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Attorneys for Defendant AT&T Mobility LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

v.

AT&T MOBILITY LLC,

Defendant.

Case No. CV 11-00409-CRB

DECLARATION OF KEVIN RANLETT IN SUPPORT OF RESPONSE TO OBJECTION TO REPLY EVIDENCE AND RESPONSE TO SUPPLEMENTAL BRIEF ADDRESSING JUDICIAL ESTOPPEL

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

Honorable Charles R. Breyer

I, Kevin Ranlett, hereby declare as follows:

1. The following facts are of my own personal knowledge, and if called as a witness I could and would testify competently as to their truth.

2. A true and correct copy of the transcript of the September 8, 2011 hearing in *Bursor & Fisher, P.A. v. Federal Communications Commission*, No. 11 Civ. 5457 (LAK) (S.D.N.Y.), is attached as Exhibit 1.

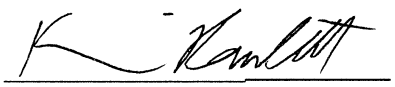
3. A true and correct copy of the September 23, 2011 order granting AT&T Mobility LLC's motion for a preliminary injunction and denying the defendants' motion to compel arbitration in *AT&T Mobility LLC v. Bushman*, No. 11-80922-CIV (S.D. Fla. Sept. 23, 2011), is attached as Exhibit 2.

4. A true and correct copy of the October 7, 2011 order granting AT&T Mobility LLC's motion for a preliminary injunction and denying the defendants' motion to compel arbitration in *AT&T Mobility LLC v. Smith*, No. 2:11-cv-05157-LDD (E.D. Pa. Oct. 7, 2011), is attached as Exhibit 3.

5. A true and correct copy of Defendants' Reply Memorandum in Support of their Motion to Compel Arbitration in *AT&T Mobility LLC v. Gonnello*, No. 1:11-cv-05636-PKC (S.D.N.Y. Sept. 30, 2011), is attached as Exhibit 4.

6. A true and correct copy of ATTM's Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration in *AT&T Mobility LLC v. Gonnello*, No. 1:11-cv-05636-PKC (S.D.N.Y. Sept. 26, 2011), is attached as Exhibit 5.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, DC on October 17, 2011.



Kevin Ranlett

EXHIBIT 1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

BURSOR & FISHER, P.A.,

Plaintiff,

v. 11 Civ. 5457 (LAK)

FEDERAL COMMUNICATIONS
COMMISSION,

Argument

Defendant.
----------x

New York, N.Y.
September 8, 2011
9:30 a.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

BURSOR & FISHER, P.A.
Attorneys for Plaintiff
BY: SCOTT BURSOR
JOSEPH I. MARCHESE

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendant
DAVID S. JONES
Assistant United States Attorney

JOEL MARCUS
Attorney for defendant

WILER REIN LLP
Attorneys for Intervenor Defendant T-Mobile USA, Inc.
BY: JOSHUA S. TURNER

SIDLEY AUSTIN LLP (NY)
Attorneys for Intervenor Defendant AT&T Mobility LLC
BY: STEVEN M. BIERMAN

(Case called)
THE CLERK: Counsel for plaintiff, are you ready?
MR. MARCHESE: Yes.
THE CLERK: You are?
MR. MARCHESE: Joseph Marchese, Bursor & Fisher.
THE CLERK: Counsel for the FCC, are you ready?
MR. JONES: Yes. David Jones.
THE CLERK: Counsel for intervenor defendant T-Mobile, are you ready?
MR. TURNER: Joshua Turner on behalf of T-Mobile.
THE CLERK: Counsel for intervenor defendant AT&T Mobility, are you ready?
MR. BIERMAN: Yes. Steven Bierman from Sidley Austin. Good morning, your Honor.
THE COURT: Isn't there another intervenor, AT&T itself?
MR. BIERMAN: It is AT&T Mobility.
THE COURT: That is the only AT&T entity?
MR. BIERMAN: Yes.
THE COURT: I take it there is no objection to the intervention application of AT&T Mobility, is that right?
MR. MARCHESE: Your Honor, no, that's correct. As the Court knows, we have welcomed AT&T.
THE COURT: A simple answer would do. Thank you. That motion is granted.

