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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

FRANK STOKES, an individual,)	Case No. CV 2006-007573
)	
Plaintiff,)	MOTION TO LIFT STAY
)	
v.)	(Oral Argument Requested)
)	
AWSM TECHNOLOGY, L.L.C., an)	(Assigned to the Honorable
Arizona limited liability corporation;)	Carey Hyatt)
CRAIG MUNSEY and Jane Does Munsey,)	
husband and wife; JOHN and JANE DOES)	
1 through 10; DOE CORPORATIONS 1)	
through 10,)	
)	
Defendants.)	
)	

Plaintiff Frank Stokes (“Stokes”), by and through counsel undersigned, hereby requests that the Court lift the stay that was entered in this case on September 12, 2006, so that Stokes may pursue this matter against the Defendants AWSM Technology, L.L.C. and

1 Craig Munsey (collectively, “AWSM”) in this forum. This Motion is supported by the
2 following Memorandum of Points and Authorities.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. FACTUAL AND PROCEDURAL BACKGROUND**

5 Stokes initiated this case against AWSM by filing his Complaint with this Court on
6 May 18, 2006. The Complaint set forth claims of fraud, negligent misrepresentation, and
7 breach of contract (among others) against AWSM. Service of the Complaint was effected on
8 AWSM on June 7, 2006.

9 After AWSM failed to appear or otherwise respond to the Complaint within the
10 required time frame, Stokes submitted an Application for Entry of Default on August 4,
11 2006. In response to the default application, AWSM appeared in the case, filing a Motion to
12 Compel Arbitration on August 16, 2006. The Motion to Compel Arbitration argued that
13 Stokes’ claims against AWSM all arose out of the “AWSM Site Map Services Agreement,”
14 which contained an arbitration clause that mandated that all claims arising out of that
15 agreement be submitted to binding arbitration before the American Arbitration Association
16 (“AAA”). AWSM claimed that the Arizona Arbitration Act (A.R.S. 12-1501, et seq.)
17 required the Court to compel arbitration. On stipulation of the parties, this Court signed an
18 Order, dated September 12, 2006, staying this case and directing that Stokes pursue his
19 claims against AWSM in arbitration before the AAA.
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1 In accordance with the Court’s September 12th Order, Stokes initiated an arbitration
2 proceeding against AWSM with the AAA on November 6, 2006. The claim was assigned
3 AAA Arbitration No. 11 147 02374 06. Stokes alleged the same claims against AWSM that
4 he had set forth in his original Complaint, and provided notice that he sought to pursue those
5 claims as a class arbitration. See Stokes’ Statement of Claim and Demand for Class
6 Arbitration, attached hereto as [Exhibit 1](#).

7 Once the arbitrator selection process was completed, Stokes proceeded to prosecute
8 the claim against AWSM under a four-phase process set forth in the AAA’s Commercial
9 Arbitration Rules and its Supplementary Rules for Class Arbitrations. On June 22, 2007, after
10 full briefing and a telephonic hearing on the first phase of the case – called the “Clause
11 Construction Phase” – the AAA Arbitrator issued the Clause Construction Award in favor
12 of Stokes. A copy of the Clause Construction Award is attached hereto as [Exhibit 2](#). Per the
13 Supplementary Rules for Class Arbitrations, the Arbitrator then stayed the case for a period
14 of 30 days in order to give AWSM time to seek judicial review of the Arbitrator’s decision.
15 Although AWSM indicated that it would seek judicial review of the Clause Construction
16 Award and, in fact, sought and obtained an extension of the stay in order to allow it
17 additional time to do so, AWSM never did seek such review. See AWSM’s Motion to Extend
18 Stay and Order on Motion to Extend Stay, attached together hereto as [Exhibit 3](#).

