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16 *Attorneys for Plaintiff*

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19

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

22 Plaintiff,

23 v.

24 AT&T MOBILITY LLC,

25 Defendant.
26
27
28

Case No. C11-00409 CRB

PLAINTIFF'S SUPPLEMENTAL BRIEF
ADDRESSING JUDICIAL ESTOPPEL

Date: October 21, 2011
 Time: 10:00 a.m.
 Courtroom 8

Hon. Charles R. Breyer

1 In *AT&T Mobility LLC v. Gonnello*, Case No. 11 Civ. 5636 (S.D.N.Y.) (filed August 12,
2 2008, order denying motion to compel arbitration October 7, 2011), AT&T Mobility LLC (“AT&T”)
3 contradicted the fundamental premise of its motion to compel arbitration of Mr. Hendricks’ claims.
4 AT&T persuaded the *Gonnello* court that claims seeking broad injunctive remedies are outside the
5 scope of the agreement to arbitrate. AT&T should now be judicially estopped from asserting the
6 opposite argument: that Mr. Hendricks’ claims seeking broad injunctive relief are within the scope
7 of an agreement to arbitrate. *See, e.g.*, Hendricks Complaint ¶¶ 46(b), 53(b), 58(b) and 70 (seeking
8 broad injunctive relief requiring AT&T to “cease the improper billing of data usage”) (Dkt. 34).
9 AT&T’s motion to compel arbitration should be denied on that ground, and the Court need not reach
10 the question of the enforceability of the agreement to arbitrate.

11 “Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage
12 by asserting one position, and then later seeking an advantage by taking a clearly inconsistent
13 position.” *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 782 (9th Cir. 2001). Courts
14 invoke judicial estoppel “not only to prevent a party from gaining an advantage by taking
15 inconsistent positions, but also because of general consideration[s] of the orderly administration of
16 justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast
17 and loose with the courts.” *Id.* (internal quotation marks omitted). In determining whether to apply
18 judicial estoppel, courts typically consider three factors: (1) whether a party’s later position is
19 “clearly inconsistent” with its original position; (2) whether the party has successfully persuaded the
20 court of the earlier position; and (3) whether allowing the inconsistent position would allow the party
21 to derive an unfair advantage or impose an unfair detriment on the opposing party. *Id.* at 782-83,
22 quoting *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 1815, 149 L. Ed.2d 968 (2001).

23 Here, all three criteria are met and AT&T should be judicially estopped from asserting that
24 Mr. Hendricks’ claims are within the scope of an agreement to arbitrate.

1 **1. AT&T’s Argument That Mr. Hendricks’ Claims Are Within The Scope Of The**
 2 **Arbitration Agreement Is “Clearly Inconsistent” With AT&T’s Arguments In**
 3 **Gonnello**

4 AT&T asserted two arguments in *Gonnello* that are fundamentally and clearly inconsistent
 5 with its arguments in support of this motion:

AT&T’s Arguments In <i>Hendricks</i>	AT&T’s Clearly Inconsistent Arguments In <i>Gonnello</i>
<p>6</p> <p>7</p> <p>8 “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.” (Dkt. 35, AT&T Motion to Compel Arbitration at 4:21-23) (bold in original)</p>	<p>9 “Defendants argue that an individual could bring a claim in court seeking to enjoin the merger and that the same claim therefore may be asserted under the arbitration agreement. But that argument fundamentally misunderstands the restrictions set forth in the arbitration agreement.</p> <p>10 To begin with, Section 2.2(6) prohibits an arbitrator from ‘presid[ing] over any form of a representative or class proceeding.’ Compl. Ex. A § 2.2(6) A demand seeking to institute any form of a representative ... proceeding’ is barred, even though, in the absence of the agreement, an individual could bring such a proceeding in court.</p> <p>11 The agreement is even more specific with regard to injunctive relief, stating that an arbitrator may not award injunctive relief that is ‘in favor of’ more people than the ‘individual party’ alone or that is greater than ‘necessary to provide relief warranted by the[e] party’s individual claim.’ <i>Id.</i> Because that language prohibits an arbitrator from enjoining [ATTM] from continuing [a] violative practice as to other[s], it necessarily limits a remedy available to consumers in court.” (<i>Gonnello</i> Dkt. 9, AT&T Preliminary Injunction Mem. at 26) (Internal quotation marks omitted) (RJN Exh. 1).</p>
<p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22 “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. ... The plain language of ATTM’s arbitration provision is all-encompassing and ‘intended to be broadly interpreted.’” (Dkt. 35, AT&T Motion to Compel Arbitration at 7:14-17)</p>	<p>23 “Defendants’ demands are precluded by Section 2.2(6), and therefore fall outside the scope of their arbitration agreements ...” (<i>Gonello</i> Dkt. 9, AT&T Preliminary Injunction Mem. at 16) (RJN Exh. 1).</p>

1 **2. AT&T Successfully Persuaded The *Gonnello* Court To Restrict The Scope Of The**
2 **Arbitration Agreement**

3 AT&T successfully persuaded the *Gonnello* court that “full remedies” are not available in
4 arbitration, and that the scope of the arbitration clause is not all-encompassing because it excludes
5 claims that seek remedies AT&T contends are prohibited by Section 2.2(6). *See Gonnello* October 7,
6 2011 Order at 7 (“As the only relief sought by the individual defendants is relief that is foreclosed by
7 the language of the arbitration provision, the demand for arbitration is beyond the scope of disputes
8 that the parties have contractually agreed to arbitrate.”) (RJN Exh. 2).

9 **3. Accepting AT&T’s Inconsistent Arguments Would Allow AT&T To Derive An**
10 **Unfair Advantage Against, And Impose An Unfair Detriment Upon, Mr. Hendricks**

11 “A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and
12 expeditious results.’” *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008), *quoting Mitsubishi Motors*
13 *Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). That might be possible with an
14 arbitration agreement that is “all-encompassing” and makes “full remedies available.” But allowing
15 AT&T to assert inconsistent positions on the scope of the agreement to arbitrate gives AT&T an
16 unfair advantage because it can choose its forum. To stifle Mr. Hendricks’ case in court, AT&T
17 contends the arbitration agreement is “all-encompassing.” To stifle Mr. Hendricks’ case in
18 arbitration, AT&T can assert the contradictory arguments from *Gonnello*, that remedies are restricted
19 and Mr. Hendricks’ claims thus fall “far outside the scope” of the agreement to arbitrate.

20 The ability to assert these inconsistent arguments would allow AT&T to straddle the line
21 between court and arbitration to prevent claims from being asserted in either venue. AT&T could
22 drag Mr. Hendricks back and forth between court and arbitration in a potentially endless circle that
23 will not promote efficient dispute resolution. Accepting AT&T’s contradictory arguments would
24 fundamentally deprive Mr. Hendricks of the benefits – streamlined and efficient dispute resolution –
25 that are supposed to flow from an agreement to arbitrate, and leave him with no potential remedy in
26 either forum.

27 For the foregoing reasons, AT&T should be judicially estopped from asserting that Mr.
28 Hendricks’ claims are within the scope of an agreement to arbitrate. AT&T’s motion to compel

1 arbitration should be denied on that ground, and the Court need not reach the question of the
2 enforceability of the agreement to arbitrate.

3
4 Dated: October 14, 2011

Respectfully submitted,
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