MR. BIERMAN: Thank you, your Honor.
THE COURT: Is there any opposition to the T-Mobile application to intervene?
MR. MARCHESE: No, your Honor.
THE COURT: That motion is granted.
I looked at this pending motion to prepare a Herfindahl index, and I said to myself somebody is smoking a controlled substance. You want an index, Mr. Marchese, of one document, is that right?
MR. MARCHESE: We did request that, yes, your Honor.
THE COURT: Denied as frivolous.
I have a letter from the United States Attorney's office dated September 6th asking to postpone any response to the motion for a Herfindahl index. That is denied as moot, that application.
Mr. Marchese, I will hear you.
MR. MARCHESE: Good morning, your Honor. Your Honor, today we are here because of a FOIA request that we have made in connection with a declaration by Colin B. Weir which was filed in the FCC proceeding WT docket number 11-65.
THE COURT: He works for you, right?
MR. MARCHESE: He is an expert we have retained in connection with one of our client representations, yes.
THE COURT: This representation or another one?
MR. MARCHESE: He is actually working with us on

multiple representations, but this representation, yes.
THE COURT: As I understand it, therefore, your retained expert already has seen all of the information in question and indeed it is his massaging of that information which you are seeking to compel the FCC to turn over to you, and he hasn't turned it over because of the protective order, I take it. Is that about the size of it?
MR. MARCHESE: That is about the size of it, your Honor.
THE COURT: Your retained expert on behalf of your client has said whatever he thinks is appropriate, given his knowledge of the data in question to the FCC on the question of whether the FCC should approve the AT&T/T-Mobile transaction, is that correct?
MR. MARCHESE: Yes, your Honor.
THE COURT: So the dispute here is solely whether you, as counsel to your clients, should have the disaggregated data in addition to your retained expert having it and using it on behalf of your clients, is that an accurate statement?
MR. MARCHESE: Actually, we have requested the aggregated noncarrier-specific public information which has been redacted in the Weir declaration.
THE COURT: I'm sorry. Maybe I phrased the question poorly, and I accept your correction of, at least provisionally, the nature of the data. But the bottom line

here is that absolutely everything you want your retained expert has and has used on behalf of your clients in the proceeding in the commission, true?
MR. MARCHESE: That's true, your Honor.
THE COURT: So the only issue is whether you, as the lawyer for your clients, also get to see some of that information?
MR. MARCHESE: Yes, your Honor.
THE COURT: OK. Go ahead.
MR. MARCHESE: Your Honor, I would like to hand up a couple of exhibits that I have which are relevant to the data that Mr. Weir calculated. Mr. Weir's declaration contains HHI calculations, four-firm HHI calculations in 165 economic areas. This is the same type of information which is published on an annual basis by the FCC in a CMRS report to Congress and the same type of information which the Department of Justice has recently published as an appendix to their complaint opposing the proposed merger by AT&T and T-Mobile.
THE COURT: Is the information you are proposing to hand up in the record before me?
MR. MARCHESE: It is in the record before you, yes, your Honor.
THE COURT: You can just invite my attention to where I find it.
MR. MARCHESE: In our response to AT&T's motion to

intervene, it is attached as Exhibit A to that filing. Do you also have a copy of Mr. Weir's declaration, your Honor? We have only had access to the redacted version. However, we do have Mr. Weir here in court today, and he has brought an unredacted version, which you are invited to see. We have not seen it.

THE COURT: If it's necessary, I'll ask for it, but I doubt very much that it is going to be necessary. I have read Mr. Weir's redacted declaration, and I know what HHI numbers are, having practiced antitrust law for 25 years and been the liaison at the ABA in the antitrust section and having had more than a couple of antitrust cases. So it is not exactly terra incognita.

MR. MARCHESE: Our position, your Honor, is that this information which we are seeking is in fact not confidential. It is the same type of public information that is published on an annual basis by Congress and which the DOJ has released in connection with its suit against the proposed merger.

THE COURT: Is it your position that the information attached to the DOJ's complaint is in fact line for line, statistic for statistic identical to the data that you are seeking here?

MR. MARCHESE: It is not identical, your Honor. The DOJ calculated its HHI calculations on the cellular market area level, and we calculated it or Mr. Weir calculated it on an

economic area level.
In response to our FOIA request, the FCC produced a denial letter on July 20th, which was a month, a full month, after we had submitted our request. They basically ran out the entire statutory period, as you said, for our request for one document. I tried to short circuit the process.
THE COURT: Did you appeal the denial within the commission.
MR. MARCHESE: Informally I did, your Honor. Here the FCC actually admits in its opposition papers to our motion that, and I quote them, "The FCC's letter denying plaintiff's FOIA request states that the Weir declaration itself contains disaggregated carrier-specific data, which is not correct." That is in footnote 5 on page 18 of their memorandum in opposition to our motion for preliminary injunction.
THE COURT: Could we go back to the question I asked you. There is a procedure in the Code of Federal Regulations for appealing the denial of a FOIA request. It goes, if I remember correctly, to the office of general counsel. There are certain procedural and temporal requirements that have to be met, right?
MR. MARCHESE: Correct, your Honor.
THE COURT: Did you do it?
MR. MARCHESE: No. The reason that I did not do it is because in our view there are exigent circumstances in this

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case.

