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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

AT&T MOBILITY LLC,

Defendant.

Case No. C11-00409 CRB

PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF SUPPLEMENTAL BRIEF ADDRESSING JUDICIAL ESTOPPEL

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

Hon. Charles R. Breyer

Pursuant to Rule 201 of the Federal Rules of Evidence, Plaintiff Patrick Hendricks respectfully requests that this Court take judicial notice of the following documents in connection with AT&T Mobility LLC's Motion to Compel Arbitration and Stay Case:

Exhibit 1: September 12, 2011 Memorandum of Law in Support of Plaintiff AT&T Mobility LLC's Motion for Preliminary Injunction in *AT&T Mobility LLC v. Gonello*, United States District Court for the Southern District of New York Case No. 1:11-CV-05636-PKC (Dkt. No. 9)

Exhibit 2: October 7, 2011 Memorandum and Order in *AT&T Mobility LLC v. Gonello*, United States District Court for the Southern District of New York Case No. 1:11-CV-05636-PKC (Dkt. No. 57).

Pursuant to Rules 201(b) and 201(d) of the Federal Rules of Evidence, the Court must take judicial notice of these documents because they are not subject to reasonable dispute and are capable of accurate and ready determination by resort to the docket for the *Gonello* action, a source whose accuracy cannot reasonably be questioned.

Dated: October 14, 2011

Respectfully submitted,
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AT&T Mobility LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AT&T MOBILITY LLC, Plaintiff, v. RICHARD GONNELLO, JUAN MONTE-VERDE, LEAF O'NEAL, JARED POPE and BRYAN RODRIGUEZ, Defendants.	Case No. 1:11-cv-05636-PKC ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF AT&T MOBILITY LLC'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This motion seeks to enjoin an unprecedented abuse of the arbitration process.

Defendants Richard Gonnello, Juan Monteverde, Leaf O'Neal, Jared Pope, and Bryan Rodriguez and 972 other individuals have initiated separate arbitrations, each seeking to enjoin the proposed $39 billion merger between Plaintiff AT&T Mobility LLC ("ATTM") and T-Mobile USA ("T-Mobile") or, in the alternative, impose a long list of onerous conditions on the merger. These arbitration proceedings are part of a scheme hatched by the law firm of Bursor & Fisher P.A. ("the Bursor firm") that is intended to:

- override the ongoing federal and state government regulatory reviews of the proposed merger—as well as the federal court adjudication of the Justice Department's recently-initiated lawsuit to enjoin the merger;
- resolve adversely the interests of numerous third parties that support the merger even though none of those third parties consented to have their interests adjudicated in these arbitrations;
- inflict on ATTM the costs of 1,000 or more separate, entirely duplicative, *ultra vires* arbitrations in the hopes of extorting settlement payments; and
- punish ATTM for prevailing in the Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

The principal flaw in this scheme is that Defendants' arbitration demands fall far outside the scope of the arbitration agreement between ATTM and its customers, which requires both ATTM and its customers to arbitrate disputes only in their "individual capacity," prohibits "any form" of "representative or class proceeding," and permits the arbitrator to "award[] injunctive relief ***only*** in favor of the individual party seeking relief and ***only*** to the extent necessary to provide relief warranted by that party's individual claim." Compl. Ex. A § 2.2(6) (emphasis added).

ATTM's arbitration agreement gives each of ATTM's customers a practical and effective way to resolve disputes. The agreement strikes a balance by limiting arbitrable disputes to claims for individualized relief while providing consumers with procedural and remedial benefits

not available in court—which, the Supreme Court recognized, gives consumers "sufficient * * * incentive for the individual prosecution of meritorious claims that are not immediately settled." *Concepcion*, 131 S. Ct. at 1753. The Supreme Court held in *Concepcion* that, under the Federal Arbitration Act ("FAA"), states may not refuse to enforce ATTM's arbitration provision on the ground that it "require[s] that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" *Id*. at 1744.

Looking to retaliate against ATTM for its victory in *Concepcion*—a victory that threatens a pending class action against ATTM in which the Bursor firm claims to have invested considerable resources—the Bursor firm undertook to recruit ATTM customers to bring representative claims in arbitration seeking a blanket injunction either prohibiting ATTM from completing its merger with T-Mobile or imposing class-wide restrictions on the merger. To carry out this scheme, the Bursor firm—working in concert with Faruqi & Faruqi LLP ("the Faruqi firm") and Thornton, Davis & Fein, P.A. ("Thornton, Davis, & Fein")—has filed 977 demands for arbitration to date—including five on behalf of the Defendants in this case—and threatens to file hundreds or thousands of additional identical arbitrations. The AAA began administering 24 of these arbitrations in August after receiving payment of the filing fees.

The abusive nature of the Bursor scheme is clearly evident. Only someone seeking to make a mockery of the process would file hundreds of identical demands for arbitration asking hundreds of separate adjudicators for identical relief, and then block consolidation of the cases in order to maintain multiplicative proceedings before different arbitrators. The Bursor firm and its co-counsel are hoping that hundreds or even thousands of bites at the same apple will turn up just one arbitrator willing to grant an injunction while the DOJ and FCC proceedings are still underway—and that ATTM will hedge against that risk by settling.

Preliminary relief enjoining these five duplicative arbitrations initiated by Defendants is plainly warranted. ATTM is likely to prevail on the merits, because the arbitration provision expressly precludes these arbitrations. Under the provision, the scope of arbitration is strictly limited, allowing a customer to bring only his or her own individual claims seeking only his or her own individualized relief. Specifically, the provision forbids "any form of a representative or class proceeding," and allows an arbitrator to consider a claim for "injunctive relief only in favor of the individual party seeking relief" and "only to the extent necessary to provide relief warranted by that party's individual claim." Compl. Ex. A § 2.2(6). Defendants' demands, by contrast, each seek class-wide relief enjoining a $39 billion merger.

The recently-filed Department of Justice lawsuit seeking to block the merger and the ongoing FCC consideration of whether the merger is in the public interest establish that the balance of the equities overwhelmingly favors the issuance of a preliminary injunction. ATTM will suffer irreparable injury not only by being forced to participate in multiple entirely duplicative, *ultra vires* arbitrations—but also because it will have to do so while litigating the very same issues in the DOJ proceeding and making its case before the FCC. In addition, the compressed schedule now governing the arbitrations—the hearings on the merits in each arbitration will have to be completed by early November at the latest—will make it impossible to make witnesses available for, and otherwise devote the appropriate attention to, the DOJ and FCC proceedings.

Moreover, the existence of these ongoing government proceedings—in which the DOJ (and outside parties before the FCC) are seeking the very same ultimate relief that Defendants seek here—means that Defendants will not be harmed by a delay in the arbitrations to allow this Court to resolve the merits of ATTM's claim that the arbitrations are *ultra vires*. Indeed, the Seventh Circuit has held that the precise claim that Defendants seek to assert in the arbitrations is

not even ripe until after the FCC has decided whether to approve the merger. *S. Austin Coal. Cmty. Council v. SBC Commc'ns Inc.*, 191 F.3d 842, 843 (7th Cir. 1999). Defendants can hardly claim injury from a brief delay in adjudicating claims that should be dismissed as premature.

The public interest strongly favors permitting the government proceedings to reach their conclusion without being overridden by decisions of a single arbitrator—decisions that, under the rules that the AAA has deemed presumptively applicable, must be rendered within 44 days of the arbitrator's appointment. In that short time span, the arbitrators must each grapple with numerous complex issues that have been the subject of tens of thousands of pages of argument before the FCC, 1.4 million pages of information submitted by ATTM alone, and months of consideration by federal and state regulators—and that will be considered by the federal court hearing the DOJ action. This Court can and should put a stop to the Bursor firm's scheme by preliminarily enjoining these arbitrations from going forward.

STATEMENT OF FACTS

A. ATTM's Pending Merger With T-Mobile

On March 20, 2011, AT&T Inc. (ATTM's parent company) and Deutsche Telekom AG ("Deutsche Telekom") announced an agreement under which AT&T will acquire Deutsche Telekom's subsidiary T-Mobile USA ("T-Mobile"), leading to the merger of ATTM and T-Mobile, in a transaction valued at approximately $39 billion. *See* Decl. of Joseph Baker ¶¶ 3-4 & Exs. 1-2 The merger between ATTM and T-Mobile is subject to review by the Department of Justice ("DOJ"), the Federal Communications Commission ("FCC"), and certain state regulators.

