] The attorney premium "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." Manchanda Decl. Ex. 1 at 18. Thus, even if an arbitrator were to award a customer less than ATTM's last settlement offer, the customer would be entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

- **Flexible consumer procedures:** Arbitration will be conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;
- **Conveniently located hearing:** Arbitration will take place "in the county * * * of [the customer's] billing address";
- **Choice of in-person, telephonic, or no hearing:** For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator"; and
- **Right to a written decision:** "Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based."

Manchanda Decl. Ex. 1 at 15-18.

C. Dispute Resolution Under ATTM's Arbitration Provision.

ATTM has tailored the dispute-resolution process to the needs of its customers. The procedures create powerful incentives for ATTM to resolve the vast majority of disputes to customers' satisfaction without the need to invoke the formal arbitration process.

It is only if a customer cannot resolve his or her dispute informally through ATTM's customer-service department that the arbitration provision comes directly into play. The first step is for the customer to notify ATTM of the dispute in writing. Weiman Decl Ex. 6 at 2. That is as simple as mailing a letter to ATTM or submitting a one-page Notice of Dispute form that ATTM has posted on its web site (at http://www.att.com/arbitration-forms). *Id.* Ex. 7. If the dispute is not resolved within 30 days, the customer may commence the arbitration. To do so, the customer need only fill out a two-page Demand for Arbitration form and send copies to the AAA and to ATTM. Customers may either obtain a copy of the demand form from the AAA's web site (at http://www.adr.org) or use the simplified form that ATTM has posted on its web site (at http://www.att.com/arbitration-forms). *Id.* Exs. 3, 8. To further assist its customers, ATTM has posted on its web site a layperson's guide on how to arbitrate a claim. *Id.* Ex. 6

(http://www.att.com/arbitration-information).

D. Hendricks Files Suit Against ATTM Despite Agreeing To Arbitrate.

Despite agreeing to arbitrate all disputes against ATTM, Hendricks filed this suit on January 27, 2011. Hendricks contends that ATTM "systematically overbill[s] for every data transaction" as well as for "phantom data traffic when there is no actual data usage initiated by the customer." First Am. Compl. ¶ 2. Hendricks, who seeks to represent a putative nationwide class of customers with a usage-based data plan on an Apple iPhone or iPad (*id.* ¶ 13), asserts causes of action under state common law, California's Unfair Competition Law ("UCL"), and the FCA, 47 U.S.C. § 201(b) (*id.* ¶¶ 21-70). He requests compensatory and punitive damages, declaratory and injunctive relief, restitution, pre- and post-judgment interest, and attorneys' fees and costs (*id.* at 8-12).

On March 25, 2011, pursuant to the parties' stipulation, this action was stayed pending the Supreme Court's decision in *Concepcion*. *See* Dkt. No. 18. After the Supreme Court decided *Concepcion*, Hendricks amended his complaint to add a new claim that his arbitration agreement with ATTM violates the FCA's prohibition on "unjust" and "unreasonable" "charge[s], practice[s], classification[s], or regulation[s]." First Am. Compl. ¶¶ 21-40.

ARGUMENT

I. THE FAA MANDATES ENFORCING HENDRICKS' ARBITRATION AGREEMENT.

The FAA requires that Hendricks' arbitration agreement be enforced. It is "beyond dispute that the FAA was designed to promote arbitration." *Concepcion*, 131 S. Ct. at 1749. The centerpiece of the FAA is Section 2, which mandates that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Sections 3 and 4 also emphasize the duty of courts to compel arbitration "in accordance with the terms of the [arbitration] agreement." *Id.* §§ 3-4. As the Supreme Court has explained, "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at

1748. And this "liberal federal policy favoring arbitration agreements" applies "notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 1749 (internal quotation marks omitted). Accordingly, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

In view of these principles, the FAA requires enforcement of Hendricks' arbitration agreement with ATTM. The FAA applies if the arbitration agreement is "written" and in a contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. Both criteria are met here: (i) ATTM's arbitration provision is in writing (*see* page 3, *supra*); and (ii) contracts for wireless service involve interstate commerce, because wireless devices, even "during intrastate use," are "[i]nterstate commerce facilities." *United States v. Marek*, 238 F.3d 310, 318 (5th Cir. 2001). Indeed, the arbitration provision itself specifies that the ATTM service agreement "evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision." Manchanda Decl. Ex. 1 at 15. Moreover, there can be no denying that Hendricks' claims fall within the broad scope of his agreement to arbitrate "all disputes and claims between" himself and ATTM. *Id*. The plain language of ATTM's arbitration provision is all-encompassing and "intended to be broadly interpreted." *Id.*

When, as here, the FAA governs arbitration provisions that cover the plaintiff's claims, the Court should compel arbitration and stay litigation. *See* 9 U.S.C. § 3 (providing for a stay of court proceedings pending the resolution of arbitration).

