

1 H. TIM HOFFMAN (049141)  
 hth@hoffmanandlazea.com  
 2 ARTHUR W. LAZEAR (083603)  
 awl@hoffmanandlazea.com  
 3 MORGAN M. MACK (212659)  
 mmm@hoffmanandlazea.com  
 4 **HOFFMAN & LAZEAR**  
 180 Grand Avenue, Suite 1550  
 5 Oakland, California 94612  
 Telephone: (510) 763-5700  
 6 Facsimile: (510) 835-1311

7 MAX FOLKENFLIK, ESQ.  
 max@fmlaw.net  
 8 MARGARET McGERITY, ESQ.  
 MMcGerity@fmlaw.net  
 9 **FOLKENFLIK & MCGERITY**  
 1500 Broadway, 21st Floor  
 10 New York, NY 10036  
 Telephone: (212) 757-0400  
 11 Facsimile: (212) 757-2010

12 Attorneys for Plaintiffs

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 14 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 15 **OAKLAND DIVISION**

16 ZOLTAN STIENER and YNEZ STIENER, ) Case No.: C 07-04486 SBA  
 17 individually and on behalf of all others )  
 18 similarly situated, )

19 Plaintiffs, ) **PLAINTIFFS’ OPPOSITION TO DEFENDANT**  
 ) **AT&T MOBILITY’S ADMINISTRATIVE MOTION**  
 20 vs. ) **TO STAY PROCEEDINGS PENDING**  
 ) **RESOLUTION OF MOTION FOR STAY PENDING**  
 ) **APPEAL**

21 ) Date Filed: March 24, 2008  
 22 APPLE, INC., AT&T MOBILITY, LLC, and ) Judge: Honorable Sandra B. Armstrong  
 23 DOES 1 through 50, inclusive, )  
 )  
 24 Defendants. )

24 **INTRODUCTION**

25 Defendant AT&T Mobility (“ATTM”) has filed a motion under Local Rule 7-11 for an  
 26 administrative stay of proceedings related to ATTM in the above-captioned action pending its appeal  
 27 to the Ninth Circuit Court of Appeals of this Court’s order denying its motion to compel arbitration.  
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1 The motion should be denied because ATTM's appeal is patently baseless, and this case has already  
2 endured undue delay arising from ATTM's insistence on staying all proceedings while it pursued its  
3 unmeritorious attempt to compel arbitration.

4 **FACTUAL BACKGROUND**

5 The complaint in this action was filed on August 29, 2007. On September 18, 2007,  
6 defendant ATTM appeared in this action and filed a stipulation, which it had obtained following its  
7 request to Plaintiffs, extending its time to respond to the complaint. On November 6, 2007, ATTM  
8 filed a motion seeking a stay of its obligations under the Court's scheduling order, pending a  
9 resolution of its anticipated motion to compel arbitration. The motion to compel arbitration was  
10 filed on November 21, 2007, and on November 29, 2007 the Court granted ATTM's motion for a  
11 stay pending resolution of the motion to compel arbitration. On March 12, 2008, the Court denied  
12 ATTM's motion to compel arbitration. In a carefully reasoned 28-page decision, the Court noted  
13 that the Ninth Circuit court had previously invalidated a substantially similar arbitration clause  
14 employed by AT&T in *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9<sup>th</sup> Cir.  
15 2007). The Court rejected ATTM's attempt to distinguish its present arbitration clause from the one  
16 found to be unconscionable in *Shroyer*. In its order, the Court issued a new schedule of case  
17 management and ADR deadlines.

18 On March 18, 2008, ATTM filed a Notice of Appeal of the Court's order denying its motion  
19 to compel arbitration. On March 24, 2008, ATTM filed a noticed motion for a stay pending appeal.  
20 At the same time, it filed the present administrative motion for a stay pending a resolution of its  
21 noticed motion.

22 **ARGUMENT**

23 **ATTM Offers No Proper Basis to Stay This Proceeding Any Further**

24 This action has been pending for approximately seven months, and nothing has occurred to  
25 advance the litigation on the merits. Rather, the action has been stayed for virtually its entire life  
26 while ATTM pursued its baseless efforts to compel the parties to arbitrate the matter under its  
27 unenforceable arbitration clause. ATTM now wishes to hold up this litigation further in order to  
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1 continue pursuing the same unsuccessful claim that it can compel arbitration. This Motion should be  
2 denied, because ATTM has failed to provide good cause in support of its request for an additional  
3 stay of these proceedings.