On August 31, 2011, the DOJ commenced an action in the United States District Court for the District of Columbia alleging that the proposed merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18, which provides in pertinent part that one corporation may not acquire the stock of another corporation when "the effect of such [an] acquisition may be substantially to

lessen competition, or to tend to create a monopoly." The DOJ seeks a permanent injunction barring consummation of the merger—precisely the same relief being sought by Defendants in these arbitrations. *See United States v. AT&T Inc.*, No. 1:11-cv-01560 (D.D.C.). Litigation or resolution of the DOJ's action, which has just been filed, will involve a thorough and detailed consideration of the merger's relevant effects on competition.[1]

Separately, the merger requires the FCC's approval, because the Commission must approve the transfer and acquisition of federally issued licenses. AT&T Inc. and Deutsche Telekom have therefore filed an application seeking the FCC's approval of the merger. *See* Baker Decl. ¶¶ 5, 23 & Exs. 3, 21.[2] The standard applied by the Commission—whether the merger serves "the public interest, convenience and necessity"[3]—is guided by a "deeply rooted preference for preserving and enhancing competition in relevant markets." *In re Comcast Corp., Gen. Elec. Co., & NBC Universal, Inc.*, Mem. Op. & Order, 26 FCC Rcd. 4238 ¶ 23 (2011).

The FCC proceedings, which are ongoing, thus also encompass an intensive and comprehensive evaluation of the issues presented by the merger—including competition issues. The merging parties have submitted hundreds of pages of briefs and 19 witness affidavits; over 130 parties have registered their opposition to the merger; and over 400 parties—including labor unions, businesses, public interest groups, and dozens of state and federal elected officials—have filed in support. Baker Decl. ¶ 8 & Ex. 6. Tens of thousands of individuals have also submitted

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[1] AT&T strongly disagrees with the DOJ's decision to bring its lawsuit, and will vigorously defend its position that the merger will not lessen competition, but instead will provide significant benefits to customers and the public at large.

[2] A number of other parties have filed petitions urging the Commission to disapprove the merger. *See, e.g.,* Baker Decl. ¶¶ 135, 151 & Exs. 133, 149 (Sprint/Nextel and Clearwire Corporation petitions).

[3] 47 U.S.C. § 310(d); *see also id.* § 214(a) (requiring FCC to determine whether license transfers and acquisitions serve "the present or future public convenience and necessity").

comments to the FCC. *Id.* ¶¶ 6-7 & Ex. 4-5. And the FCC has issued comprehensive requests for information to the merging parties, *id.* ¶ 10 & Ex. 8, resulting in the production by ATTM of approximately 1.4 million pages of information and millions of data points related to wireless service across the country for the last three years. Declaration of Michael Van Ardsall ¶ 4. Similar data from competitors of and vendors to the merging parties are being collected and analyzed by the FCC. Baker Decl. ¶¶ 11-16 & Exs. 9-14.

In addition, the public utility commissions of Arizona, California, Hawaii, Louisiana, and West Virginia have commenced proceedings to review the effect of the merger on competition in their respective states. *Id.* ¶¶ 17-22 & Exs. 15-20. The commissions in Arizona, Louisiana, and West Virginia have already granted approval of the merger. *Id.* ¶¶ 17, 21, 22 & Exs. 15, 19, 20.

B. ATTM's Arbitration Agreement With Its Customers

ATTM provides wireless voice and data services to more than 98 million customers across the country. Decl. of Kevin Ranlett Exs. 1-2.

ATTM's relationship with its customers is governed by a Wireless Customer Agreement. That agreement includes, among other things, a provision requiring ATTM and each customer to arbitrate "all disputes and claims between us" on an individual basis. Compl. Ex. A § 2.2(1). The arbitration provision makes clear that any dispute or claim must be individualized in nature: "**YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.**" *Id.* § 2.2(6) (boldface and capitalization in original).

The provision reiterates that "unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and ***may not otherwise preside over any form of a representative or class proceeding***." *Id.* (emphasis added). The provision also impos-

es strict limits on the authority of the arbitrator to award injunctive relief that affects more than the individual customer: "The arbitrator may award injunctive relief ***only in favor of the individual party*** seeking relief and ***only to the extent necessary*** to provide relief warranted by that party's individual claim." *Id.* (emphasis added).

These provisions of the arbitration agreement requiring that arbitration proceed on an individual basis—and prohibiting any form of class or representative actions—were upheld by the Supreme Court of the United States earlier this year in *AT&T Mobility LLC v. Concepcion*. The Court held that the Federal Arbitration Act preempts states from refusing to enforce arbitration agreements that require disputes to be resolved on an individual basis and prohibit all manner of class-wide dispute resolution. 131 S. Ct. at 1753.

C. The Bursor Firm's Plan To Use The Arbitration Clause To Hold The Merger Hostage And Extort An Unjustified Settlement

In July 2011, the Bursor firm announced "a plan to use AT&T's own Arbitration Agreement to help stop the takeover of T-Mobile." Ranlett Decl. Ex. 3. The firm declared that it was prepared to institute "thousands" of coordinated copycat arbitrations, each seeking the same relief: "[E]njoin[ing] the merger." *Id.* To that end, it launched a web site (http://www.fightthemerger.com) to solicit ATTM customers to "join that effort" by filling in a form on the site. *Id.* Ex. 4.

According to one press report, the Bursor firm's stated goal is to coerce "AT&T to settle, given the 'daunting' prospect of fighting more than 750 arbitrations, any one of which could stop the deal." Terry Baynes, Reuters, Law Firm Strikes Back At AT&T Over Merger (July 27, 2011), *at* http://www.reuters.com/article/2011/07/27/us-att-merger-arbitration-idUSTRE76Q7F320110720 ("Reuters report"). Another press report quotes Barry Davis of Thornton, Davis & Fein as saying that "we will soon have more than one thousand arbitrations on file, any one of

which could stop this merger." Josh Long, AT&T Customers Challenge T-Mobile Merger Via Arbitration (Aug. 9, 2011), *at* http://www.channelpartnersonline.com/news/2011/08/att-customers-challenge-t-mobile-merger-via-arbitration.aspx. Another reporter quotes Scott Bursor (one of two named partners in the Bursor firm) as saying: "If we bring 100 cases and lose 99 of them we are going to win." Ina Fried, All Things D, AT&T Customers File Arbitration Cases Seeking to Block T-Mobile Merger (July 22, 2011), *at* http://allthingsd.com/20110722/att-customers-file-arbitration-cases-seeking-to-block-t-mobile-merger.

Mr. Bursor has made no attempt to disguise the relationship between his scheme and ATTM's victory in *Concepcion*. He told Forbes Magazine: "If you don't want to have 1,000 individual arbitrations seeking to enjoin a $39 billion merger, don't write such a sweeping contract." He continued: "Once you commit to that you're stuck with it. And now AT&T needs to take its medicine." Daniel Fisher, *AT&T's Arbitration Victory Breeds Swarm of Antitrust Cases* (Aug, 18, 2011), *at* http://www.forbes.com/sites/danielfisher/2011/08/18/atts-arbitration-victory-breeds-swarm-of-antitrust-cases/.

D. Defendants' Arbitration Demands

In keeping with their plan, the Bursor firm—along with the Faruqi firm and Thornton, Davis & Fein—has already filed 977 demands for arbitration before the American Arbitration Association ("AAA"), the arbitral forum designated in the arbitration agreement, that are ***identical*** aside from the names of the claimants. Ranlett Decl. ¶ 19. The AAA began administering 24 of those arbitrations in August upon receiving payment of the filing fees. *Id.* ¶ 18 & Exs. 27-34.[4]

[4] The Bursor and Faruqi firms have enlisted a familiar cast of characters as the figurehead plaintiffs for their effort. At least 12 of the 24 claimants whose arbitration demands are being administered—including four of the Defendants in this action—are either Faruqi attorneys or in-

The Defendants in this case are among the claimants in the 24 arbitrations.[5] Each carbon-copy demand asserts a violation of Section 7 of the Clayton Act (15 U.S.C. § 18). Eschewing any claim for individualized relief, ***each*** demand requests the same class-wide order: enjoining the merger between ATTM and T-Mobile. *See, e.g.*, Ranlett Decl. Ex. 5, ¶ 334. Alternatively, ***each*** demand requests an injunction imposing a number of burdensome restrictions that would affect all of AT&T Mobility's and T-Mobile's current and future customers, as well as a wide swath of the telecommunications industry and business community, including:

- requiring the divestiture of spectrum licenses, network infrastructure, subscribers, money, and technology (*id.* ¶¶ 340, 370-378);
- ordering the combined entity to offer all customers rate-plan "packages" that are "similar to those now offered by T-Mobile" (*id.* ¶ 340);
- forcing the combined entity to allow competitors to access its facilities and lease data roaming bandwidth at rates set by the arbitrator (*id.* ¶¶ 341-343, 352-354);
- barring the combined entity from contracting for exclusivity with cell-phone suppliers, preventing any compatible device from connecting to its network, or financing the implementation of 4G LTE services or equipment with available government subsidies (*id.* ¶¶ 344-351, 383-384);
- requiring the combined entity to extend all existing interconnection and special access agreements with other carriers and to forbear from retiring any existing copper facilities for five years (*id.* ¶¶ 359-368);
- forbidding it from bundling certain wireline and wireless products or from increasing prices for transit services for five years (*id.* ¶¶ 355-358, 369);

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dividuals who have served in the past as named plaintiffs in class actions brought by the Bursor and Faruqi firms. Ranlett Decl. ¶¶ 9-16.

