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 11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN FRANCISCO DIVISION**

14
 15 **PATRICK HENDRICKS**, on behalf of himself
 and all others similarly situated,

16 **Plaintiff,**

17 vs.

18 **AT&T MOBILITY, LLC,**

19 **Defendant.**

Case No. CV 11-00409-CRB

**DEFENDANT AT&T MOBILITY LLC'S
 RESPONSE TO SUPPLEMENTAL
 BRIEF ADDRESSING JUDICIAL
 ESTOPPEL**

Date: October 21, 2011
 Time: 10:00 a.m.
 Courtroom 8
 Honorable Charles R. Breyer

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INTRODUCTION

Plaintiff Patrick Hendricks’s counsel recognizes that his gambit to exploit a settlement from AT&T Mobility LLC (“ATTM”) by filing over 1,000 arbitrations in the hope of finding one arbitrator willing to enjoin the AT&T/T-Mobile merger has thus far not succeeded: Every court to rule on the propriety of those arbitrations has held that they are impermissible. *See AT&T Mobility LLC v. Gonnello*, 2011 WL 4716617, at *4 (S.D.N.Y. Oct. 7, 2011); Decl. of Kevin Ranlett Exs. 2-3 (Order, *AT&T Mobility LLC v. Smith*, No. 2:11-cv-05157-LDD (E.D. Pa. Oct. 7, 2011); Order, *AT&T Mobility, LLC v. Bushman*, No. 9:11-cv-80922-KLR (S.D. Fla. Sept. 23, 2011)). In a last-ditch effort to salvage something from his counsel’s abusive efforts, Hendricks now contends that ATTM is judicially estopped from seeking to compel arbitration of his “claims seeking broad injunctive relief” on behalf of other consumers. Pl.’s Supp. Br. (Dkt. 51-1) at 1.

Hendricks’s invocation of judicial estoppel fails for multiple reasons. Most important, Hendricks cannot point to any inconsistency on ATTM’s part. He invokes *AT&T Mobility v. Gonnello*, contending that ATTM’s contention in that case that the arbitration agreement bars claims for injunctive relief on behalf of third parties is inconsistent with a reference in this case to the arbitrator’s ability to award “any form of individual relief that a court could award.” *Id.* at 2 (internal quotation marks omitted). But ATTM also has been arguing *in this case* that Hendricks **cannot** assert claims for public-injunctive relief in arbitration. In fact, whether the arbitration clause’s prohibition on claims for non-individualized injunctive relief is enforceable is one of the chief disputed issues in this case. *Compare* Pl.’s Mem. of Law in Opp. to Mot. to Compel Arb. (Dkt. No. 37) at 16-18 *with* ATTM Reply in Supp. of Mot. to Compel Arb. (Dkt. No. 42) at 13-15.

Hendricks also asserts that ATTM’s position in *Gonnello* that claims for non-individualized injunctive relief are “outside the scope” of ATTM’s arbitration provision cannot be squared with ATTM’s assertions here that Hendricks’s claims are “within the broad scope” of that provision. Pl.’s Supp. Br. at 2. He again is mistaken. In both *Gonnello* and this case, ATTM’s position has been the same: ATTM’s arbitration agreement requires parties to arbitrate “all disputes and claims between us”—but those disputes must be brought in compliance with the limitations set forth in the agreement, including its prohibition of non-individualized injunctive relief and class or

1 representative actions. Pl.’s Request for Judicial Notice Ex. 1 at 6-7; ATTM Reply in Supp. of
2 Mot. to Compel Arb. at 13-15. ATTM has never—in *Gonnello* or otherwise—contended that
3 claims for non-individualized injunctive relief are exempt from the arbitration clause and may be
4 brought in court. Yet that is the position that Hendricks seeks to estop ATTM from denying here.

5 Because Hendricks cannot identify any inconsistency between ATTM’s position in this
6 case and any other case, his invocation of the doctrine of judicial estoppel should be rejected.