THE COURT: Do you have any authority for the proposition that exhaustion of administrative remedies is excused if the applicant feels there are exigent circumstances?

MR. MARCHESE: There are exceptions to the --

THE COURT: Answer my question.

MR. MARCHESE: I don't, your Honor.

THE COURT: Why isn't that absolutely fatal not just to your motion but to the case?

MR. MARCHESE: If I have a chance to explain myself.

THE COURT: I asked the question. I'm inviting an answer.

MR. MARCHESE: Your Honor, in this case there is a shot clock that is running. The FCC can basically make a decision at any time.

THE COURT: The shot clock, as I understand it from the papers, is stopped at 180 days.

MR. MARCHESE: That's incorrect. Actually, the FCC's letter of September 6th I believe makes note of the fact that the shot clock is running right now.

THE COURT: All right, go ahead.

MR. MARCHESE: Your Honor, while the shot clock is a prescribed 180-day period, as we have seen with the DOJ, the FCC can make a decision at any point. If we were to follow the prescribed administrative process, then we would be taken out

to the end of this month, at which point objectors AT&T and T-Mobile would have a chance to apply for a stay if in fact the FCC reversed itself.

Essentially, like I said, every day of delay that is going forward is a day where our client is deprived of this information with which AT&T and T-Mobile are going out every day lobbying government representatives, lobbying the public about their transaction.

We want to take this information and we want to give it to our government representatives. We want to put it out there and do whatever we want with it. As I said, our view is the information is public and not confidential.

THE COURT: If it were public, you wouldn't be here, right?

MR. MARCHESE: I disagree. We are here to resolve this dispute. I say it's public, they say it's not.

THE COURT: Obviously, it isn't public, or you would pick up the book that has it in it and you would use it, right?

MR. MARCHESE: I respectfully disagree. I don't have access to it right now. It was redacted by Mr. Weir.

THE COURT: So it's not public, right?

MR. MARCHESE: By that definition.

THE COURT: You would like it to be, but it isn't, isn't that true?

MR. MARCHESE: That is true, your Honor.

THE COURT: OK. There is a whole lot to be said for accuracy in advocacy.
MR. MARCHESE: Your Honor, one thing that we do have here, however, are affidavits that were submitted on behalf of experts at the FCC and experts of AT&T. These affidavits are by Dr. Singer of the FCC and Dr. -- I believe it is pronounced "sham pine," I'm not sure, your Honor. It is our contention that the math that is proffered in these affidavits is false and faulty.
I would like to, having made that argument, point your Honor specifically to what I'm talking about in the Singer affidavit.
THE COURT: I have a question. You have had those affidavits since when? August 26th?
MR. MARCHESE: That's correct, your Honor.
THE COURT: During all that time you could have filed an affidavit of a qualified person --
MR. MARCHESE: Right. Just to correct --
THE COURT: Would you not interrupt me, counsel. Throughout that period of time you could have filed an affidavit from a qualified person attempting to raise an issue of fact as to the accuracy of those two affidavits, is that right?
MR. MARCHESE: Yes, that's right.
THE COURT: And you didn't do it, right?

MR. MARCHESE: That's right.
THE COURT: The first time you suggested that there was any problem with those affidavits was the day before yesterday, is that true?
MR. MARCHESE: That's true, your Honor.
THE COURT: It was in a memorandum in response to a motion by AT&T to intervene, is that true?
MR. MARCHESE: That's true, your Honor.
THE COURT: Whether you meant to or not, this is what I would call a sandbagging. Hold it back and spring it at the last second. I don't regard it as appropriate practice. What I have before me are uncontradicted affidavits by Singer and the other person and no issue of fact to try.
MR. MARCHESE: The declaration submitted by Mr. Weir in support of our motion for a preliminary injunction in fact does contradict the math.
THE COURT: Show me where, please.
MR. MARCHESE: Sure. Can I do that by reference, for example, to the FCC declaration of Singer? Obviously, if there is a contradiction --
THE COURT: If you say it's in Weir's affidavit, that might be the best place to start.
MR. MARCHESE: Sure. On page 6 of 11, paragraph 11, Mr. Weir begins talking about how to calculate the HHI for the value of an EA and talks about the steps that he goes through.