[5] AT&T has brought similar actions in seven other federal district courts (to secure personal jurisdiction over the 19 other claimants) seeking a halt to the remaining 19 arbitrations. Because the Bursor firm has not remitted the fees for pursuing an arbitration seeking an injunction on behalf of the remaining 953 claimants, the AAA is not currently administering those arbitrations. However, the Bursor firm recently has filed suit seeking to compel ATTM to pay the filing fees. *Schroeder v. AT&T Mobility LLC*, No. 3:11-cv-4412 (N.D. Cal.). If the Bursor firm prevails in that suit, ATTM potentially would be subject to close to 1,000 duplicative, *ultra vires* arbitrations and would owe millions of dollars in AAA filing fees.

- ordering it to publish all roaming agreements with competitors and "turn [them] over" to the FCC to set rates (*id.* ¶¶ 379-382); and

- requiring it to provide unbundled wholesale DSL service to competitors at set rates (*id.* ¶¶ 385-386).

E. The Current Status Of The Arbitration Proceedings

On August 4, 2011, the AAA notified the parties that it intended to proceed with administering Defendants' arbitrations "in the absence of * * * a court order staying" the arbitrations. Ranlett Decl. ¶ 18 & Exs. 27-34 at 1. Notwithstanding the pendency of this lawsuit and the actions against the other claimants, on August 23, 2011, a AAA case manager conducted a conference call with the parties' counsel, during which he stated that the AAA had made the following initial administrative determinations (all over ATTM's objections):

- It will appoint one arbitrator (as opposed to a three-arbitrator panel) for each arbitration.

- These 24 arbitrations will not be consolidated because, while ATTM has consented to consolidate them, counsel for Defendants has withheld consent.

- The AAA will not stay the arbitrations pending this Court's resolution of ATTM's motion for a preliminary injunction, because counsel for Defendants has not agreed to a stay.

- The AAA will apply the Supplementary Procedures for Consumer-Related Disputes, and the Expedited Procedures of the Commercial Arbitration Rules, which apply to cases "in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs." AAA Rule R-1(b).[6]

Ranlett Decl. Ex. 35 at 11:8-11; 11:14-19; 15:16-19; 32:11-12; *id.* Ex. 36.

The expedited rules provide that (i) any hearing is "to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment" (Rule E-7); (ii) "[g]enerally, the hearing shall not exceed one day"—although, "[f]or good cause shown, the arbitrator may schedule addi-

[6] The case manager indicated that ATTM is free to request of each arbitrator the he or she not apply the expedited rules. The Bursor firm consistently has indicated that it will oppose any such request. *See* Ranlett Decl. Ex. 35 at 10:16, 12:15-13:7, 16:14-22.

tional hearings within seven business days after the initial day of hearings" (Rule E-8(a)); and (iii) unless the parties agree otherwise, "the award shall be rendered not later than 14 days from the date of the closing of the hearing" (Rule E-9). Ranlett Decl. Ex. 37.

Under the current procedural posture, then, the 24 arbitrations—each of which aims to enjoin a $39 billion merger—are each slated to be decided no more than 44 days after the arbitrators are appointed. The date of those appointments is fast approaching; between August 24 and 26, 2011, the AAA issued 24 lists of potential arbitrators; the parties have 30 days to object to the potential arbitrators and rank their preferences. The AAA will therefore begin to appoint arbitrators as early as September 26 and appears likely to finish appointing all 24 arbitrators by the end of the September. Ranlett Decl. Ex. 36.

In short, the hearings and decisions in these arbitrations will be imminent without this Court's intervention.

ARGUMENT

The standard for issuing a preliminary injunction is well established. The party seeking relief must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm absent relief; (3) the balance of equities tips in its favor; and (4) the requested relief is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Citigroup Global Mkts., Inc. v. VGC Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010).

Moreover, under the Second Circuit's "serious questions" standard, the first and third elements are to be balanced such that "serious questions" going to the merits and a balance of hardships that "tip[s] decidedly" towards the movant is sufficient so long as the other two elements are met. *Citigroup Global Mkts.*, 598 F.3d at 35.

ATTM easily satisfies this standard. This Court should therefore issue the preliminary injunction.

I. ATTM IS LIKELY TO SUCCEED ON THE MERITS; AT A MINIMUM, THIS LAWSUIT PRESENTS SERIOUS QUESTIONS

Because Defendants have initiated arbitration proceedings that are prohibited by their arbitration agreements, ATTM is likely to succeed on the merits of its claims. At a minimum, ATTM has raised serious questions warranting immediate relief.

A. This Court Must Determine Whether Defendants' Arbitrations May Proceed.

"[W]hether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Comm'cns Workers*, 475 U.S. 643, 649 (1986)) (emphasis omitted); *see also Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208 (1991) ("a party cannot be forced to arbitrate the arbitrability issue question") (internal quotation marks omitted). Questions of arbitrability, which the Supreme Court has labeled "gateway" issues, are ones that the "contracting parties would likely have expected a court to have decided" and "are not likely to have thought * * * that an arbitrator would" determine. *Howsam*, 537 U.S. at 83.

The issue here is the meaning of the section of ATTM's arbitration provision prohibiting representative and class actions and barring non-individualized injunctive relief. Those prohibitions are so critical and fundamental to the arbitration agreement that the provision containing them—Section 2.2(6)—specifically states that "[i]f this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void." Compl. Ex. A § 2.2(6).

Given the parties' explicit recognition of the centrality of these limits to the entire arbitration agreement, there can be no doubt that whether or not a demand for arbitration violates these prohibitions is a "gateway" question that the parties would have expected a court to decide. This Court accordingly must resolve this disagreement to "avoid[] the risk of forcing" ATTM "to arbitrate a matter"—a representative claim for class-wide, non-individualized injunctive relief—that ATTM has not "agreed to arbitrate." *Howsam*, 537 U.S. at 83-84.[7]

Parties to an arbitration agreement may by contract dispense with the rule that courts decide questions of arbitrability if they "clearly and unmistakably provide" that the arbitrator should decide those questions. *Howsam*, 537 U.S. at 83 (internal quotation marks omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) ("presumption" against arbitrators deciding questions of arbitrability means that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so") (quoting *AT&T Techs*., 475 U.S. at 649)); *see also Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 n.1 (2010) (quoting *First Options*, 514 U.S. at 944-45).

Far from superseding the generally applicable rule, however, the agreement here clearly and unmistakably reinforces it, stating that "issues relating to the scope and enforceability of the arbitration provision ***are for the court to decide***." Compl. Ex. A § 2.2(3) (emphasis added). That language confirms that this Court must decide whether Defendants' arbitration demands are within an arbitrator's jurisdiction and authority to decide under ATTM's arbitration provision.

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[7] As we discuss below, these arbitrations—if they were to culminate in an arbitration award prohibiting the merger or imposing conditions upon it—would have the practical effect of adjudicating the rights and interests of a wide variety of absent third parties that have not agreed to have their rights and interests determined by an arbitrator. *See* Section I.B.2, *infra* (identifying some of the myriad affected third parties). Judicial confirmation of any such award would violate due process—which is an added reason why the parties would have intended consideration of this question of arbitrability now, rather than after incurring the huge costs associated with the multiplicative arbitrations that the Bursor firm has initiated.

This Court has the power to issue an injunction now to halt these unauthorized arbitrations. The Supreme Court has made clear that a party to an arbitration clause may pursue "an independent court decision on the question of arbitrability * * * by trying to enjoin the arbitration." *First Options*, 514 U.S. at 946. In other words, "[p]etitions to compel and petitions to enjoin are two sides of the same coin": "Section 4 of the FAA provides courts with the power to compel an arbitration pursuant to a valid agreement to arbitrate, and to enjoin such an arbitration in the absence of an applicable agreement." *J.P. Morgan Secs. Inc. v. La. Citizens Property Ins. Corp.*, 712 F. Supp. 2d 70, 80 & n.38 (S.D.N.Y. 2010) (citing 9 U.S.C. § 4; footnotes omitted); *see also*, *e.g.*, *Sterling Fin. Inv. Group, Inc. v. Hammer,* 393 F.3d 1223, 1225-26 (11th Cir. 2004) (citing Section 4 of the FAA in affirming a district court's order enjoining arbitration from proceeding in an improper location); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136 (3d Cir. 1998) ("[W]hen a party resists arbitration under an existing arbitration clause * * *, the FAA allows a district court to compel, or enjoin, arbitration as the circumstances may dictate.") (citing 9 U.S.C. §§ 3, 4); *PCS 2000 LP v. Romulus Telecomms., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998)) ("[T]he power to enjoin an arbitration is the concomitant of the power to compel arbitration, and thus the same provision of the FAA, 9 U.S.C. § 4, authorizes both types of orders.") (internal quotation marks and citation omitted); *AHTNA Gov't Servs. Corp. v. 52 Rausch, LLC*, 2003 WL 403359, at *6 (N.D. Cal. Feb. 19, 2003) ("The Federal Arbitration Act, 9 U.S.C. § 4, grants federal courts the authority to compel and enjoin arbitration.").[8]

[8] *See also, e.g.*, *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 266 n.3 (2d Cir. 1996) ("a number of courts have held that, in appropriate circumstances, § 4 of the FAA may be applied to stay or enjoin arbitration proceedings"), *abrogated on other grounds*, *Vaden v. Discover Bank*, 556 U.S. 49 (2009); *Tai Ping Ins. Co. v. M/V Warschau*, 731 F.2d 1141, 1144 (5th Cir. 1984) ("the case law clearly establishes that, in the appropriate circumstances"—such as "where [a] dispute [is] not covered by [the] arbitration clause"—"an order [enjoining the arbitration] is within the power of the district court").