II. IN LIGHT OF *CONCEPCION*, HENDRICKS CANNOT AVOID HIS ARBITRATION AGREEMENT.

Under *Concepcion*, Hendricks is unable to rely on California law as a basis for avoiding arbitration on an individual basis. His attempt to resurrect California's *Discover Bank* rule by invoking the FCA is meritless.

A. Hendricks Cannot Avoid His Arbitration Agreement On State-Law Grounds.

Concepcion makes clear that Hendricks' agreement to arbitrate on an individual (as

opposed to a class-wide) basis is fully enforceable under the FAA. Accordingly, Hendricks cannot successfully rely upon state law to avoid his obligation to arbitrate under the terms of his arbitration agreement with ATTM.

At issue in *Concepcion* was whether the FAA "preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable," which the Court described as "the *Discover Bank* rule"—referring to the California Supreme Court decision on which the Ninth Circuit relied in *Laster*. *Concepcion*, 131 S. Ct. at 1746. Answering that question in the affirmative, the Court explained that state laws "[r]equiring the availability of classwide arbitration interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Id.* at 1748. "Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Court held, "California's *Discover Bank* rule is preempted by the FAA." *Id.* at 1753 (internal quotation marks omitted).

The Court also held that the policy concerns underlying the *Discover Bank* rule are beside the point, because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753. Moreover, the Court endorsed the observations of the district court and Ninth Circuit that "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole" under ATTM's arbitration provision and that plaintiffs are "*better off* under their arbitration agreement with [ATTM] than they would have been as participants in a class action.'" *Id.* (citations omitted; emphasis and first alteration in original).

In short, *Concepcion* establishes that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. Accordingly, in the weeks since *Concepcion* was decided, courts both in California—including three other judges of this Court—and elsewhere have relied on *Concepcion* in enforcing arbitration agreements that are less consumer-friendly than the one into which Hendricks entered. *See, e.g.*, *Estrella v. Freedom Fin.*, 2011 U.S. Dist. LEXIS 71606 (N.D. Cal. July 5, 2011) (Illston, J.); *In re Cal. Title Ins. Antitrust Litig.*, 2011 WL 2566449

(N.D. Cal. June 27, 2011) (White, J.); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 (N.D. Cal. May 16, 2011) (Alsup, J.); *Zarandi v. Alliance Data Sys. Corp.*, 2011 WL 1827228 (C.D. Cal. May 9, 2011) (Fischer, J.); *Bellows v. Midland Credit Mgmt., Inc.*, 2011 WL 1691323 (S.D. Cal. May 4, 2011) (Burns, J.); *accord, e.g.*, *Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939 (D.N.J. Jun 22, 2011); *Bernal v. Burnett*, 2011 WL 2182903 (D. Colo. June 6, 2011); *D'Antuono v. Serv. Rd. Corp.*, 2011 WL 2175932 (D. Conn. May 25, 2011); *Day v. Persels & Assocs.*, 2011 WL 1770300 (M.D. Fla. May 9, 2011); *Wallace v. Ganley Auto Group*, 2011 WL 2434093 (Ohio Ct. App. June 16, 2011); *see also Fensterstock v. Educ. Fin. Partners*, 2011 WL 2580166 (2d Cir. June 30, 2011) (treating *Concepcion* as dispositive of plaintiff's argument that the requirement that he arbitrate on an individual basis is unconscionable under California law and remanding for consideration of other issues).

B. The FCA Cannot Be Used To Resurrect California's *Discover Bank* Rule.

Hendricks no doubt recognizes—as the many cases we have cited underscore—that *Concepcion* prevents him from avoiding his arbitration agreement on state-law grounds. In an effort to get around that decision, however, he has amended his complaint to assert that his arbitration agreement is unenforceable under Section 201(b) of the FCA. Specifically, he claims that his arbitration agreement is "unjust and unreasonable under 47 U.S.C. § 201(b)" because it (1) acts "as an exculpatory clause," in that consumer claims "will not be litigated if they cannot be pursued on a class basis"; (2) "violate[s] the public policy of the State of California, and numerous other states," and (3) is "unconscionable under the law of California, and numerous other states." First Am. Compl. ¶¶ 30, 39. If these arguments sound familiar, it is because they are identical to the *Discover Bank* rule that is preempted by the FAA.

