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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re Apple & AT&TM Antitrust Litigation      NO. C 07-05152 JW

**ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OR TO CERTIFY FOR INTERLOCUTORY APPEAL; CERTIFYING FOR INTERLOCUTORY APPEAL RE. THE ASSERTION OF EQUITABLE ESTOPPEL BY A NON-SIGNATORY DEFENDANT AGAINST A SIGNATORY PLAINTIFF; STAYING CASE**

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Presently before the Court is Plaintiffs’ Motion for Leave to File Motion for Reconsideration or to Certify for Interlocutory Appeal.<sup>1</sup> The Court finds it appropriate to take the Motion under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS in part and DENIES in part Plaintiffs’ Motion for Leave to File Motion for Reconsideration or to Certify for Interlocutory Appeal. The Court CERTIFIES for interlocutory appeal solely as to the issue of whether a non-signatory defendant may assert equitable estoppel against a signatory plaintiff.

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<sup>1</sup> (Plaintiffs’ Notice of Motion and Motion for Leave to Seek Reconsideration and/or in Addition to Amend the Order to Certify for Immediate Interlocutory Appeal; Memorandum of Points and Authorities in Support Thereof, hereafter, “Motion,” Docket Item No. 554.)

1 **A. Background**

2 A detailed outline of the background and procedural history of this case may be found in the  
3 Court's October 1, 2008 Order.<sup>2</sup> The Court reviews the relevant procedural history as it relates to  
4 the present Motion.

5 On October 1, 2008, the Court denied Defendant ATTM's motions to compel arbitration and  
6 to dismiss, on the ground that Defendant ATTM's arbitration agreement with Plaintiffs was  
7 unconscionable under state law.<sup>3</sup> (See October 1 Order at 7-10.) The Court also denied Defendant  
8 ATTM's motion to dismiss, on the ground that the state laws in question were not preempted by the  
9 Federal Arbitration Act ("FAA"). (See id. at 11.) Finally, the Court granted in part and denied in  
10 part Defendant Apple's motion to dismiss. (See id. at 12-30.) In particular, the Court denied  
11 Defendant Apple's motion to dismiss Plaintiffs' antitrust claims under Section 2 of the Sherman Act,  
12 on the ground that Plaintiffs had adequately alleged that Defendant Apple had sufficient market  
13 power in certain aftermarkets.<sup>4</sup> (See id. at 12-18.)

14 On July 8, 2010, the Court granted Plaintiffs' motion for class certification.<sup>5</sup>

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17 <sup>2</sup> (See Order Denying Defendant AT&TM's Motion to Compel Arbitration and to Dismiss;  
18 Denying Defendant AT&TM's Motion to Stay Discovery; Granting in part and Denying in part  
19 Defendant Apple's Motion to Dismiss, hereafter, "October 1 Order," Docket Item No. 144.)

20 <sup>3</sup> In particular, the Court found that it was "undisputed that Plaintiffs signed an Arbitration  
21 Agreement" with Defendant ATTM which included a waiver specifying that "class arbitrations and  
22 class actions are not permitted" under the Agreement. Id. at 6. However, the Court found that this  
23 class action waiver was unconscionable and thus unenforceable, on the grounds that it violated the  
24 "Discover Bank standard" articulated by the California Supreme Court. See id. at 7-10 (citing  
25 Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005)).

26 <sup>4</sup> In finding that Plaintiffs had adequately alleged their antitrust claims against Defendant  
27 Apple, the Court relied upon a Ninth Circuit opinion which held that there "can be a legally  
28 cognizable aftermarket in a single brand's products, even if that market is created by a contractual  
relationship." (Id. at 14 (citing Newcal Indus., Inc. v. IKON Office Solution, 513 F.3d 1038, 1048-  
50 (9th Cir. 2008)).) Thus, the Court found that even though the "alleged aftermarket [was]  
predicated on an initial contractual relationship between Defendants and iPhone purchasers,"  
Plaintiffs' Complaint was still adequate under Newcal. (Id. at 14-15.)