B. Defendants' Demands Are Beyond The Scope Of Their Arbitration Agreements.

"The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)). Accordingly, the Supreme Court has "held that parties may agree to limit the issues subject to arbitration * * *, to arbitrate according to specific rules * * *, and to limit with whom a party will arbitrate its disputes." *Id.* at 1748-49 (citations omitted). "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1773-74 (2010) (quoting *Volt*, 489 U.S. at 479). "This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Id.* at 1774; *see also AT&T Techs.*, 475 U.S. at 648-49 ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

Here, the parties have not agreed that the claims in Defendants' demands may be resolved by an arbitrator. Section 2.2(6) of the arbitration agreements between ATTM and Defendants provides, in relevant part:

> The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.** Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

Compl. Ex. A § 2.2(6) (emphasis in original). This prominent and unambiguous language establishes a fundamental principle: Only individual claims seeking individualized relief may be pursued in arbitrations under the agreements.

Defendants' demands are precluded by Section 2.2(6), and therefore fall outside the scope of their arbitration agreements, because (a) Defendants are attempting to bring a "form of a representative or class proceeding"; and (b) Defendants' demands do not seek "injunctive relief only in favor of the individual party seeking relief" and "only to the extent necessary to provide relief warranted by that party's individual claim."

1. Defendants Cannot Circumvent The Arbitration Clause's Restrictions By Omitting "Representative" And "Class" From Their Demands.

The absence of the labels "representative" and "class" from the demands sheds no light on whether the demands violate Section 2.2(6). As the Fifth Circuit has put it, "the true nature of a pleading" must be determined "by its substance, not its label." *Armstrong v. Capshaw, Goss & Bowers, LLP*, 404 F.3d 933, 936 (5th Cir. 2005).

Thus, courts routinely look beyond labels to determine whether a lawsuit is a "class action" or "mass action" under the Class Action Fairness Act. *See, e.g.*, *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008) (antitrust action was mass action rather than individual action because defendant insurance companies' policy holders were real parties in interest); *W. Va. ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 453-54 (E.D. Pa. 2010) (antitrust action was class action rather than individual action because defendant cable company's subscribers were real parties in interest); *see also Ohio v. GMAC Mortgage, LLC*, 760 F. Supp. 2d 741, 750-51 (N.D. Ohio 2011); *Hood v. F. Hoffman-La Roche, Ltd.*, 639 F. Supp. 2d 25, 31-32 (D.D.C. 2009); *Shelstad v. Cook,* 253 N.W.2d 517, 555 (Wisc. 1977) ("[t]he mere labeling of a complaint does not determine its nature" for purposes of discerning whether

"the action [is] derivative and brought on behalf of [a] corporation"; instead, "the nature of the action must be determined as a whole and all allegations in the complaint may be considered"). Here too, the focus must be on the substance of the demands, not the way in which they are labeled.

2. These Demands Are Representative Actions Barred By The Arbitration Clause.

Two recent Supreme Court arbitration decisions—*Stolt-Nielsen* and *Concepcion*—explain the distinctions between individual claims on one hand, and class and representative actions on the other. Because the demands here bear all of the critical hallmarks of the latter, they fall squarely within Section 2.2(6)'s prohibition of "any form of a representative or class proceeding."

Stolt-Nielsen identified several "fundamental" ways in which class arbitration differs from traditional, individual arbitration. 130 S. Ct. at 1776. First, in a class arbitration the arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Id.* Second, "[t]he arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well." *Id.* Third, the "stakes" of class arbitration "are comparable to those of class-action litigation, even though the scope of judicial review is much more limited." *Id.* (citation omitted). The Supreme Court echoed these points in *Concepcion*, adding that, unlike individual arbitration, class arbitration "*requires* procedural formality" in order to ensure "the protection of absent parties." 131 S. Ct. at 1750-51. For such reasons, the Court observed, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Id.* at 1752.

The demands here possess every one of those characteristics. First, although each demand nominally is brought by an individual consumer, the arbitrators are not being asked to award relief affecting only the individual claimants, but rather to resolve the competing interests of over 120 million current AT&T Mobility and T-Mobile customers—who will obtain improved service and coverage as a result of the transaction—and a vast array of other interested third parties. These affected individuals and groups include:

- T-Mobile USA, Inc. and its parent company, Deutsche Telekom AG, which obviously have an interest in the consummation of the merger;

- the governors of 27 states, the attorneys general of eleven states, and over 75 members of the United States Senate and House of Representatives who have expressed their support for the merger to the FCC (Baker Decl. ¶¶ 99-124 & Exs. 97-122; ¶ 125 & Ex. 123; ¶¶ 96-98 & Exs. 94-96);

- 55 million Americans to whom the combined company will offer a state-of-the-art 4G LTE mobile broadband service that would not be available from either company without the merger (*id.* Ex. 27 at 23 & Ex. 31 at 3);

- labor unions representing 20 million workers and educators, including the Communications Workers of America, the AFL-CIO, the Teamsters, the Service Employees International Union, the International Union of Painters and Allied Trades, the United Food and Commercial Workers, the United Mine Workers of America, the National Education Association, and the American Federation of Teachers, who have urged FCC approval of the merger because they believe that it will create tens of thousands of well-paying jobs (*id.* ¶¶ 64, 65, 130 & Ex. 62, 63, 128);

- leading mobile computing technology businesses, including equipment and handset manufacturers (*e.g.*, Qualcomm, Corning, Research in Motion, Pantech, Avaya, Juniper Networks, Brocade, JDS Uniphase, Amdocs, Tellabs, ADTRAN, and Sierra Wireless), providers of applications, content, and technology (*e.g.*, Facebook, Microsoft, Oracle, and Yahoo!), and venture capital firms (*e.g.*, Kleiner Perkins Caufield & Byers, Sequoia Capital, Charles River Ventures, Matrix Partners, New Venture Partners, Technology Crossover Ventures, Radar Partners, Norwest Partners, and Lightspeed Ventures), who have endorsed the merger as a means of addressing rising consumer demand for wireless services and fueling innovation and investment in U.S. high-tech industries (*id.* ¶¶ 88-91 & Exs. 86-89; ¶ 70 & Ex. 68); and

- public interest groups representing the interests of minorities (*e.g.*, the NAACP, the Hispanic Institute, and the United States Hispanic Chamber of Commerce),

> people with disabilities (*e.g.*, World Institute on Disability, the American Foundation for the Blind, the American Association of People with Disabilities, and the United Spinal Association), rural citizens (*e.g.*, the National Grange, the U.S. Cattlemen's Association, the National Black Farmers Association, the Intertribal Agriculture Council, and the National Rural Health Association), and supporters of environmental protection (*e.g.*, the Sierra Club and Future 500), who support the merger based on the benefits their respective constituents will realize as a result of the merger, such as the enormous beneficial economic impact for rural America and the U.S. economy as a whole that will result from the $8 billion network investment that will be used to integrate the networks and expand 4G LTE service to 97% of Americans (*id.* ¶¶ 59-61 & Exs. 57-59; ¶¶ 66-69 & Exs. 64-67; ¶¶ 61, 82, 83, 85, 86 & Exs. 59, 80, 81, 83, 84; ¶¶ 92-93 & Exs. 90-91).

As this extensive list makes clear, an award of the injunctive relief Defendants seek would "adjudicate[] the rights" of many "absent parties"—the most notable feature of class and representative actions. The relief sought by Defendants would, if granted, prevent every single member of this huge class of individuals and businesses from obtaining the benefits of the merger. And, as Defendants' counsel themselves recognize, granting relief in one arbitration would secure the relief sought by each of their 1,000 or more clients. As one of their lawyers stated, "[i]f we bring 100 cases and lose 99 of them we are going to win"—*i.e.*, if one prevails, all of the recruited claimants prevail. *See* page 8, *supra*. That is the hallmark of a class or representative action.

Second, the stakes of these arbitrations are not only "comparable to those of class-action litigation" (*Stolt-Nielsen*, 130 S. Ct. at 1776), but in fact far outstrip the stakes of virtually every class action ever filed: The demands seek to halt a $39 billion merger and effect an end-run around ongoing regulatory proceedings involving an enormous number of interested parties who have made tens of thousands of filings containing an extraordinary amount of information.

Third, because of the class-wide scope of the demands, the arbitrators will be obliged to develop procedures to protect the interests of all of the affected consumers, businesses, and state and federal regulators—the precise characteristic of class and representative actions identified by

the Supreme Court in *Concepcion*. Of course, because those third parties have not consented to adjudication of their interests by the arbitrator, and will be absent from the arbitration proceedings, there is no way for the arbitrators here to do so.