The heading on the next page, "It is not possible to reverse-engineer underlying market shares from aggregated four-firm HHI values." Mr. Weir then goes through his calculations basically saying there is not enough information available.

THE COURT: Then Dr. Singer's affidavit makes clear that the assumption that there is not enough information available is incorrect, that if you have information that permits you to formulate -- I may misstate the math slightly, but I think I have the general idea -- four simultaneous equations, you can then solve for any of the four variables. You may in some instances get some indeterminate results where you have more than one possible solution, but that's about the size of it. I see nothing that contradicts that in Weir's affidavit.

MR. MARCHESE: Your Honor, at paragraph 14 of Dr. Singer's declaration, she puts forth several mathematical equations which are assumptions that she is founding her conclusion upon. I'd like to point out that equation number 1, A plus B plus C plus D equals 100, is simply false in 90 percent of the economic areas simply because there are not only four carriers that are competing.

THE COURT: What she says here is not false. What she is doing is making an illustration with respect to the extension of her reasoning to a four-firm market. In other words, the paragraph speaks about a four-firm market, and A

plus B plus C plus D in a four-firm market does equal 100.
MR. MARCHESE: The calculations in Mr. Weir's declaration take the top four carriers. So in fact this assumption is incorrect.
Moving down to the third equation, where it says the sum of A squared plus B squared plus C squared plus D squared equals HHI plus 200, this is also false because Dr. Singer purports this to be a four-carrier HHI calculation. The difference here is that when Mr. Weir did the four-carrier HHI calculations in his declaration, he added another carrier, which would be, for example, E squared here. So in fact what Dr. Singer is proposing is a three-carrier calculation and not a four-carrier calculation, and that is a material difference.
THE COURT: Let's get to the other ground that the FCC mentioned in shooting you down. That is to say that you are representing any number of clients in matters against AT&T, and they are pretty much persuaded that your real interest in all of this is to use this information in other litigation you are handling that has nothing to do with the AT&T/T-Mobile acquisition.
MR. MARCHESE: Your Honor, number one, that's not the issue that is before the Court. The Court is deciding the FOIA request on this issue.
THE COURT: One issue before me is whether you are likely to suffer irreparable injury. I certainly have to

consider it on that basis.
MR. MARCHESE: Sure. Your Honor, I have actually explained to the FCC on a conference call that we have been privy to private information subject to protective orders on previous actions and we have acted in compliance with those orders, and we feel that this case is no different. There is no difference here, no indication that we are going to use the information improperly.
Of course, our contention is that this information is public. Quite frankly, we could shout it from the mountaintops once we get it because, once again, it is not confidential, according to our information. It is admittedly aggregated and it is admittedly not carrier-specific.
THE COURT: Anything else you want to say?
MR. MARCHESE: No. Thank you, your Honor.
THE COURT: Thank you.
I'll hear from the government. I'd like to know, first of all, counselor, where the Department of Justice stands with the lawsuit.
MR. JONES: Your Honor, there are, of course, multiple components. I assume you're getting into the antitrust division lawsuit that has been filed.
THE COURT: Yes.
MR. JONES: I have not had direct communication with the antitrust division. FCC counsel has communicated and has

determined that the data underlying in the Weir declaration that is at issue here, specifically the NRUF data, was not used in preparing the justice department's complaint. So it is not the case that identical information has now been made public through that lawsuit. Quite simply, your Honor, we are proceeding on different tracks.

THE COURT: Is the antitrust division going to seek inductive relief in D.C.?

MR. JONES: They filed their complaint. Procedurally, your Honor, I don't know that I can give you an accurate answer other than to say my understanding is the suit that they filed is intended to block the proposed merger. So yes, I assume that's them seeking an injunction to block the merger, but I don't know that to be correct.

Your Honor, for purposes of this case, when we learned of that lawsuit, my mind immediately turned to the fact that that makes irreparable harm all the more speculative and not imminent.

THE COURT: Sure. Let me ask you another question, has the Hart-Scott-Rodino period run out on the acquisition?

MR. JONES: Your Honor, I have FCC counsel here who may know the answer. I don't know the answer. If I may have a moment to consult.

Your Honor, I am advised that the period was extended for purposes of the DOJ review so that it had not expired as of

the filing, and we are not sure exactly how that was worded. The extension may have been simply until the date of filing, which has now occurred. We are not sure precisely.