Hendricks' attempt to evade *Concepcion* by repackaging the same arguments within a federal statute unrelated to arbitration borders on frivolous. First, his FCA allegations are not properly before this Court. The Ninth Circuit has held that a private litigant "cannot demonstrate a violation of § 201(b) in the absence of an FCC determination" that a particular practice is "unreasonable" or "unjust" under the statute. *N. County Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1160 (9th Cir. 2010); *see also, e.g., Higdon v. Pac. Bell Tel. Co.*, 2010 WL

1337712, at *4 (N.D. Cal. Apr. 2, 2010) (claims under Section 201(b) are unavailable in court absent "a threshold FCC determination regarding the challenged practice"); *Epstein v. AT&T Commc'ns of Cal., Inc.*, 2010 WL 3000202, at *2 (S.D. Cal. July 30, 2010) ("Plaintiff, however, overlooks a prerequisite to filing suit for a violation of § 201(b)—*i.e.*, a determination by the FCC that the practice in question is unjust or unreasonable.").[3] As the Ninth Circuit explained, it is improper for "federal courts [to] fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b)" because such a result would "put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission." *N. County Commc'ns*, 594 F.3d at 1158 (internal quotation marks omitted); *cf. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 58 (2007) ("Congress, in § 201(b), delegated to the [FCC] authority to "fill" a "gap," i.e., to apply § 201 through regulations and orders with the force of law.").

Even if that were not the case, Hendricks' suggestion that the FCA disfavors agreements to arbitrate on an individual basis is demonstrably wrong. In rejecting the proposition that FCA claims are non-arbitrable, the Ninth Circuit has already concluded that no "congressional intent to bar arbitration exists in the FCA." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 726 (9th Cir. 2007). Moreover, the FCC has routinely approved carrier tariffs containing arbitration provisions. *See Metro East Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 926-27 (7th Cir.2002). Relatedly, the FCC has made clear that "class action lawsuits are neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act." *In re Halprin, Temple, Goodman, & Sugrue*, 13 F.C.C.R. 22568, 22581 (1998).[4] Hendricks' attempt to concoct an implication to the contrary from the FCA's

[3] *See also, e.g.*, *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1071 (9th Cir. 2005) ("under § 201(b), the Commission must conclude that a practice is reasonably related to rates and services and is substantively 'unjust or unreasonable' before a private action can exist"), *aff'd*, *Global Crossing*, 550 U.S. at 58; *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 631 (6th Cir. 1987) ("claims based on section 201(b) of the Communications Act are within the primary jurisdiction of the FCC").

[4] Hendricks invokes Sections 206 and 207 as the basis for his private right of action for alleged violations of Section 201(b). *See* First Am. Compl. ¶¶ 64-65.

prohibition on "unjust" or "unreasonable" practices is irreconcilable with this authority. It also runs headlong into the FAA, which establishes "a liberal federal policy favoring arbitration agreements" (*Moses H. Cone*, 460 U.S. at 24) and "requires that [courts] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Hendricks' assertion even fails on its own terms. *Concepcion* makes clear that there is nothing unjust or unreasonable about arbitration under ATTM's arbitration provision, which makes arbitration cost-free for consumers with non-frivolous claims and entitles consumers to a minimum recovery of $10,000 and double attorneys' fees if the arbitrator's award exceeds ATTM's last settlement offer. *See* pages 3-5, *supra*. As the Supreme Court recognized in *Concepcion*, these pro-consumer terms are "sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled" and "'essentially guarantee[]'" that aggrieved customers are made whole. 131 S. Ct. at 1753 (quoting *Laster*, 584 F.3d at 856 n.9). Such a provision cannot be deemed "unjust" or "unreasonable."

In short, Hendricks cannot legitimately invoke the FCA to avoid the import of *Concepcion*.

CONCLUSION

The Court should issue an order (i) compelling Hendricks to arbitrate his claims on an individual basis and (ii) staying this action.

Dated: July 7, 2011

MAYER BROWN LLP

By: /s/ John Nadolenco

John Nadolenco (CA Bar No. 181128)
jnadolenco@mayerbrown.com
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Donald M. Falk (CA Bar No. 150256)
dfalk@mayerbrown.com
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Telephone: (650) 331-2000
Facsimile: (650) 331-2060

Attorneys for Defendant
AT&T Mobility LLC

Of counsel:
Evan M. Tager
Archis A. Parasharami
Theodore J. Weiman
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-3300