7 ARGUMENT

8 Judicial estoppel is an “equitable doctrine invoked by a court at its discretion” to bar a
9 party from denying an earlier position asserted in the same or an earlier case. *New Hampshire v.*
10 *Maine*, 532 U.S. 742, 750 (2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).
11 The doctrine “is intended to protect the integrity of the judicial process by preventing a litigant
12 from playing fast and loose with the courts.” *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir.
13 2008) (quoting *Wagner v. Prof’l Eng’rs in Cal. Gov’t*, 354 F.3d 1036, 1044 (9th Cir. 2004)). As
14 this Court has explained, the party invoking “the extraordinary sanction of judicial estoppel” must
15 meet a “heavy burden” to show that the application is warranted. *Deppe v. United Airlines*, 2001
16 WL 902648, at *9 (N.D. Cal. July 31, 2001) (Breyer, J.).

17 The Ninth Circuit has identified four factors that bear on whether to find judicial estoppel:
18 (1) whether the two positions are “clearly inconsistent”; (2) whether the first position had been
19 “successfully advanced”; (3) whether withholding estoppel would confer “an unfair advantage” on
20 one party or “impose an unfair detriment” on the other; and (4) whether the earlier “position is
21 tantamount to a knowing misrepresentation to or even fraud on the court.” *Samson v. NAMA*
22 *Holdings, LLC*, 637 F.3d 915, 935 (9th Cir. 2011) (internal quotation marks omitted).

23 Hendricks’s invocation of judicial estoppel fails at the threshold because he has not shown
24 that ATTM’s position in this case is “clearly inconsistent” with its position in any other case. *Id.*
25 (internal quotation marks omitted). The only prior case he identifies is *AT&T Mobility LLC v.*
26 *Gonnello*, No. 1:11-cv-05636-PKC (S.D.N.Y.), which is identical to an action before this Court.
27 See *AT&T Mobility LLC v. Bernardi*, No. 3:11-cv-03992-CRB (N.D. Cal.). In *Gonnello*, ATTM
28 contended—and Judge Castel held—that “the only relief sought by the individual defendants” in

1 that case “is relief that is foreclosed by the language of the arbitration provision,” making “the
2 demand for arbitration * * * beyond the scope of disputes that the parties have contractually agreed
3 to arbitrate.” *Gonnello*, 2011 WL 4716617, at *3-*4.

4 Hendricks observes that ATTM contended in *Gonnello* that Section 2.2(6) of the arbitration
5 provision bars claimants from seeking to arbitrate claims for injunctive relief on behalf of others.
6 Pl.’s Supp. Br. at 2. He insists that this argument cannot be squared with ATTM’s position in this
7 case that “[t]he arbitrator may award the consumer any form of individual relief (including * * *
8 injunctions) that a court could award.” *Id.* (quoting Mot. to Compel Arb. (Dkt. No. 35) at 4).

9 There is no inconsistency; Hendricks has quoted language from ATTM’s motion to compel
10 arbitration in this case out of context. In that passage, ATTM was simply summarizing features of
11 the arbitration agreement in 11 short bullet points, and used the phrase “individual relief” as a
12 shorthand reference to an injunction benefiting only an individual consumer. *See* Mot. to Compel
13 Arb. at 4-5. ATTM’s position in *Gonnello* is that its arbitration agreement permits the arbitrator to
14 award a claimant injunctive relief that would benefit that individual claimant alone—but not relief
15 that would affect other persons or entities who are not parties to the arbitration.

16 And ATTM’s reply brief in support of its motion to compel arbitration in this case confirms
17 that it has taken exactly that position in this case:

18 Hendricks concedes that his agreement permits him to obtain an
19 injunction that would benefit him individually; his complaint is
20 that it bars him from seeking an injunction “with respect to anyone
21 other than [himself] alone.” Opp. 17. But to the extent that
22 California law forbids enforcing arbitration agreements when the
23 plaintiff seeks a so-called “public injunction” under the CLRA or
24 UCL, it is preempted by the FAA. * * *

25 * * *

26 * * * If, as the Supreme Court declared in *Concepcion*, California
27 cannot require that parties to arbitration agreements agree to class
28 procedures in order to maximize enforcement of state consumer-
protection laws, it follows that California cannot preclude such
parties from agreeing to limit the injunctive relief available in
arbitrable disputes to that necessary for vindication of the
individual’s own claims.

ATTM Reply in Supp. of Mot. to Compel Arb. (Dkt. No. 42) at 13-14; *see also id.* at 13 n.8, 14-15.