<sup>5</sup> (See Order Granting Defendant Apple's Motion for Summary Judgment; Granting in part  
Plaintiffs' Motion for Class Certification; Denying Folkenflik & McGerity's Motion for  
Appointment as Co-Lead Counsel, hereafter, "July 8 Order," Docket Item No. 466.)

1 On September 15, 2010, the Court stayed proceedings in this case, on the grounds, *inter alia*,  
 2 that Defendants had raised “significant legal questions as to the proper interpretation of Newcal  
 3 Indus., Inc. v. IKON Office Solution,” and because “Newcal’s implications for the type of class  
 4 action claim at issue” in this matter “may be a case of first impression.”<sup>6</sup> On December 9, 2010, the  
 5 Court continued the stay in this case on different grounds, namely, the fact that the Supreme Court’s  
 6 then-pending decision in AT&T Mobility LLC v. Concepcion “could likely simplify the legal  
 7 questions [in this case] and conserve judicial resources.”<sup>7</sup> On April 27, 2011, the Supreme Court  
 8 issued its decision in Concepcion.<sup>8</sup>

9 On December 1, 2011, the Court granted Defendants’ Motions to Compel Arbitration and  
 10 Motions to Decertify Class. (hereafter, “December 1 Order,” Docket Item No. 553.)

11 Presently before the Court is Plaintiffs’ Motion for Leave to File Motion for Reconsideration  
 12 or to Certify for Interlocutory Appeal.

13 **B. Standards**

14 Pursuant to Civil Local Rule 7-9(b), a party moving for leave to file a motion for  
 15 reconsideration must specifically show the following:

- 16 (1) At the time of the filing the motion for leave, a material difference in fact or law  
 17 exists from that which was presented to the Court before entry of the interlocutory  
 18 order for which reconsideration is sought. The party also must show that in the  
 19 exercise of reasonable diligence the party applying for reconsideration did not know  
 20 such fact or law at the time of the interlocutory order;
- (2) The emergence of new material facts or a change of law occurring after the time of  
 such order; or
- (3) A manifest failure by the Court to consider material facts or dispositive legal  
 arguments which were presented to the Court before such interlocutory order.

21 Civ. L.R. 7-9(b). A motion for leave to file a motion for reconsideration may not repeat any oral or  
 22 written argument previously made with respect to the interlocutory order that the party now seeks to

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24 <sup>6</sup> (See Order Granting Defendants’ Motion to Stay Proceedings at 5-6, Docket Item No.  
 25 493.)

26 <sup>7</sup> (Order Vacating Case Management Conference and Staying Proceedings Pending the  
 Supreme Court’s Decision in AT&T Mobility v. Concepcion [sic] at 1, Docket Item No. 499.)

27 <sup>8</sup> 131 S. Ct. 1740 (2011).

1 have reconsidered. Id. 7-9(c). “A party who violates this restriction shall be subject to appropriate  
2 sanctions.” Id.

3 Title 28 U.S.C. § 1292(b) provides, in pertinent part, that a district judge may certify an order  
4 for immediate interlocutory appeal if the judge is “of the opinion” that: (1) the order involves “a  
5 controlling question of law”; (2) there “is substantial ground for difference of opinion” as to the  
6 resolution of that question; and (3) “an immediate appeal from the order may materially advance the  
7 ultimate termination of the litigation[.]” Even if all three of these requirements are satisfied, “a  
8 district court still has the discretion in deciding whether or not to grant a party’s motion for  
9 certification.” In re LDK Solar Sec. Litig., 584 F. Supp. 2d 1230, 1258 (N.D. Cal. 2008).

10 Certification should “be used only in extraordinary cases where decision of an interlocutory appeal  
11 might avoid protracted and expensive litigation.” U.S. Rubber Co. v. Wright, 359 F.2d 784, 785  
12 (9th Cir. 1966).