4 In its order denying the motion to compel, this Court set a schedule that would finally permit  
5 this litigation to advance on the merits. Obviously, the Court believed that the time for procedural  
6 diversions had passed, and that it was time for the substantive litigation to proceed. Yet Defendant  
7 seeks to thwart that progress even further while it continues to rehash the same arguments made in  
8 support of its efforts to enforce its invalid arbitration clause.

9 In any motion where a party seeks an order that will cause a substantial disruption in the  
10 progress of the litigation, it is incumbent upon the moving party to make a substantial showing  
11 justifying the court's intervention. Specifically, in deciding whether to grant a stay or injunction  
12 pending appeal, the court "assesses the movant's chances of success on the merits and weighs the  
13 equities as they affect the parties and the public." *E.I. Dupont de Nemours & Co. v. Phillips*  
14 *Petroleum Co.*, 835 F.2d 277, 278 (Fed. Cir. 1987). See also *Standard Havens Prods. v. Gencor*  
15 *Indus.*, 897 F.2d 511 (Fed. Cir. 1990). To prevail, a movant must establish a strong likelihood  
16 of success on the merits or, failing that, must demonstrate that it has a substantial case on the merits  
17 and that the "harms" factors militate in its favor. *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987).

18 Another court has held that the court, in ruling on a request for a stay, should consider the  
19 following factors:

20 "(1) Has the petitioner made a strong showing that it is likely to  
21 prevail on the merits of its appeal? Without such a substantial  
22 indication of probable success, there would be no justification for the  
23 court's intrusion into the ordinary processes of administration and  
24 judicial review. (2) Has the petitioner shown that without such relief,  
25 it will be irreparably injured? . . . (3) Would the issuance of a stay  
26 substantially harm other parties interested in the proceedings? . . . (4)  
27 Where lies the public interest. . ." *Virginia Petroleum Jobbers Ass'n*

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1 v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958). See also *Washington*  
2 *Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d  
3 841 (D.C. Cir. 1977).

4 Applying these standards, it is clear that ATTM has not made, and cannot make, any such showing.  
5 On the contrary, it is highly unlikely that the Court of Appeals will overturn this Court's order  
6 following the conclusion that the Court of Appeals reached on substantially identical facts in  
7 *Shroyer*, and ATTM cannot make any showing of substantial irreparable injury if this action is  
8 allowed to proceed..

9 It should also be noted that there is no basis at all for staying the litigation between Plaintiffs  
10 and defendant Apple. Inc. ATTM appears to acknowledge this fact in that its requested stay applies  
11 only to "all proceedings related to ATTM." Thus, if the requested stay were granted, the litigation  
12 would still proceed as to the claims against Apple, Inc. The result would be a chaotic state of affairs  
13 with litigation proceeding on two different tracks as to two co-defendants on the basis of the same  
14 claims. ATTM cannot justify such an inefficient result on the basis of its desire to continue  
15 litigating its rejected claims regarding the validity of its arbitration clause.

### 16 CONCLUSION

17 For the foregoing reasons, the Court is respectfully urged to deny the administrative motion  
18 of AT&T Mobility for a stay of these proceedings pending resolution of its noticed motion for a  
19 stay.

20 Dated: March 27, 2008,

Respectfully submitted,

HOFFMAN & LAZEAR

23 By: /s/ Arthur W. Lazear  
24 Arthur W. Lazear

25 H. TIM HOFFMAN (049141)  
26 hth@hoffmanandlazeare.com  
27 ARTHUR W. LAZEAR (083603)  
28 awl@hoffmanandlazeare.com  
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180 Grand Avenue, Suite 1550  
Oakland, California 94612  
Telephone: (510) 763-5700  
Facsimile: (510) 835-1311

MAX FOLKENFLIK, ESQ.  
max@fmlaw.net  
MARGARET McGERITY, ESQ.  
MMcGerity@fmlaw.net  
**FOLKENFLIK & MCGERITY**  
1500 Broadway, 21st Floor  
New York, NY 10036  
Telephone: (212) 757-0400  
Facsimile: (212) 757-2010

Attorney for Plaintiffs ZOLTAN STIENER and YNEZ STIENER