Hendricks also contrasts ATTM’s contention in *Gonnello* that arbitration “demands [that]

1 are precluded by Section 2.2(6)” of the arbitration agreement “therefore fall outside the scope of
2 the[] arbitration agreement[]” with ATTM’s statement in this case that Hendricks’s claims “fall
3 within the broad” and “all-encompassing” “scope” of his arbitration agreement. Pl.’s Supp. Br. at
4 2 (internal quotation marks omitted). Once again, there is no inconsistency.

5 In *Gonnello*, ATTM did not say that claims for non-individualized injunctive relief must
6 be brought in court—the position that Hendricks now seeks to have ATTM estopped from
7 denying. Instead, seeking to halt arbitrations already commenced in which customers were
8 pursuing claims for broad non-individualized injunctive relief, ATTM argued, and the court
9 agreed, that such claims were forbidden by the arbitration agreement and thus could not be
10 asserted in arbitration. *See Gonnello*, 2011 WL 4716617, at *3-*4.

11 ATTM is taking the same position here: As the passage quoted above makes clear,
12 ATTM is arguing that Hendricks too is forbidden from bringing claims for public injunctive
13 relief in arbitration. Indeed, Hendricks relies on the fact that such claims are forbidden when he
14 argues (incorrectly) that his arbitration agreement is unenforceable. By asserting that
15 Hendricks’s claims are “within the broad scope of his arbitration agreement” (Mot. to Compel
16 Arb. at 7), ATTM is merely explaining that Hendricks must bring his claims in conformity with
17 his arbitration agreement, including its restrictions on the types of claims for injunctive relief that
18 may be asserted in arbitration.

19 Because ATTM’s positions in this case and *Gonnello* are not “clearly inconsistent,” there
20 is no basis for imposing judicial estoppel. *Samson*, 637 F.3d at 935 (internal quotation marks
21 omitted).

22 Moreover, even if ATTM’s positions were inconsistent, ATTM would derive no “unfair
23 advantage,” and Hendricks would not suffer “an unfair detriment.” *Id.* (internal quotation marks
24 omitted). Nothing ATTM said in *Gonnello* could undermine Hendricks’s ability to obtain fair
25 consideration of his arguments *in this case*. Nor was Hendricks’s counsel disadvantaged in
26 *Gonnello*. In that case, Hendricks’s counsel drew the court’s attention to the ATTM filings in this
27 case that he says are inconsistent. Defs.’ Reply in Supp. of Mot. to Compel Arb. at 5 & n.2,
28 *AT&T Mobility LLC v. Gonnello*, No. 1:11-cv-05636-PKC (S.D.N.Y. Sept. 30, 2011) (attached

1 as Exhibit 4 to the declaration of Kevin Ranlett) (stating that “AT&T itself has described the
2 scope of this arbitration clause as ‘all-encompassing,’” and citing ATTM’s motion to compel
3 arbitration in this case).

4 Finally, Hendricks has fallen far short of showing that ATTM’s positions in this case and
5 *Gonnello* are “tantamount to a knowing misrepresentation to or even fraud on the court.” *Id.*
6 (internal quotation marks omitted); *see also Johnson*, 141 F.3d at 1369 (“[I]f a claimant’s
7 particular representations are so inconsistent that they amount to an affront to the court, judicial
8 estoppel may apply.”). In both this case and *Gonnello*, ATTM has made clear that its arbitration
9 provision bars claimants from pursuing claims for injunctive relief on behalf of others—whether
10 in arbitration or in court. In fact, in *Gonnello* ATTM specifically explained that courts that have
11 granted ATTM’s motions to compel arbitration have “declar[ed] that arbitration must proceed on
12 an individual, rather than class-wide, basis in accordance with the arbitration provision.” ATTM
13 Opp. to Mot. to Compel. Arb. at 15, *AT&T Mobility LLC v. Gonnello*, No. 1:11-cv-05636-PKC
14 (S.D.N.Y. Sept. 26, 2011) (attached as Exhibit 5 to the declaration of Kevin Ranlett). And as
15 noted above, Hendricks’s counsel submitted ATTM’s purportedly inconsistent filings in this case
16 to the court in *Gonnello*. Because ATTM did not mislead either this Court or the Southern
17 District of New York—to the contrary, its position has been crystal clear in both cases—
18 Hendricks’s request to apply judicial estoppel should be denied.

19 CONCLUSION

20 Hendricks’s attempt to invoke judicial estoppel should be rejected, and ATTM’s motion to
21 compel arbitration and stay litigation should be granted.

22
23 Dated: October 19, 2011

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