13 **C. Discussion**

14 Plaintiffs move for leave to file a motion for reconsideration as to the issue of whether it was  
15 equitable to allow Defendant Apple to demand that Plaintiffs arbitrate their claims, even though the  
16 iTunes contract between Plaintiffs and Defendant Apple states that Plaintiffs must bring all their  
17 claims against Defendant Apple “only in court.” (Motion at 5-7.) Alternatively, Plaintiffs move the  
18 Court to certify for immediate appeal whether: (1) Plaintiffs must arbitrate their individual antitrust  
19 claims against Defendant Apple, in light of the iTunes contract; and (2) Defendant Apple is  
20 permitted to invoke equitable estoppel against Plaintiffs, even though it is a non-signatory defendant  
21 to the agreement in this case which provides for arbitration. (Id. at 7-11.) Finally, Plaintiffs move  
22 the Court to certify for immediate appeal whether Defendant ATTM abandoned its right to arbitrate  
23 Plaintiffs’ claims. (Id. at 11-15.) Defendant Apple responds that the Court should neither  
24 reconsider, nor certify for immediate appeal, any issue involving the iTunes contract, on the grounds  
25 that Plaintiffs’ case was based on a different contract—namely, Defendant ATTM’s Wireless Service  
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1 Agreement—which means that the iTunes contract is “irrelevant” to this case.<sup>9</sup> Further, Defendant  
 2 Apple responds that the Court should not certify for immediate appeal the question of whether it is  
 3 permitted to invoke equitable estoppel as a non-signatory defendant, on the ground that Plaintiffs  
 4 cannot show that there is “substantial ground for difference of opinion” as to this issue. (*Id.* at 10-  
 5 11.) Finally, Defendant ATTM responds that the Court should not certify for immediate appeal the  
 6 question of whether it abandoned its right to arbitrate, on the ground that Plaintiffs cannot show that  
 7 there is “substantial ground for a difference of opinion” concerning the conclusion that it did not  
 8 waive its right to compel arbitration.<sup>10</sup> The Court considers each issue in turn.

### 9 **1. The iTunes Contract**

10 At issue is whether the Court should reconsider whether it was equitable to allow Defendant  
 11 Apple to demand that Plaintiffs arbitrate their claims, despite the iTunes contract between Plaintiffs  
 12 and Defendant Apple which provides that Plaintiffs must bring their claims against Defendant Apple  
 13 in court.

14 As a threshold matter, the Court observes that this issue was before the Court at the time it  
 15 issued its December 1 Order.<sup>11</sup> At that time, the Court considered and rejected this argument,  
 16 though it did not address the argument in its December 1 Order.<sup>12</sup> For the sake of completeness,  
 17 however, the Court briefly addresses the argument here.

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 20 <sup>9</sup> (Defendant Apple Inc.’s Opposition to Plaintiffs’ Motion for Leave to File Motion for  
 21 Leave to Seek Reconsideration and/or in Addition to Amend the Order to Certify for Immediate  
 22 Interlocutory Appeal at 1-10, hereafter, “Apple Opp’n,” Docket Item No. 558.)

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 24 <sup>10</sup> (Defendant AT&T Mobility LLC’s Opposition to Plaintiffs’ Motion to Amend the Order  
 25 to Certify for Immediate Interlocutory Appeal at 1-8, hereafter, “AT&T Opp’n,” Docket Item No.  
 26 557.)

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 28 <sup>11</sup> (*See* Plaintiffs’ Opposition to Defendant Apple’s Motion to Compel Arbitration and Stay  
 Case at 4-7, hereafter, “Plaintiffs’ Apple Opp’n,” Docket Item No. 515.)

<sup>12</sup> *See, e.g., Morse v. ServiceMaster Global Holdings Inc.*, Nos. C 10-00628 SI, C 09-05152  
 SI, 2011 WL 3476525, at \*1 (N.D. Cal. Aug. 9, 2011) (explaining the court’s decision to deny a  
 motion for leave to file a motion for reconsideration by noting that the court had not “fail[ed] to  
 consider [an] argument” raised by the plaintiff, but instead had “concluded that [the] argument was  
 insufficient to demonstrate [the proposition for which the plaintiff raised the argument]”).