In addition, as the Supreme Court recognized in *Concepcion*, one reason that parties would not—and do not—contract for class arbitration is because it "greatly increases risks to Defendants." 131 S. Ct. at 1752. The risks of using informal arbitral procedures, the Court explained, may be tolerable when "the impact is limited to the size of individual disputes" (*id.*), but not when the stakes are multiplied thousands of times over. In such circumstances, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail * * *, and class arbitration would be no different." *Id.* Here, the Bursor firm and its co-counsel are engaged in a similar enterprise: As Mr. Bursor has admitted, his legal team seeks to use the threat of obtaining class-wide injunctive relief to extort a settlement. *See* page 7, *supra*. In his view, all that is needed is a victory in one arbitration, even if he were to lose dozens or thousands of similar arbitrations, to "stop this merger."[9]

Finally, although Defendants may contend that their claims are not "representative" in character because the arbitrations have been filed by individual claimants, examples of "representative" actions that are not pleaded on behalf of a class abound. For example, the District of Columbia's Consumer Protection Procedures Act authorizes "a person" to "act[] for the interests of itself * * * or the general public," and claims on behalf of the general public are referred to as "representative actions." D.C. Code § 28-3905(k)(1) (2001). California likewise has made ex-

[9] *See*, *e.g.*, Ranlett Decl. Ex. 3 ("We have already started the process of initiating dozens of arbitrations on behalf of our clients, any one of which could stop this merger. We have a team in place with the resources to bring thousands more."); Reuters report, *supra* (reporting that Mr. Bursor had already recruited 750 AT&T Mobility customers to file arbitration proceedings).

tensive use of "representative actions" in which an individual plaintiff represents the interests of persons beyond the plaintiff himself or herself. As the California Supreme Court has explained, "[i]n a 'representative action,' the plaintiff seeks recovery on behalf of other persons. There are two forms of representative actions: those that are brought as class actions and those that are not." *Arias v. Super. Ct.*, 209 P.3d 923, 927 n.2 (Cal. 2009). The latter type of representative action, for example, is available to individual plaintiffs under California's Private Attorneys General Act. *Id.* at 931-32. And before California's Unfair Competition Law was amended in 2004, that law authorized a person "to bring an action 'acting for the interests of itself, its members or the general public'" (*id.* at 930); thus, "[b]efore 2004, any person could assert representative claims under the unfair competition law to obtain restitution or injunctive relief * * *. Such claims did not have to be brought as a class action." *Id.* at 927.

Similarly, the purpose of injunctive remedies under the Clayton Act is "not merely to provide private relief." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Defendants' demands here are no different from the types of "non-class representative actions" that are common in many areas of the law.

Moreover, the arbitration clause does not simply prohibit "representative or class proceedings"; it bars an arbitrator from presiding over "***any form*** of a representative or class proceeding." Compl. Ex. A § 2.2(6) (emphasis added). The Supreme Court has explained that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31 (2004) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting in turn WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)). The Court accordingly has held that "[t]he plain language" of a contractual limitation of liability employing the modifier "any" indicates "an intent to extend the lia-

bility limitation broadly—to '*any* servant, agent or other person (including *any* independent contractor)' whose services contribute to performing the contract" and that "[t]here is no reason to contravene the clause's obvious meaning." *Id.* at 31-32 (emphasis in original); *see also Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an expansive meaning * * *") (internal quotation marks omitted); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (there is no "more all-encompassing phrase than 'any'"); *HUD v. Rucker*, 535 U.S. 125, 130-31 (2002); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974).

Because the demands share the key characteristics of class or representative actions, there can be no doubt that they violate Section 2.2(6)'s "expansive," all-encompassing prohibition of "any" form of class or representative actions.

3. The Demands Are Beyond The Arbitrators' Authority Because They Seek Only Non-Individualized Injunctive Relief.

Section 2.2(6) reinforces its prohibition of representative actions and class actions by specifically barring demands for injunctive relief that are the functional equivalent of those types of actions—because they necessarily would affect the rights of parties other than the claimant who filed the demand. In particular, the provision specifies that an arbitration claimant may request an injunction "***only*** in favor of the individual party seeking relief and ***only*** to the extent necessary to provide relief warranted by that party's individual claim." Compl. Ex. A § 2.2(6) (emphasis added; capitalization removed). That is, the claims must be "individual" in nature, and the relief requested must affect "only" the individual claimant himself or herself—***not other people***.

Defendants' demands violate this requirement: They do not assert any individual claims, and they do not seek any relief—injunctive or otherwise—that would affect only the particular

claimant initiating the arbitration. For example, no Defendant seeks damages for any injury that the merger allegedly would cause to him or her. Nor does any Defendant seek an individual injunction that would afford relief only to him or her, such as one requiring AT&T to preserve his or her rate plan for some period following the merger.

The scope of the relief that Defendants do seek is breathtaking: They each request an injunction flatly prohibiting the merger or, alternatively, imposing global restrictions on it. The broad array of individuals and groups that would be affected by Defendants' claims—virtually all persons in the United States who use wireless devices—demonstrates that Defendants are *not* requesting injunctive relief "only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." To the contrary, if these arbitrations were permitted to proceed, and just one claimant were to prevail, all of the millions of individuals and entities with an interest in the consummation of the merger—pro or con—would have their rights determined by the injunctive relief sought by that single person.

Such a demand is far beyond the scope of ATTM's arbitration agreement. Indeed, another federal court interpreting the same language in an earlier version of ATTM's arbitration provision already has so held. *See Riensche v. Cingular Wireless LLC*, 2006 WL 3827477 (W.D. Wash. Dec. 27, 2006). As that court explained, this language means that, in the event that ATTM were found to have "violated the rights of an ***individual*** consumer," an arbitrator "would be barred from enjoining [ATTM] from continuing the violative practice as to ***other*** consumers." *Id.* at *13 (emphasis added).[10]

[10] The court in *Riensche* went on to hold that the arbitration provision was unenforceable under Washington law because it required customers to pursue disputes on an individual basis. *Id.* That aspect of the court's decision is no longer good law in light of the Supreme Court's decision in *Concepcion*. *See In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011).

This interpretation of the prohibition against demands asserting class-like injunction claims serves at least two critical purposes: It protects the rights of third parties and it ensures that ATTM will not be subjected to inconsistent obligations.

With respect to the former, it is well established that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt Info. Scis.* 489 U.S. at 479); *see also AT&T Techs.,* 475 U.S. at 648 ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (internal quotation marks omitted). For this reason, "[a]n arbitration panel may not determine the rights or obligations of non-parties to the arbitration." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003); *see also Orion Shipping & Trading Co. v. E. States Petroleum Corp.,* 312 F.2d 299, 300-01 (2d Cir. 1963) ("[T]he arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding * * *. [A] decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not been submitted to him is not within the province of the arbitrator himself but only of the court."). Thus, as the Supreme Court recently reiterated, an arbitrator "'has no general charter to administer justice for a community which transcends the parties' but rather is 'part of a system of self-government created by and confined to the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1774 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

Here, the broad injunctive relief sought by Defendants would affect the myriad third parties that never have consented to arbitrate under ATTM's arbitration clause. As a result, if an arbitrator were to award such relief, "[t]he arbitrator's award no longer [would] bind just the par-

ties to a single arbitration agreement," but effectively would "adjudicate[] the rights of absent parties as well." *Id.* at 1776. That is wholly incompatible with not only ATTM's arbitration agreement but the fundamental nature of arbitration itself. As the Supreme Court recently pointed out, "it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied." *Concepcion*, 131 S. Ct. at 1751-52. That is especially true here, where—because the third parties have not entered into arbitration agreements with Defendants—the arbitrator has no ability to implement procedures to protect their due process rights.

These considerations confirm that the limitation on injunctive relief in the arbitration agreement between Defendants and ATTM means what it says—that a claimant may pursue individualized relief, but may not seek a broad injunction that necessarily would affect the interests of non-parties.

In addition, this interpretation serves to protect ATTM against inconsistent orders arising out of separate arbitrations. For example, one customer might file a demand alleging inadequate service and seek as relief configuration of ATTM's network in a manner that is best for him or her, while a second customer might file a demand making the same allegation but seeking a different network configuration. In the absence of Section 2.2(6)'s limitation of the scope of arbitration to individualized injunctive relief, the arbitration panels in the two cases could each award the relief sought, leaving ATTM with no way to reconcile its inconsistent obligations.[11] By permitting only individualized relief, the arbitration agreement avoids that result.

[11] ATTM could not consolidate the two arbitrations without the claimants' consent. *See* Section 2.2(6). Because of the limited scope of judicial review of arbitration awards, there is no reason to believe that a court reviewing the arbitration awards could provide relief from the inconsistent obligations.

4. Defendants' Arguments Are Meritless.

Before the AAA, Defendants have advanced two arguments in support of their plan to ask multiple arbitrators to do what (to our knowledge) no court has ever done—enjoin a merger at the behest of a customer of one of the parties to the merger. Both lack any support in law or logic.

