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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ZOLTAN STIENER and YNEZ STIENER,

Plaintiffs,

v.

APPLE COMPUTER, INC., AT&T MOBILITY, LLC, and DOES 1 through 50, inclusive,

Defendants.

Case No.: C 07-04486 SBA

REPLY IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTION FOR STAY PENDING APPEAL

Date: April 29, 2008
Time: 1:00 p.m.

Honorable Saundra B. Armstrong

Plaintiffs oppose ATTM's request for a stay pending appeal of the Court's denial of ATTM's motion to compel arbitration for three reasons. First, while they acknowledge that, in the Ninth Circuit, the standard for granting a stay is whether an appeal presents a substantial question (*see* Opp. 4), they insist (Opp. 5) that ATTM bears the burden of making an "unusually strong case for reversal" in light of the Ninth Circuit's holding that an earlier, materially different version of ATTM's arbitration provision was unenforceable. Second, Plaintiffs contend that forcing ATTM to litigate in the judicial forum during the pendency of the arbitration appeal does not constitute an "irreparable injury that justifies a stay." Opp. 6. And third, Plaintiffs argue that a stay cannot be granted because their non-arbitrable claims against Defendant Apple Computer, Inc. ("Apple") might end up being litigated on a different track than their claims against ATTM. *Id.* Each of Plaintiffs' contentions is incorrect.

1. The Ninth Circuit has explained that "[t]he system created by the Federal Arbitration Act allows the district court" to grant a stay if it "finds that the motion [to compel arbitration] presents a ***substantial question***." *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (emphasis added). Plaintiffs acknowledge that ATTM need only demonstrate the existence of a "substantial question," but contend that, because the Ninth Circuit struck down an earlier version of ATTM's arbitration provision, ATTM's position that the revised provision at issue here is enforceable "is less tenable than that of the average appellant on such a motion." Opp. 5 (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007)).

This contention in turn is predicated on Plaintiffs' assertion that the arbitration provision at issue in ***this*** case is "virtually identical" or "substantially identical" to the one at issue in *Shroyer*. *Id.* That assertion is demonstrably incorrect. The arbitration provision that ATTM developed and sent to tens of millions of customers nationwide in 2006 was entirely unprecedented. As of that time, no other arbitration provision had provided affirmative incentives for customers to pursue individual arbitration. The provisions for a $7,500 minimum payment and double-attorneys' fees do not constitute mere tinkering around the edges. To the contrary, a

law professor who agrees with the premise of *Discover Bank* that class waivers should be struck down when they effectively preclude customers from bringing individual claims reviewed ***this*** provision and concluded that it would not have that forbidden effect and therefore should be upheld. *See* Declaration of Richard A. Nagareda (Docket No. 40) ¶¶ 7–15. While this Court may disagree with Professor Nagareda about whether the incentives built into the 2006 provision are adequate, surely the fact that a recognized scholar in this field has placed the weight of his professional reputation behind this arbitration provision makes ATTM's argument a "substantial" one.

Moreover, Plaintiffs do not even respond to our contention that the Supreme Court's recent decision in *Preston v. Ferrer*, 128 S. Ct. 978 (2008), now makes it an open question whether California may impose procedural preconditions to the enforcement of an arbitration agreement. *See* Mot. 5. In addition, at least four circuits have held that, under the FAA, an agreement to arbitrate on an individual basis must be enforced so long as that provision does not impose excessive arbitration costs and permits consumers to recover attorneys' fees. *See, e.g.*, *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002). ATTM's arbitration provision goes far beyond these requirements. Accordingly, the question whether the FAA requires its enforcement is a substantial one both in the Ninth Circuit and, if necessary, in the Supreme Court.