1 In its December 1 Order, the Court explained at length the reasons for its finding that  
2 Defendant Apple is permitted, under the doctrine of equitable estoppel, to compel Plaintiffs to  
3 arbitrate their claims against it. (December 1 Order at 8-14.) In particular, the Court explained that  
4 “Plaintiffs themselves have contended throughout this litigation that their antitrust and related claims  
5 against [both] Defendant ATTM and Defendant Apple arise from their respective ATTM service  
6 contracts.”<sup>13</sup> Further, the Court explained that “[a]t Plaintiffs’ request, the Court [had] certified a  
7 single unified class as follows: ‘All persons who purchased or acquired an iPhone in the United  
8 States and entered into a two-year agreement with [Defendant ATTM] for iPhone voice and data  
9 service [at] any time from June 29, 2007, to the present.’”<sup>14</sup> Thus, the Court explained that the  
10 relevant contract, for purposes of equitable estoppel, is Plaintiffs’ agreement with Defendant ATTM,  
11 which—as discussed above—contains an arbitration provision.

12 Moreover, the Court finds that the cases on which Plaintiffs rely for the proposition that the  
13 iTunes contract should preclude the Court from applying equitable estoppel in this situation are  
14 inapposite.<sup>15</sup> First, in Hawkins v. KPMG LLP,<sup>16</sup> the court considered an agreement between a  
15 plaintiff and a corporation which contained an arbitration provision. Id. at 1041-42. The court went  
16 on to deny a motion to compel arbitration brought by defendants who were “not parties to” the  
17 agreement containing the arbitration provision. Id. at 1049. In denying that motion, however, the  
18 court emphasized that the plaintiff’s claims against those defendants “[did] not depend in any way  
19 on the content of [the agreement containing the arbitration provision].” Id. In particular, in  
20 considering defendants’ equitable estoppel argument, the court found that the doctrine of equitable  
21 estoppel was not applicable because the “plaintiff’s claims [did] not rely on the content of [the  
22 agreement containing the arbitration provision] for their success.” Id. at 1051. In this case, by

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24 <sup>13</sup> (December 1 Order at 12 (citing Plaintiffs’ Reply Memorandum of Points and Authorities  
in Further Support of their Motion for Class Certification at 10, Docket Item No. 422 ).)

25 <sup>14</sup> (Id. (citing July 8 Order at 25).)

26 <sup>15</sup> (Motion at 6; see also Plaintiffs’ Apple Opp’n at 5-6.)

27 <sup>16</sup> 423 F. Supp. 2d 1038 (N.D. Cal. 2006).

1 contrast, Plaintiffs’ claims against both Defendant ATTM and Defendant Apple have relied upon the  
 2 content of Plaintiffs’ agreement with Defendant ATTM, as discussed above. Second, in Hallwood  
 3 Group Inc. v. Balestri,<sup>17</sup> the Northern District of Texas affirmed a bankruptcy court’s denial of a  
 4 motion to compel arbitration. In that case, however, the district court merely found that a  
 5 bankruptcy court had not abused its discretion in finding that the “central agreement” to a dispute  
 6 between various parties was one that did not contain an arbitration provision, and that an “arbitration  
 7 clause in [a separate agreement] should not be invoked.” Id. at \*3. In this case, by contrast, the  
 8 Court has expressly found that the central agreement between Plaintiffs and both Defendants is  
 9 Plaintiffs’ agreement with Defendant ATTM.

10 Thus, the Court does not find good cause to grant Plaintiffs leave to file a motion for  
 11 reconsideration of whether it was equitable to allow Defendant Apple to demand that Plaintiffs  
 12 arbitrate their claims, despite the iTunes contract between Plaintiffs and Defendant Apple.  
 13 Moreover, Plaintiffs’ sole argument as to why the Court should certify this question for appeal relies  
 14 on the two cases discussed above, which Plaintiffs contend create a “split of authority within the  
 15 [Ninth] Circuit that requires the Ninth Circuit to review [this issue].”<sup>18</sup> However, as discussed  
 16 above, the Court finds that Hawkins is inapposite, which means that no “split of authority” has been  
 17 created between the court’s decision in that case and this Court’s December 1 Order.<sup>19</sup> Therefore,  
 18 the Court does not find good cause to certify this issue for immediate appeal.