1 In relation to the services provided by the Arbitrator during the Clause Construction
2 phase of the case, the AAA sent periodic invoices to each party that, pursuant to AAA rules,
3 equally divided the Arbitrator’s compensation between the two parties. Stokes timely paid
4 all fees allocated to him. AWSM, however, only paid \$240.00 of the \$13,785.00 allocated
5 and assessed to it by the AAA. See AAA Financial Summary, sent to the parties by e-mail
6 from Jonathan Weed, dated February 7, 2008. A copy of the February 7th e-mail and the
7 attached Financial Summary are attached hereto as [Exhibit 4](#). On January 25, 2008, after
8 having suspended the case because of AWSM’s continued refusal to pay its share of the
9 Arbitrator’s fees, the AAA dismissed the arbitration proceeding. A copy of the January 25,
10 2008 Order is attached hereto as [Exhibit 5](#).

11 **II. AWSM HAS WAIVED THE RIGHT TO COMPEL ARBITRATION**

12 “Unquestionably, a party may lose his contractual right to arbitrate.” *EFC*
13 *Development Corp. v. F.F. Baugh Plumbing & Heating, Inc.*, 24 Ariz.App. 566, 567, 540
14 P.2d 185, 186 (1975); *see also U.S. Insulation, Inc. v. Hilro Construction Co., Inc.*, 146 Ariz.
15 250, 705 P.2d 490 (App. 1985) (“Arizona cases make it clear that although an arbitration
16 agreement has validly been made, a party to the contract may waive his right to seek its
17 enforcement.”).

18 In determining whether or not a party has waived its right to enforce an agreement to
19 arbitrate, the courts examine the party’s conduct:

20 The basis of the finding of waiver of an arbitration provision is
21 the showing of conduct inconsistent with the utilization of the

1 arbitration remedy – conduct showing an intent not to arbitrate.
2 Inconsistency is usually found from such conduct as preventing
3 arbitration, making arbitration impossible, proceeding at all
4 times in disregard of the arbitration clause, expressly agreeing
5 to waive arbitration, or unreasonable delay.

6 *EFC Development*, 24 Ariz.App. at 188, 540 P.2d at 569 (citations omitted).

7 Moreover, a waiver may be found even where (as in this case) the party exhibited a
8 clear intent to initially invoke the arbitration clause. *See Rancho Pescado, Inc. v.*
9 *Northwestern Mutual Life Ins. Co.*, 140 Ariz. 174, 680 P.2d 1235 (App. 1984) (finding that
10 a party’s decision not to appeal from an order denying the party’s application to compel
11 arbitration amounted to waiver of the right to arbitrate).

12 The issue here, then, is whether AWSM’s persistent refusal to pay its share of the
13 arbitration fees (resulting in the dismissal of the arbitration proceeding) is behavior that is
14 “inconsistent with the utilization of the arbitration remedy.”

15 The arbitration remedy in this case originates from the arbitration provision of the
16 underlying contract. That provision states that “[a]ny and all disputes arising out of, under,
17 in connection with, or relating to this Agreement, or the breach or any alleged breach thereof,
18 shall be settled by arbitration in the City of Phoenix, Arizona, before the American
19 Arbitration Association *in accordance with its then applicable rules . . .*” AWSM Site Map
20 Services Agreement, Section 7 (emphasis added). A copy of the AWSM Site Map Services
21 Agreement is attached as an exhibit to Stokes’ Statement of Claim and Demand for Class
Arbitration, which is [Exhibit 1](#) to this Motion.

1 With respect to this case, the AAA’s “then applicable rules” were the AAA’s
2 Commercial Arbitration Rules and Mediation Procedures (as amended and effective
3 September 15, 2005) and the AAA’s Supplementary Rules for Class Arbitrations (as
4 amended and effective October 8, 2003). AWSM was well-aware that these rules would be
5 governing this matter from the outset. In a letter dated November 13, 2006 (just one week
6 after Stokes had initiated the arbitration proceeding), Danielle Gorini, the AAA Case
7 Manager assigned to this matter, acknowledged the filing of the arbitration claim and referred
8 both parties’ counsel to the Commercial Rules and the Supplementary Rules for Class
9 Arbitrations. A copy of Ms. Gorini’s November 13th letter is attached as [Exhibit 6](#). Then
10 again on November 29, 2006, Ms. Gorini sent an e-mail to both parties’ counsel stating:
11 “Both the Commercial Rules, as amended and in effect September 15, 2005, and the
12 Supplementary Rules for Class Arbitrations (SRCA), as amended and in effect October 8,
13 2003, are governing this matter.” A copy of Ms. Gorini’s November 29th letter is attached
14 hereto as [Exhibit 7](#). AWSM never raised any objection to applicability of these rules.