First, 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.

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.

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 th[e] party's individual claim." *Id.* 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. *Riensche*, 2006 WL 3827477, at *13.

Defendants' view that this sentence does not limit the demands permissible under the agreement would render the language entirely meaningless: If all of the injunctive relief available in court were also available in arbitration under ATTM's agreement, there would be no need for the sentence restricting the injunctive relief that an arbitrator may grant. That would violate the basic principle of contract interpretation that every provision in a contract exists for some

purpose, and is not mere surplusage. *See, e.g., J.A. Apparel Corp. v. Abboud*, 568 F.3d 390, 405 (2d Cir. 2009) ("the rule against surplusage" provides "that a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect") (quoting *Corhill Corp. v. S.D. Plants, Inc.*, 176 N.E. 2d 37 (N.Y. 1961)); *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) ("an interpretation that gives a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect").

Moreover, the reason for the sentence's inclusion is clear: It confirms that a party may not circumvent the prohibition against class and representative actions by instituting an "individual" action seeking broad injunctive relief. Otherwise, a single claimant could obtain class-wide relief by seeking an injunction generally barring ATTM from engaging in a particular practice, or requiring it to provide specified benefits to all customers. That would allow institution of any class or representative action as long as the claimant does not seek damages, and render the clause's prohibition on class and representative actions largely meaningless.

Second, Defendants have asserted that the limitations contained in Section 2.2(6) should be ignored, because Section 2.1 of the agreement, which is titled "Summary," states that "[a]rbitrators can award the same damages and relief that a court can award." Compl. Ex. A § 2.1. But that prefatory language describes arbitration generally, not the particular arbitration procedure specified in the agreement.

The Summary begins by stating that most customer concerns can be resolved by the customer-service department and then states that disputes that cannot be resolved by that department will be resolved "through binding arbitration or small claims court instead of in courts of general jurisdiction." *Id.* The Summary then explains what arbitration is:

> Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award.

Id. Only then does the Summary provide a description, in four sentences, of how arbitration will proceed "under this Agreement." *Id.* That, as a general proposition, arbitrators "can" award the same relief as a court obviously does not mean that ***the ATTM agreement*** places no limitations on an arbitrator's authority. To the contrary, the summary notes ***in the very next sentence*** that an arbitrator may not order class-wide or representative relief.

Even if there were in fact a conflict between Section 2.1 and Section 2.2(6), however, the latter would govern. It is a settled principle of contract interpretation that specific language controls over general language. *See County of Suffolk v. Alcorn*, 266 F.3d 131 (2d Cir. 2001) ("It is axiomatic that courts construing contracts must give specific terms and exact terms greater weight than general language.") (internal quotation marks and ellipsis omitted); *Aramony v. United Way of Am.*, 254 F.3d 403, 413-14 (2d Cir. 2011) ("Even where there is no true conflict between two provisions, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate.") (internal quotation marks omitted); RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981) ("specific terms and exact terms are given greater weight than general language"). That principle has been applied to hold that a substantive provision of an arbitration agreement controls over its preamble. *Freedman* v. *Comcast Corp.*, 988 A.2d 68, 194 (Md. Ct. Spec. App. 2010). The same conclusion would be warranted here.

* * *

In short, given the language of ATTM's agreement, ATTM is highly likely to succeed on the merits of its claim that Defendants have violated the FAA and breached their contracts by filing demands seeking class-like injunctive relief.

II. ATTM WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

The harm that ATTM would suffer in the absence of a preliminary injunction would be irreparable. To begin with, as a matter of law, "[b]eing forced to arbitrate a claim one did not agree to arbitrate constitutes an irreparable harm for which there is no adequate remedy at law." *UBS Secs., LLC v. Voegeli*, 405 F. App'x 550, 552 (2d Cir. 2011) (citing *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 129 (2d Cir. 2003) (per curiam)); *see also McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997) ("If a court has concluded that a dispute is *non*-arbitrable, prior cases uniformly hold that the party urging arbitration may be enjoined from pursuing what would now be a futile arbitration, even if the threatened irreparable injury to the other party is only the cost of defending the arbitration and having the court set aside any unfavorable award."); *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 515 (3d Cir. 1990) (finding it "obvious that the harm to a party would be per se irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator's jurisdiction"), *overruled on other grounds by Howsam*, 537 U.S. at 85.

That harm is multiplied exponentially here because ATTM will be forced to arbitrate the same claim in at least 24 separate, entirely duplicative, hearings—all of which must, under the AAA's rulings, take place by early November at the latest.[12] Ranlett Decl. ¶ 20 & Ex. 36; *see also id.* Ex. 37 (Rules E-7 to E-9). And if Bursor begins to pay the arbitration fees for the other

[12] Under the arbitration rules advocated by Defendants and ruled applicable by the AAA, decisions must be issued within 44 days of the appointment of the arbitrators, which will take place as early as September 26, 2011. *See* page 11, *supra*.

953 pending demands, the number of duplicative hearings within the next several months would increase nearly 4,000%.

ATTM also would be forced to participate in these carbon-copy proceedings at the same time that it is engaged in litigation with the Department of Justice and in a proceeding before the FCC addressing the very same issues. The same witnesses would be needed in all of these proceedings, forcing ATTM to divert resources and attention away from the government proceedings. That is another, separate form of irreparable injury.

Moreover, as these arbitration proceedings are currently configured, ATTM will be forced to spend considerable time and effort to distill its evidentiary presentation regarding the numerous antitrust issues raised by the demands—antitrust issues that will be the subject of intensive review by the federal district court hearing the DOJ action and as to which the FCC has received thousands of pages of submissions and devoted months of study—into a day (or perhaps a three-day) presentation.[13] The myriad, complex issues that have been raised in the FCC proceeding or the DOJ litigation, many of which are duplicated in the arbitration demands, include (but are not limited to):

- The scope of the relevant "geographic market" for purposes of the antitrust analysis. Should the analysis focus on local markets (and if so, which ones), should larger regional or nationwide areas be examined as well, or both? *E.g.*, Baker Decl. Ex. 133 at 16-27; *id.* Ex. 32 at 105.

- The definition of the relevant wireless service "product markets" that should be analyzed for purposes of Defendants' claims. For example, is there a single market for mobile telephone and mobile broadband services, or are these separate markets? Is there a separate relevant market for business and governmental wireless customers? *E.g.*, *id*. Ex. 133 at 10-16; *id.* Ex. 32 at 115-25.

[13] Under the currently applicable rules, the hearing must be completed in one day with the arbitrator empowered to grant extensions, subject to strict overall time limits on the proceeding. *See* page 10, *supra*.

- The competitive dynamics in each local market, including the number of competitors, the wireless spectrum, equipment, technology, and intellectual property available to those competitors, the competitive importance of AT&T, T-Mobile, and the host of other competitors in those markets, and the other firms capable of entry. *E.g.*, *id*. Ex. 133 at 47-76; *id.* Ex. 32 at 126-33 & App. A-C; Ranlett Decl. Ex. 5 at 76-86, 96-113.

- The potential "unilateral" competitive effects of the merger in the relevant geographic and product markets. For example, will the merger increase the combined company's ability to raise prices, or would such an attempt to raise prices be constrained by the presence of other competitors remaining in the marketplace, by new entrants, or by significant efficiencies resulting from the merger? *E.g.*, Baker Decl. Ex. 32 at 133-37; *id*. Ex. 133 at 28-30; Ranlett Decl. Ex. 5 at 54-56.

- The likelihood of "coordinated" anticompetitive effects of the merger in the relevant geographic and product markets. Would the merger create a market dynamic in which major competitors would be likely to engage in tacit collusion to raise prices, without risking loss of market share? *E.g.*, Baker Decl. Ex. 32 at 137-43; *id*. Ex. 133 at 30-34; Ranlett Decl. Ex. 5 at 56-60.

- The wireless spectrum capacity constraints currently faced by the merging parties, including a detailed technical assessment of the characteristics of the various types of spectrum, the spectrum holdings of all of the competitors in the wireless marketplace, and the compatibility of these diverse holdings with each other and with the expanded roll out of next generation LTE wireless service that the merging parties believe that the transaction will enable them to achieve. *E.g.*, Baker Decl. Ex. 32 at 19-43, 179-91; *id*. Ex. 133 at 55-76, 83-98; Ranlett Decl. Ex. 5 at 113-24, 160-74.

- The likelihood that the merger will alleviate such capacity constraints, lower the cost of wireless services, increase the volume and quality of these services available to consumers, or otherwise produce synergies and benefits to wireless consumers. *E.g.*, Baker Decl. Ex. 32 at 43-63; *id*. Ex. 133 at 98-118; Ranlett Decl. Ex. 5 at 174-93.

- The possibility of unilateral or coordinated effects in numerous ancillary markets, such as, among others, roaming services and wireless transmission ("backhaul"); markets for wireless handsets and applications; and markets for wireless transmission infrastructure. *E.g.*, Baker Decl. Ex. 32 at 143-79, 191-200; *id*. Ex. 133 at 29-47; Ranlett Decl. Ex. 5 at 60-76.