19 In sum, the Court does not find good cause either to reconsider or to certify for immediate  
 20 appeal the issue of whether it was equitable to allow Defendant Apple to demand that Plaintiffs  
 21 arbitrate their claims, despite the iTunes contract between Plaintiffs and Defendant Apple.

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 24 <sup>17</sup> No. 3:10-CV-1198-K, 2010 WL 4274754 (N.D. Tex. Oct. 21, 2010).

25 <sup>18</sup> (Motion at 8 (contending that “[h]ere, the strength of Plaintiffs’ argument . . . is easily  
 26 demonstrated by the two well-reasoned decisions directly on point (Hawkins and Hallwood) as well  
 27 as the absence of any contrary authority”).)

28 <sup>19</sup> Inasmuch as Hallwood is a decision of the Northern District of Texas, it necessarily  
 cannot create a “split of authority within the [Ninth] Circuit.”



1           **2. Equitable Estoppel**

2           At issue is whether the Court should certify for immediate appeal the issue of whether  
3 Defendant Apple is able to assert the doctrine of equitable estoppel against Plaintiffs, even though it  
4 is a non-signatory defendant to the agreement in this case which provides for arbitration.

5           Upon review, the Court finds good cause to certify this issue for immediate appeal. In its  
6 December 1 Order, the Court considered Mundi v. Union Security Life Insurance Co.,<sup>20</sup> the  
7 controlling Ninth Circuit case addressing the circumstances under which a non-signatory may  
8 compel a signatory to arbitrate.<sup>21</sup> As the Court explained, in Mundi the Ninth Circuit considered  
9 whether “a nonsignatory [defendant] to [an] arbitration agreement . . . can require [a signatory  
10 plaintiff] to arbitrate her claims against [the defendant].”<sup>22</sup> The Court went on to explain that the  
11 court in Mundi determined that prior Ninth Circuit cases had failed to “address[] [that] precise  
12 situation,” and therefore looked to other circuits for guidance.<sup>23</sup> Finally, following the Second  
13 Circuit decision<sup>24</sup> to which the court in Mundi had looked for guidance, the Court concluded that a  
14 non-signatory defendant may “compel a signatory to arbitrate based on estoppel,” so long as two  
15 requirements—namely, that the subject matter of the dispute is “intertwined” with the contract, and  
16 that there is a sufficient “relationship” between the parties—are met. (*Id.* (citations omitted).)

17           Thus, in concluding that Defendant Apple is able to assert the doctrine of equitable estoppel  
18 against Plaintiffs, even though it is a non-signatory defendant to the agreement providing for  
19 arbitration, the Court followed the Ninth Circuit’s opinion in Mundi. The Court further explained  
20 that a “similar conclusion regarding the ability of a non-signatory defendant to compel a signatory  
21 plaintiff to arbitrate its claims under the doctrine of equitable estoppel has been reached, post-

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23           <sup>20</sup> 555 F.3d 1042 (9th Cir. 2009).

24           <sup>21</sup> (*See* December 1 Order at 9-13.) The parties agree that Mundi is controlling, though they  
25 differ as to their interpretation of the case. (*See* Motion at 10-11; Apple Opp’n at 10-12.)

26           <sup>22</sup> (December 1 Order at 9-10 (citing Mundi, 555 F.3d at 1044).)

27           <sup>23</sup> (*Id.* at 10 (citing Mundi, 555 F.3d at 1046).)

28           <sup>24</sup> Sokol Holdings, Inc. v. BMB Munai, Inc., 542 F.3d 354 (2d Cir. 2008).