15 Pursuant to the AAA’s Commercial Rules, the parties are assessed two types of
16 charges: (1) “administrative fees,” which are addressed in R-49; and (2) “expenses,” which
17 are addressed in R-50.

18 Administrative fees consist of an “initial filing fee,” to be paid by the party “making
19 a claim or counterclaim,” and a “case service fee.” In this case, the initial filing fee was
20 \$3,250.00, which Stokes (as the party “making a claim”) paid in November of 2006 when

1 it initiated the claim with the AAA. No case service fee was ever assessed by the AAA in this
2 case.

3 With respect to “expenses,” R-50 of the Commercial Rules provides:

4 The expenses of witnesses for either side shall be paid by the
5 party producing such witnesses. *All other expenses of the*
6 *arbitration, including required travel and other expenses of the*
7 *arbitrator, AAA representatives, and any witness and the cost of*
8 *any proof produced at the direct request fo the arbitrator, shall*
9 *be borne equally by the parties, unless they agree otherwise or*
10 *unless the arbitrator in the award assesses such expenses or any*
11 *part thereof against any specified party or parties.*

12 (Emphasis added.). “Expenses,” as that term is used in R-50, includes any arbitrator fees. See
13 R-52 of the Commercial Rules authorizing the AAA to require the parties to deposit certain
14 sums of money in advance of any hearings “to cover the *expenses, including the arbitrator’s*
15 *fee, if any*” (Emphasis added.). A copy of the AAA’s Commercial Arbitration Rules and
16 Mediation Procedures is attached hereto as [Exhibit 8](#).

17 In January of 2007, the AAA began assessing the parties – in equal amounts – their
18 share of the arbitrator’s compensation. The initial invoice sent to each party from the AAA
19 was for \$150.00, and the description read: “Your Share of the Neutral Compensation Deposit
20 covering 1 hour of Study.”¹ A second invoice, for \$240.00, was sent one month later in
21 February of 2007. Again, the description read: “Your Share of the Neutral Compensation

¹ In the process of selecting the arbitrator through the AAA, the parties agreed that the arbitrator would be compensated at the rate of \$300.00 per hour. See letter, dated December 27, 2006, from Tanya Srabian of the AAA, to counsel for both parties, attached hereto as [Exhibit 9](#) (advising of the appointment of an arbitrator and setting forth the arbitrator’s rate of compensation).

1 Deposit covering 2 hours of Study.” A third invoice for arbitrator compensation was sent by
2 the AAA in May of 2007. The third invoice was for \$5,550.00, and covered an additional “37
3 hours of Study.” The fourth and final invoice was sent by the AAA in June of 2007. The final
4 invoice was for \$7,950.00, and covered an additional 53 hours of the arbitrator’s time. The
5 total amount of all four invoices, representing Stokes’ share of the arbitrator’s compensation,
6 was \$13,785.00.² Copies of all four invoices received by Stokes are attached hereto as
7 [Exhibit 11](#).

8 Stokes paid each and every invoice received from the AAA in a timely manner. See,
9 for example, the third invoice from the AAA to Stokes (dated May 17, 2007), which is
10 included in [Exhibit 11](#), showing payment on behalf of Stokes of the first two invoices within
11 30 days of receiving those invoices. AWSM, however, failed to pay all but \$240.00 of the
12 \$13,785.00 assessed to it by the AAA. In an e-mail, dated February 7, 2008, from Jonathan
13 Weed of the AAA, to counsel for both parties, Mr. Weed included a copy of a financial
14 summary of each parties’ balance due to the AAA showing that AWSM still owed
15 \$13,545.00. See [Exhibit 4](#).