And these issues just scratch the surface of the questions an arbitrator will be required to consider. The experience before the FCC is telling: The production and evaluation of this record has required—and will continue to require—an intensive commitment of resources. As an example, on July 13, 2011 the FCC hosted a workshop of economists to discuss issues presented by the merger. That workshop was attended by 41 FCC and DOJ staff members, 22 rep-

resentatives of the merging parties, and 21 representatives of Sprint-Nextel, a principal opponent of the merger. Baker Decl. ¶ 9 & Ex. 7.

If Defendants are permitted to pursue these *ultra vires* arbitration proceedings, each arbitrator would be faced with the same extraordinary range of issues and the same massive body of evidence that the FCC and/or the federal district court hearing the DOJ case must evaluate, and ATTM would be put to the impossible task of presenting this monumental case on an expedited basis many times over. The cost to ATTM would be excessive and unwarranted; the distraction of key employees and advisors from the ongoing judicial and regulatory review would be highly prejudicial; and the outcomes of the proceedings potentially may conflict with each other and with the resolution of the ongoing state and federal regulatory efforts.

Finally, the rules currently being applied to this proceeding require each arbitrator to issue an award within 14 days of the hearing. This expedited schedule will harm ATTM by depriving it of its right to reasoned decisionmaking. It is simply impossible for anyone to digest and decide these numerous, complex issues within such a short period of time. That is yet another form of irreparable injury to ATTM.

III. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN ATTM'S FAVOR

In stark contrast to the irreparable injury that ATTM would suffer (*see* Section II, *supra*), Defendants would suffer no harm from a preliminary injunction. To begin with, the DOJ's lawsuit invokes the same statutory provision as Defendants' demands and seeks the same ultimate relief as Defendants. The FCC also is assessing the competitive impact of the merger, among other things, in connection with its review. Defendants cannot claim prejudice from a delay in the arbitrations—to enable this Court to determine whether the arbitrations violate the parties' agreements—when these ongoing government proceedings could result in the precise relief that Defendants seek.

Judge Kaplan of the Southern District of New York recently reached this conclusion in denying the Bursor firm's request for a preliminary injunction requiring the FCC to release certain confidential information. Ranlett Decl. Ex. 39 (Argument Transcript, *Bursor & Fisher, P.A. v. FCC* (S.D.N.Y. Sept. 8, 2011)). In holding that the Bursor firm had failed to show that it faced "a clear threat of imminent irreparable injury" if it did not receive the requested information (*id.* at 30), Judge Kaplan noted:

> At this moment it doesn't appear that this proposed transaction is in imminent danger of going anywhere in a hurry. The FCC has not cleared it. The Department of Justice has brought suit in the district court for the District of Columbia to enjoin it. * * * I simply bring to bear the common-sense proposition that the government didn't bring this case with the intention that they wouldn't move for a preliminary injunction and would just let the transaction close despite their objections. Obviously, they are going to move for relief unless they get what they regard as some satisfactory resolution.

Id. at 34.

More fundamentally, Defendants cannot demonstrate that they will suffer any prejudice as a result of a preliminary injunction, because their claims are not yet ripe for adjudication in any event—no matter what the forum. As the U.S. Court of Appeals for the Seventh Circuit has explained, any private litigation seeking to enjoin a merger is premature "until all required state and federal approvals have been obtained—for the agencies might insist on changes that would substantially alter the merger's competitive effects." *S. Austin Coal. Cmty. Council*, 191 F.3d at 843. There, the court upheld the dismissal on ripeness grounds of a challenge to a telecommunications merger under Section 7 of the Clayton Act—the very claim asserted in Defendants' arbitration demands—because the FCC had not yet issued the required approval. A preliminary injunction that delays pursuit of claims that are not ripe cannot cause any hardship to Defendants, much less the degree of hardship that would outweigh the harms to ATTM if the arbitrations were permitted to go forward. And the absence of hardship to Defendants is especially evident

because, to our knowledge, no court ever has enjoined a merger when the injunction was sought by customers of one of the parties to the merger.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING AN INJUNCTION.

The public interest also weighs heavily in favor of issuing a preliminary injunction. To begin with, there is a strong public interest in ensuring that regulatory agencies and courts hearing government actions are able to consider the merger without the potential for being preempted by the decisions of one of dozens—potentially hundreds or even thousands—of arbitrators. Under the rules held applicable by the AAA, however, these arbitrations would conclude long before Judge Huvelle, who is presiding over the DOJ's lawsuit in the United States District Court for the District of Columbia, could issue her ruling. It is starkly contrary to the public interest for a single arbitrator hearing a private action to be able to preempt a federal judge's ruling.

Similarly, the FCC plays an enormously significant role in reviewing the merger. The FCC's work—which is taking place in an open, transparent way—is aimed at ensuring that the public interest is served. And, as discussed above (*see* Part II, *supra*), the FCC is conducting extensive proceedings and reviewing an enormous amount of evidence. Just as—in the context of private litigation—no "court should try to beat the FCC to the punch" (*S. Austin Coal. Cmty. Council*, 191 F.3d at 844), Defendants should not be permitted to do so through arbitration.

Additionally, a preliminary injunction would serve the public interest by ensuring that the thousands of affected third parties—including states—that have been participating in public proceedings before the FCC do not have their rights and interests decided in a private action in their absence, and without their consent, absent a determination by this Court that the arbitration agreement requires that result. Likewise, an injunction would protect the interests of the millions of ATTM and T-Mobile subscribers, as well as other third parties, who support the merger and

who would be deprived of the benefits of the merger if it were enjoined in an arbitration in which they have no ability to participate.

CONCLUSION

The Court should issue a preliminary injunction prohibiting Defendants from arbitrating the claims set forth in their arbitration demands.

Dated: September 12, 2011

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EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AT&T MOBILITY LLC,

Plaintiff,

-against-

RICHARD GONNELLO, JUAN MONTEVERDE, LEAF O'NEAL, JARED POPE and BRYAN RODRIQUEZ,

Defendants.

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11 Civ. 5636 (PKC)

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge:

Defendants are five customers of AT&T Mobility LLC ("ATTM") who have demanded arbitration with ATTM from the American Arbitration Association ("AAA") pursuant to their customer agreements. The sole relief sought in the 227-page demand is injunctive relief pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26. Specifically, defendants seek an injunction against the announced merger between ATTM and T-Mobile USA, Inc. ("T-Mobile") or, in the alternative, the imposition of certain business divestitures and other conditions on the closing of the merger. Nine hundred and seventy-two other customers of ATTM, also represented jointly by the law firms of Bursor & Fisher, P.A., Faruqi & Faruqi LLP, and Thornton, Davis & Fein, P.A., have filed similar demands with the AAA. Twenty-four of the 977 arbitrations, including the five filed by the defendants, are currently being administered by the AAA.

ATTM has filed suit in this district and in seven other districts seeking to enjoin the twenty-four arbitrations. Now before this Court are two motions. Defendants move to compel the arbitrations as to the five defendants and dismiss ATTM's complaint. Plaintiff

moves for a preliminary injunction to enjoin the five arbitrations. For the reasons set forth below, defendants' motion to compel arbitration is denied. The Court need not reach plaintiff's motion for a preliminary injunction at this juncture. The Court will retain jurisdiction in the event there are further applications pending the closing or abandonment of the merger.

BACKGROUND

On March 21, 2011, AT&T Inc., ATTM's parent company, and Deutsche Telekom AG announced an agreement pursuant to which AT&T Inc. will acquire Deutsche Telekom's subsidiary T-Mobile USA and merge it with ATTM. (Decl. of Joseph Baker ("Baker Decl.") ¶¶ 3-4 & Exs. 1-2.) The transaction is valued at approximately $39 billion. (Id.)

There are several regulatory and judicial proceedings relating to the announced merger. On August 31, 2011, the Department of Justice ("DOJ") commenced an action in the United States District Court for the District of Columbia seeking a permanent injunction barring completion of the announced merger, alleging that it violates section 7 of the Clayton Act, 15 U.S.C. § 18. United States v. AT&T Inc., No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011), 2011 WL 3823252. The Federal Communications Commission ("FCC") is also reviewing the merger. In connection with the FCC's review, the merging entities have submitted hundreds of pages of briefs and the affidavits of nineteen witnesses. (Baker Decl. ¶ 8 & Ex. 6.) At the request of the FCC, the merging entities have also submitted approximately 1.4 million pages related to wireless telephone service across the country for the last three years. (Decl. of Michael Van Ardsall ¶ 4.) More than 400 organizations have filed papers with the FCC in support of the announced merger, while more than 130 organizations have filed papers in opposition. (Baker Decl. ¶ 8 & Ex. 6.) Finally, the merger is being reviewed by a number of State Attorneys General and State Public Utilities Commissions, including the public utility commissions of

Arizona, California, Hawaii, Louisiana, and West Virginia. (Id. ¶¶ 17-22 & Exs. 15-20.) The commissions of Arizona, Louisiana, and West Virginia have already approved the merger. (Id. ¶¶ 17, 21, 22 & Exs. 15, 19, 20.)