1 Mundi, by other district courts in the Ninth Circuit.”<sup>25</sup> However, the Court recognized that the  
 2 Mundi court stated that it saw “no basis for extending the concept of equitable estoppel of third  
 3 parties in an arbitration context beyond the very narrow confines delineated” in the Ninth Circuit’s  
 4 previous cases in this area.<sup>26</sup> Given the fact that the Court’s December 1 Order was premised on an  
 5 interpretation of Mundi which required the Court to undertake an extensive analysis of both that  
 6 opinion itself and the Second Circuit caselaw to which the Mundi court looked for guidance, and  
 7 given the language in Mundi which indicates that the Ninth Circuit did not mean to extend the  
 8 “concept of equitable estoppel of third parties” beyond the “very narrow confines” delineated in  
 9 previous cases, the Court finds that a substantial difference of opinion exists as to this issue.<sup>27</sup>

10 Accordingly, the Court finds good cause to certify for immediate appeal the issue of whether  
 11 Defendant Apple is able to assert the doctrine of equitable estoppel against Plaintiffs, even though it  
 12 is a non-signatory defendant to the agreement providing for arbitration.

### 13 3. Waiver of ATTM’s Right to Compel Arbitration

14 At issue is whether the Court should certify for immediate appeal the issue of whether  
 15 Defendant ATTM abandoned its right to demand arbitration by failing to appeal the Court’s October  
 16 1 Order to the Ninth Circuit.

17 Upon review, the Court does not find good cause to certify this issue for immediate appeal,  
 18 because Plaintiffs do not show that there is any “substantial ground for difference of opinion” as to  
 19 the Court’s finding with regard to this issue. In its December 1 Order, the Court explained that if  
 20 there was “no existing right to arbitration” because the “then-prevailing law of [the] circuit” would

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 22 <sup>25</sup> (December 1 Order at 10 n.20 (citing ValueSelling Assocs., LLC v. Temple, No. 09 CV  
 23 1493 JM, 2009 WL 3736264, at \*6-7 (S.D. Cal. Nov. 5, 2009).)

24 <sup>26</sup> (Id. at 11 (citing Mundi, 555 F.3d at 1046).)

25 <sup>27</sup> In addition, the Court finds that this is a “controlling question of law,” inasmuch as the  
 26 issue of whether Defendant Apple may compel arbitration in this case is governed by the Court’s  
 27 interpretation of Mundi. Further, the Court finds that “immediate appeal [on this issue] may  
 28 materially advance the ultimate termination of the litigation,” as it avoids the possibility that the  
 Ninth Circuit might reverse the Court’s December 1 Order upon an appeal by Plaintiffs following  
 arbitration, which would render such arbitration nugatory.

1 have rendered an attempt to compel arbitration “futile,” there can be no waiver of the right to  
 2 arbitration.<sup>28</sup> The Court went on to explain that as of October 2008, when the Court denied  
 3 Defendant ATTM’s motion to compel arbitration, “the prevailing law of the Ninth Circuit held that  
 4 arbitration agreements of the type at issue in this case were unconscionable.”<sup>29</sup> Thus, the Court  
 5 concluded that in October 2008 it would have been futile for Defendant ATTM to appeal the Court’s  
 6 denial of its motion to compel arbitration to the Ninth Circuit, from which it followed that Defendant  
 7 ATTM did not waive its right to arbitration by failing to appeal. (*Id.*)

8 Here, Plaintiffs do not contend that there is any substantial ground for difference of opinion  
 9 as to whether a party waives its right to arbitrate, if appealing a denial of arbitration would have  
 10 been “futile” under then-prevailing circuit law. Indeed, Plaintiffs cite no case holding that a party  
 11 may abandon its right to arbitrate where such an appeal would have been futile under then-prevailing  
 12 circuit law; nor is the Court aware of any such case. Instead, Plaintiffs rely entirely on cases in  
 13 which it would *not* have been futile for a party to appeal the denial of a motion to compel  
 14 arbitration.<sup>30</sup> However, the Court finds that those cases do not stand for the proposition that a party  
 15 may waive the right to arbitrate by failing to appeal an order denying a motion to compel arbitration,  
 16 *even if* such an appeal would have been futile. Rather, they state that a party may waive its right to  
 17 arbitrate by failing to take an immediate appeal of a denial of arbitration—when such an appeal  
 18 would not be futile—because a party may not proceed to trial and then later “seek arbitration on  
 19 appeal if the trial goes badly instead of appealing [the denial of a motion to compel arbitration]