16 AWSM’s refusal to pay the arbitration fees was evident almost immediately after it
17 started receiving the invoices from the AAA. In June of 2007, after the AAA had sent the

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19 ² Although the total amount of the four invoices was \$13,890.00, the AAA later adjusted that
20 assessment by reducing it by \$105.00. Since Stokes had previously paid the full invoiced amount
21 of \$13,890.00, the AAA sent Stokes a refund check for \$105.00, so that Stokes’ net allocation was
\$13,785.00. A copy of the \$105 refund check is attached hereto as [Exhibit 10](#).

1 first three invoices, Jonathan Weed sent a letter to counsel for both parties stating: “This will
2 confirm a telephone conversation on June 20, 2007 with Ms. Van Cott [Stokes’ counsel] and
3 Mr. Mann [AWSM’s counsel], wherein the undersigned [Mr. Weed] confirmed that the
4 Association has not received payment from Respondent [AWSM] for deposits previously
5 requested.” See letter, dated June 20, 2007, from Jonathan Weed to counsel, a copy of which
6 is attached hereto as [Exhibit 12](#). Mr. Weed’s June 20th letter also transmitted the fourth
7 invoice to both parties (for \$7,950.00 each), and set July 18, 2007, as the deadline for
8 receiving all outstanding balances. Two days after receiving the fourth invoice, the parties
9 received notice of the Arbitrator’s Clause Construction Award finding in favor of Stokes.

10 Stokes timely remitted his \$7,950, but AWSM again refused to make any further
11 payment. After waiting several months beyond the July 18th deadline for AWSM to pay its
12 outstanding balance, the Arbitrator suspended the case pursuant to R-54 of the Commercial
13 Rules, and set November 3, 2007, as the new deadline for depositing any outstanding
14 balances. See Order of Arbitrator, dated October 4, 2007, copy attached hereto as [Exhibit](#)
15 [13](#). That deadline was subsequently extended to December 14, 2007, and the Arbitrator made
16 clear that if payment was not received by that date, “administration of the matter will be
17 terminated.” See Order of Arbitrator, dated November 13, 2007, copy attached hereto as
18 [Exhibit 14](#). AWSM, however, continued in its refusal to pay, and on January 25, 2008 –
19 more than a year after it had started sending out invoices – the AAA terminated the
20 proceedings for nonpayment. See [Exhibit 5](#).

1 As the court in *EFC Development* stated, a party waives the right to arbitrate when
2 their conduct is found to be “inconsistent with the utilization of the arbitration remedy,” such
3 as when it “prevents arbitration,” “makes arbitration impossible,” or causes “unreasonable
4 delay.” As the facts set forth above indicate, AWSM was well-aware of its obligations under
5 the AAA rules to pay its share of the fees and was given ample opportunity to make those
6 payments. However, despite knowing that its actions would result in dismissal of the
7 arbitration proceeding, AWSM chose not to pay those fees. By failing to pay its share of the
8 arbitration fees and causing the arbitration action to be dismissed, AWSM has exhibited
9 behavior that is clearly “inconsistent with the arbitration remedy.” Therefore, even though
10 AWSM was the party that initially moved this Court to compel arbitration, it has now
11 repudiated the agreement to arbitrate and, thus, waived the right to continue to compel Stokes
12 to proceed in arbitration.

13 **III. THE EFFECT OF THE WAIVER**

14 In discussing the effect of a waiver of a right to arbitrate, the Arizona Supreme Court
15 has explained:

16 The Arizona Uniform Arbitration Act [A.R.S. § 12-1501, et
17 seq.] provides for the specific enforceability of an agreement to
18 arbitrate, and it is clear that such enforcement may be prayed for
19 by either party upon the refusal of the other to honor that
20 contract provision. *However, if either party, by his conduct can
21 be said to have waived his right to arbitrate, the other party is
placed in a position of choice: Either to compel arbitration
under the contract, or to acquiesce in the waiver thereby making
the revocation complete and binding on both.*

1 Maricopa County Superior Court

2 **COPY** of the foregoing mailed
this 14th day of May, 2008, to:

3
4 Matthew O'Brien
4 AWSM Technology, LLC
13835 N. Tatum Blvd. Suite 9-610
5 Phoenix, Arizona 85032

6 William D. Holm
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7 Jones, Skelton & Hochuli, P.L.C.
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11 /s/ Danielle Avery

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