2. Plaintiffs also contend that the balance of harms does not favor a stay because, in their view, ATTM would not be irreparably harmed by having to "engag[e] in litigation that would, in retrospect, prove unnecessary if ATTM prevails" on appeal. Opp. 6. But the rule in the Ninth Circuit is otherwise. In *Britton*, the Ninth Circuit endorsed the stay standard announced by a federal district court in Tennessee. 916 F.2d at 1412 (citing *C.B.S. Employees Federal Credit Union v. Donaldson*, 716 F. Supp. 307 (W.D. Tenn. 1989)). Under that test, "the time and expense of litigation" conducted during the pendency of an appeal from an order denying

arbitration ***does*** "constitute irreparable harm." *Donaldson*, 716 F. Supp. at 310. That is because "[t]he main purpose for defendants' appeal is to avoid the expense of litigation"; thus, if "defendants are forced to incur the expense of litigation before their appeal is heard, the appeal will be moot, and their right to appeal would be meaningless." *Id.*; *see also* Mot. 5–7. Indeed, over two decades ago the Ninth Circuit recognized that if a party "must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever," a consequence that is "'serious, perhaps, ***irreparable***.'" *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) (emphasis added). As noted in our motion (at 6), federal district court judges in California repeatedly have acknowledged and applied this principle.

By contrast, Plaintiffs make no showing that any harm would befall them if a stay were granted and ATTM's appeal ultimately were unsuccessful. Plaintiffs do not contend, for example, that documents might be lost or witnesses' memories might fade during the delay. *See Eberle v. Smith*, 2008 WL 238450, at *4 (S.D. Cal. Jan. 29, 2008) ("Plaintiff has not shown with particularity any prejudice that outweighs the potential injury to Defendant from continuing the litigation while the interlocutory appeal is pending"). Accordingly, the balance of harms weighs strongly in favor of a stay.[1]

3. Finally, Plaintiffs argue (Opp. 6) that a stay should not be granted because their non-arbitrable claims against Apple might end up being litigated on a different track than their claims against ATTM. Plaintiffs offer no reason for assuming, however, that the proceedings against ATTM and Apple could not be harmonized later. More importantly, as the Supreme Court has explained, the FAA reflects "first and foremost * * * a congressional desire to enforce agreements into which parties had entered, and we must not * * * allow the fortuitous impact of the Act on efficient [judicial] dispute resolution to overshadow the underlying motivation." *Dean*

[1] Plaintiffs contend that stays pending arbitration appeals are "exception[s]" to the supposed rule that "the law in this Circuit does not favor the granting of a stay pending appeals." Opp. 4, 5. They have it entirely backwards; it is the ***denial*** of a stay that would constitute an exception to the rule. Such stays are routine, as we demonstrated by citing a series of decisions from federal district courts in California (*see* Mot. 2)—all of which the Plaintiffs ignore.

Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220–21 (1985). The Court has been explicit that "the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement" provides no reason to ignore a party's arbitration rights. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983). To the contrary, in that situation the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement * * *." *Id.* (emphasis in original); *see also Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008) ("the inefficiency and difficulty of conducting simultaneous arbitration and federal-court litigation [is] not a good enough reason to defer the arbitration"). Because arbitration rights under the FAA must be "rigorously enforce[d] * * *, ***even if the result is 'piecemeal' litigation***" (*Byrd*, 470 U.S. at 221 (emphasis added)), Plaintiffs' reliance on the fact that Apple is not a party to the arbitration agreement is badly misplaced.

* * * * *

In short, plaintiffs' opposition to our motion for a stay rests on the notion that, because this Court has denied ATTM's motion, it should assume that the Ninth Circuit will reach the same result and that ATTM's appeal is accordingly futile. But that has never been the standard for granting a stay in the context of an appeal from a district court's denial of arbitration. As another federal district court in California has recently observed, "it would be tough for moving parties to persuade the trial court that it was wrong and would probably be reversed on appeal." *Eberle*, 2008 WL 238450, at *2 (granting stay pending appeal despite having denied motion to compel arbitration). Instead, under *Britton* a stay pending appeal is appropriate when that appeal raises a substantial, non-frivolous issue. That is the case here.

CONCLUSION

For the foregoing reasons, this Court should issue a stay of all proceedings related to ATTM pending the resolution of ATTM's appeal from the denial of its motion to compel arbitration.

DATED: April 25, 2008

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