THE COURT: If the waiting period expired with the filing, then they are free to close the transaction in the absence of a restraining order.

MR. JONES: Sorry, your Honor. Again, your Honor, my understanding, I'm told that they are not free to close the transaction, that whatever mechanism they used preserved a bar on filing pending some appropriate order or judgment of the court hearing the antitrust division's action. So what we have is a proposed transaction that justice has sued to block and that cannot be effectuated until that lawsuit is resolved.

THE COURT: What you have just said is the substantial equivalent of telling me that, whether by agreement or otherwise, there is a preliminary injunction or its equivalent in D.C. that will block that transaction until the lawsuit is finally concluded. Is that right? If they decide to go to trial and the trial is in 2013, that transaction has gone nowhere, is that what you are telling me?

MR. JONES: Your Honor, I don't have personal knowledge, and I'm reticent to represent to the Court that that's correct. My understanding is that the current posture is that the closing cannot occur pending further action in the lawsuit.

I would note, and perhaps in the spirit of huminah-huminah, your Honor, that it is the plaintiff's burden to show irreparable harm that is imminent and nonspeculative, and they haven't identified any potential imminence or said a single word regarding the likelihood of delay that will flow from the antitrust division's lawsuit. My understanding is that at a minimum that lawsuit will delay effectuation of the merger, if indeed it ever happens, and plaintiffs have not said anything to the contrary.

Moreover, your Honor, even were it not for the antitrust division lawsuit, there has been no showing of nonspeculative and imminent irreparable harm such that the immediate application for preliminary injunction should be denied. The case law is clear that in the absence of such harm, courts won't even look further to likelihood of success, and a preliminary injunction simply is not appropriate.

Our papers detail a number of shortcomings in plaintiff's assertion of irreparable harm. The Court is obviously thoroughly familiar with the papers. Basically, this is a lawsuit that seeks an unredacted copy of a document. The document itself will remain in existence and can be produced whenever this litigation is resolved should the Court order it, which obviously we believe it should not.

As to the subject matter of this lawsuit itself, there simply is no irreparable harm anywhere to be found. Moreover,

the less direct types of irreparable harm asserted by plaintiffs also are not significant and not irreparable. As colloquy established, the document at issue in unredacted form has been provided to the FCC. The articulated desire that plaintiffs have is to use it in connection with the FCC proceedings, but that is nonsensical, because it is already being used for that purpose.

THE COURT: They want to lobby with it is what I heard.

MR. JONES: Yes. We are hearing that now. Your Honor, that is not an irreparable harm. The approach they are taking is simply an end run around both the protective order procedures. They were denied direct access through the FCC proceedings, and they could have appealed that but did not.

Also, it's an end run around the orderly processing of FOIA applications. They could have but did not pursue the formal administrative appeal route specified in the C.F.R. for FCC FOIA requests. Now they are simply too impatient to let the government even file an answer under the ordinary course and litigate this as an ordinary FOIA matter.

Courts are reluctant to grant preliminary injunctions in FOIA matters, particularly providing the ultimate relief sought, which is release of the document at issue in the litigation. There is simply no showing of irreparable harm to warrant short circuiting the process in the way that is being

proposed here.
Your Honor, as to likelihood of success, I want to set aside the topic of the declarations and their mathematical showings, but we stand by the Singer declaration. I believe it is correct and believe it is more than a sufficient showing. It certainly causes plaintiff to have failed to make a showing of likelihood of success on the merits.
More importantly and as a threshold matter, their failure to exhaust administrative remedies on the FOIA request simply makes this suit subject to dismissal, and for that very clearcut reason, which plaintiff I believe stated they have no authority to contravene, the action is subject to dismissal and there is no likelihood of success.
THE COURT: Is it correct that the information the plaintiff seeks would in the ordinary course be published by the FCC about a year from now?
MR. JONES: Yes but. It would likely in the ordinary course, at least similar information, perhaps in a less specific and somewhat watered down form, be made public. There is a periodic report made concerning market share, and what is at issue is more currentl data that is on a more granular level that is not available.
Also, your Honor, I'm reminded that what is made public does not include, quite critically, the change in HHI and is not done for four-firm markets. So there are