As noted, defendants are five ATTM customers who have commenced arbitration proceedings pursuant to Section 2.2 of their Wireless Customer Agreement with ATTM. The demand for arbitration is 388 paragraphs in length and contains 641 footnotes. Little or nothing is said about the customer demanding arbitration beyond the allegation that he or she is a purchaser of goods and services from ATTM. (Decl. of Scott A. Bursor Ex. 2 ("Demand"), ¶ 5.) The demand asserts that the "proposed horizontal merger would greatly increase concentration in the wireless industry and harm competition in national and local markets." (Id. at 18.) It asserts that the merger would violate section 7 of the Clayton Act, 15 U.S.C. § 18. It argues that the merger would have anticompetitive effects on corporate and government accounts but does not assert that the claimant has any ownership interest in such accounts. (Id. ¶ 52.) It further argues that ATTM's "post-transaction spectrum holdings would exceed the FCC's spectrum screen threshold in over one-quarter of local markets." (Id. at 104.) The arbitrations are scheduled to be conducted on an expedited basis. The customers demanding arbitration have successfully opposed consolidation with claims of other customers. Thus, each individual arbitrator, for example, will be called upon to correctly apply and interpret analytical tools such as the Herfindahl-Hirschman Index ("HHI") (id. ¶ 151), and make his or her individual assessment of the competitive impact of the merger.

As relief, the demand seeks both a declaration that the announced merger violates section 7 of the Clayton Act and an injunction against the merger. Alternatively, it seeks a wide range of conditions and limitations on the merging entities, including but not limited to the

following: (1) divestiture of "all T-Mobile spectrum licenses for any local market where the post-merger HHI would increase by 100 points or more and would exceed 2500" (id. at 206); (2) imposition of "fair access rates" (id.); (3) a prohibition on exclusive access to any model of handset (id. at 208-09); (4) a requirement that ATTM offer data roaming at "cost-based rates and without anticompetitive restrictions" (id. at 210); (5) a requirement that ATTM extend by five years "all interconnection agreements," "all special access agreements," and "all IP interconnection agreements" (id. at 212-15); and (6) a requirement that ATTM make significant spectrum divestitures to existing wireless carriers (id. at 217). The individual customers seek no money damages and no relief specific to their customer agreements with ATTM.

ATTM moves for a preliminary injunction to enjoin the arbitrations, arguing that defendants' demands for arbitration fall outside the scope of the arbitration agreement between ATTM and its customers. Defendants move to compel the arbitrations, asserting that the disputes are properly within the scope of the parties' arbitration agreement. T-Mobile, the Communications Workers of America, and the States of Utah, Alabama, Georgia, Kentucky, Louisiana, New Mexico, North Dakota, Oklahoma, and West Virginia have sought and been granted leave to appear as amici curiae. All amici support ATTM's motion for a preliminary injunction.

DISCUSSION

I. The Scope of the Parties' Arbitration Agreement

Defendants' motion asserts that their demand for arbitration falls squarely within the Wireless Customer Agreement (the "Agreement"). The arbitration provision contains broad language that "all disputes and claims" are subject to arbitration. (Agreement § 2.2(1).) The provision itself states that it is "intended to be broadly interpreted." (Id.) The arbitration

provision, however, is qualified by two important limitations. First, it provides that the customer and ATTM may only bring claims against the other in their "individual capacit[ies], and not as a plaintiff or class member in any purported class or representative proceeding." (Id. § 2.2(6).)[1] Second, it provides that "[t]he arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." (Id.)

The parties do not dispute that the issue of the scope of the arbitration agreement is a matter for this Court to decide. The parties do, however, dispute whether defendants' demands for arbitration, which seek to enjoin ATTM's proposed acquisition of T-Mobile, or, in the alternative, to impose an extensive list of conditions on the announced merger, fall within the scope of the parties' arbitration agreement.

"The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (alteration and emphasis in original) (quoting AT&T Tech. Inc., v. Commc'ns Workers, 475 U.S. 643, 649 (1986)). In resolving this issue, the Court is mindful of the "strong federal policy favoring arbitration as an alternative means of dispute resolution." JLM Indus. v. Stolt-Nielsen SA, 387 F.3d 163, 171 (2d Cir. 2004) (quoting Hartford Accident &

[1] On September 23, 2011, Judge Ryskamp of the United States District Court for the Southern District of Florida granted ATTM's motion for a preliminary injunction against the arbitration demands of eight ATTM wireless customers. See Order, AT&T Mobility LLC v. Bushman, No. 9:11-cv-80992-KLR (S.D. Fla. Sept. 23, 2011). Judge Ryskamp held that ATTM was highly likely to succeed on the merits of its claim that the defendant-customers breached the terms of their Wireless Customer Agreement by seeking "class-like injunctive relief." See id. at 4-5 (noting that the customers' arbitration demands "bear the hallmarks of a class action").

The Supreme Court upheld the validity of a clause both requiring that arbitration proceed on an individualized basis and prohibiting any form of class or representative action. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001)). As such, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Nevertheless, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Howsam, 537 U.S. at 83 (internal quotation marks omitted).

Defendants' demand for arbitration seek as its sole relief an injunction against the announced merger or, alternatively, a host of conditions on the merger—none of which are tailored to the individual claimant. An injunction of the announced merger or the imposition of conditions on the merger would necessarily affect the rights of all individuals and entities who have an interest, either in favor of or against, the consummation of the merger, including, among others, other ATTM customers, T-Mobile and its own wireless customers, labor unions, private businesses, and the public-at-large. Defendants do not seek any other, narrower relief—injunctive, monetary, or otherwise—that would affect only the individual claimant initiating the arbitration. Thus, there is nothing to arbitrate which is not foreclosed by the contractual limitation on the relief that may be awarded: "[t]he arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." (Agreement § 2.2(6).)

Defendants note that under the subheading of "Summary," Section 2.1 of the Agreement states that arbitrators "can award the same . . . relief that a court can." (Id. § 2.1.) However, this description of the arbitration process and how it operates does not supplant the specific limitations contained in Section 2.2 regarding the type of declaratory or injunctive relief

that may be awarded. Rather, Section 2.2—titled "Arbitration Agreement"—contains the aforementioned provisions limiting the type of declaratory or injunctive relief that an arbitrator may award to relief "only in favor of the individual party seeking relief." (Id. § 2.2(6).)

Defendants argue that an injunction against the merger may fairly and appropriately be viewed as "declaratory or injunctive relief" awarded "in favor of the individual party seeking relief." (Id.) But the natural reading of the entire phrase suggests otherwise. It is an important limitation on the power of the arbitrator. The parties withheld from the arbitrator the power to decide questions that would necessarily affect the rights of more than the parties to the dispute through the grant of declaratory or injunctive relief.

As the only relief sought by the individual defendants is relief that is foreclosed by the language of the arbitration provision, the demand for arbitration is beyond the scope of disputes that the parties have contractually agreed to arbitrate.

II. The Arbitrability of Claims for Injunctive Relief Under the Clayton Act

ATTM's complaint is brought under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., and the Agreement. ATTM seeks both a declaration that defendants' claims are not arbitrable and an injunction against the arbitrations. (Complaint ¶¶ 38-53.) Because of this Court's ruling on the scope of the arbitration clause, this Court need not reach the issue of whether an antitrust claim arising under section 7 of the Clayton Act is properly subject to arbitration. The United States Supreme Court spoke to the arbitrability of certain antitrust claims in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), holding that nothing contained in either the FAA or the Sherman Act expressly forbids the enforcement of a provision requiring arbitration of a claim for treble damages under section 1 of the Sherman Act. In so holding, however, the Court did not speak to the arbitrability of a claim for injunctive relief

premised upon a violation of section 7 of the Clayton Act. A merger may adversely affect, have little or no impact on, or be a pro-competitive force in a particular product or geographic market. At this juncture and in view of the Court's ruling on the scope of the arbitration provision, this Court need not decide whether arbitrators are competent to foreclose a merger that is potentially beneficial to the national or regional economy.

The Court also need not address whether the requirement of judicial confirmation of an arbitration award under the FAA is a ground for denying ATTM's request for an injunction. An eleventh hour ruling from an arbitrator purporting to award injunctive relief against the merger, which is then subject to expedited confirmation proceedings in district court, may well wreak havoc in the securities markets as investors attempt to gauge its outcome. Because of this Court's denial of the motion to compel arbitration, it is not necessary to reach the merits of ATTM's claim for injunctive relief. Plaintiff's motion for preliminary injunction is denied without prejudice to renewal. Defendants' motion to dismiss is denied for the same reasons that their motion to compel arbitration is denied.

CONCLUSION

For the reasons stated above, defendants' motion to compel arbitration and dismiss plaintiff ATTM's complaint (Docket #4) is DENIED. Accordingly, this Court need not address plaintiff's motion for a preliminary injunction (Docket #7). The Court will retain jurisdiction over the matter pending the closing or abandonment of the announced merger.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
October 7, 2011