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 22 <sup>28</sup> (*See* December 1 Order at 5 (citing Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185,  
 23 1187 (9th Cir. 1986).)

24 <sup>29</sup> (*Id.* at 6 (citing Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976, 981-84  
 (9th Cir. 2007).)

25 <sup>30</sup> *See, e.g., Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993) (finding waiver of a right to  
 26 arbitrate because of a party’s failure to take a timely appeal of an order denying a motion to compel  
 27 arbitration, but *not* stating that such an appeal would have been futile under then-prevailing circuit  
 law); Transamerica Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA, Nos. 93-55490, 93-55498,  
 1994 WL 712173, at \*1-2 (9th Cir. Dec. 19, 1994) (same).

1 immediately.”<sup>31</sup> Here, by contrast: (1) any appeal to the Ninth Circuit of the Court’s October 1  
2 Order would have been futile, as discussed above; and (2) Defendant ATTM did not proceed to trial  
3 and then seek arbitration on appeal “if the trial [were to go] badly,” but instead brought another  
4 motion to compel arbitration once the prevailing law of the circuit had changed so as to render such  
5 a motion non-futile.

6 Further, the Court finds that Plaintiffs’ contention that Defendant ATTM abandoned its right  
7 to arbitrate in this case because had a “statutory right to appeal” the October 1 Order, and because it  
8 appealed from similar orders in eight other cases, is misguided. (Motion at 12-14.) Plaintiffs offer  
9 no authority for the proposition that because a defendant chooses to appeal the denial of motions to  
10 compel arbitration in certain cases, even if those appeals were futile under then-prevailing circuit  
11 law, it therefore waives its right to arbitrate in a case where it does not take a futile appeal. Nor is  
12 the Court aware of any case standing for that proposition.

13 Accordingly, the Court does not find good cause to certify for immediate appeal the issue of  
14 whether Defendant ATTM abandoned its right to demand arbitration by failing to appeal the Court’s  
15 October 1 Order to the Ninth Circuit.

16 **D. Conclusion**

17 The Court GRANTS in part and DENIES in part Plaintiffs’ Motion for Leave to File Motion  
18 for Reconsideration or to Certify for Interlocutory Appeal.

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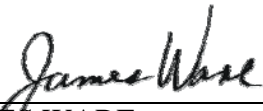
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<sup>31</sup> Colon v. R.K. Grace & Co., 358 F.3d 1, 4 (1st Cir. 2003) (citing Cotton, 4 F.3d at 180). As the court in Colon explained, the Second, Fifth and Eighth Circuits have held that the “failure to promptly appeal [a denial of a motion to compel arbitration] may by estoppel foreclose the demanding party’s right to arbitration,” on the ground that “it is wasteful to have a full trial and then determine by a post-trial appeal that the whole matter should have been arbitrated and so start again.” Id.

1 The Court CERTIFIES its December 1 Order for interlocutory appeal solely as to the issue of  
2 whether a non-signatory defendant may assert equitable estoppel against a signatory plaintiff.

3 In light of this Order, the Court STAYS its December 1 Order compelling arbitration as to  
4 both Defendants.

5  
6 Dated: February 1, 2012

  
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JAMES WARE  
United States District Chief Judge

**United States District Court**  
For the Northern District of California

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1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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18 **Dated: February 1, 2012**

**Richard W. Wieking, Clerk**

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20 **By:           /s/ JW Chambers**  
**Susan Imbriani**  
**Courtroom Deputy**

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