limitations to what is eventually made public. In addition, of course, the time lag is significant.
THE COURT: When you say it is not done for four-firm markets, do you mean to say markets with four or fewer firms? Is that what you mean?
MR. JONES: Yes, that's correct, your Honor. In other words, what is made public has less commercial sensitivity for several reasons. It is less current and therefore less sensitive simply for that reason. It doesn't reflect change in HHI, which reflects market concentration and trends and is significant.
THE COURT: Isn't that calculatable from the previous year's report?
MR. JONES: Your Honor, I'm not smart enough to be able to -- actually, I think the answer is it would --
THE COURT: I used to know this like I know my middle name. The HHI is the sum of the squares of the individual market shares, right?
MR. JONES: Correct.
THE COURT: If you have the 2009 report and you've got a market which is five or more firms so that the information is disclosed, you can readily calculate it. Even my very humanities- oriented daughter would readily calculate the HHI for 2009. And if you have the 2010 information, you do the same process all over again, and then you see the delta HHI.

MR. JONES: Your Honor, I'm told that the number of firms at issue in an FCC report is not made public, certainly on a market-by-market basis. So you would have uncertainty in calculations. Simply there is a lack of data points. Basically, you are going to have data information with too many unknowns to generate the type of information that Dr. Singer tells us can be generated from this more current and more specific data that is at issue here.
THE COURT: Thank you.
MR. JONES: Your Honor, I am happy to answer any questions the Court has to the best of my ability, acknowledging your Honor's superior knowledge of antitrust law compared to my own.
THE COURT: But mine is more dated.
MR. JONES: For purposes of this motion, plaintiff has simply made no showing whatsoever of either irreparable harm or likelihood of success, and for that reason their motion should be denied.
THE COURT: Thank you.
MR. JONES: Thank you.
THE COURT: Does AT&T or T-Mobile want to be heard?
MR. BIERMAN: Thank you, your Honor. Steven Bierman for AT&T, intervenor. I'll be very brief given the previous arguments and colloquy and your Honor's familiarity with the papers.

Based on everything we have heard and everything your Honor has read, I think there are two gatekeeper issues that require denial of preliminary injunctive relief. On the issue of irreparable harm, as your Honor elicited in colloquy, the very information that Bursor seeks is in fact before the FCC, will be used by the FCC, analyzed by the FCC, whatever they are going to do with it. It has been submitted in the unredacted Weir declaration.

It is a misnomer to suggest, as they do in their papers, that they need somehow to effectively represent their clients, whoever they are, by getting this information. And they have admitted in open court that they intend to use the information that is at issue here for a purpose that is improper under the protective order that is in place in the FCC proceeding.

So, as a matter of the threshold issue of will they be harmed at all, much less irreparably, I think on the record before you the answer is no. The context in which that issue arises should not be lost in the shuffle, and that is why should not this case be permitted to proceed as a case, if there is a case.

Your Honor raised a couple of issues about whether the case is viable, and we would submit it is not. In any event, why should they get up-front mandatory injunctive relief, being the relief they ultimately seek on the record they have made,

given the standard that applies to such a request?
The second gatekeeper issue that requires denial of the motion outright has to do with likelihood of success. Whatever the formulation of the alternate test within the Second Circuit, there is not only not a likelihood of success, there are not significant issues that create fair grounds for litigation. They admit that they have not exhausted administrative remedies.
One thing that counsel for Mr. Bursor did not mention to you is that the FCC's letter that triggered the 30-day period under, as your Honor pointed out, the regulations for seeking review by the office of general counsel is dated July 19th. With all of plaintiff's complaints about the clock is moving, the train is leaving, whatever, they did nothing, and that time has passed. That time is gone. They can't now fix that and they can't now do an end run around that administrative legal requirement.
THE COURT: What they did is they sat on their hands for a month during which they could have pursued the administrative appeal and then filed a lawsuit instead.
MR. BIERMAN: That's right, your Honor. They did more than that. They went out trolling for potential clients or plaintiffs in these hundreds or I think they said up to a thousand arbitrations they are bringing against AT&T as yet another end run. So they didn't use their time as the law

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requires, which is to exhaust administrative remedies. That again is a show stopper.

On the additional aspect of likelihood of success on the merits, I want to comment briefly on the subject matter, the substance of the information at issue. I think the record is very clear. There was some back-and-forth about the declarations and such.

It is undisputed that Mr. Weir derived his calculations that are in the redacted submitted declaration from information that was submitted by AT&T on a confidential basis pursuant to the protective order before the FCC. And there is no question on this record that AT&T zealously protects that information for the good business reasons and important considerations that are set forth in the Andrew Wilson declaration that accompanied our opposition to the PI motion.

The question becomes whether somehow that information can be backed out of the Weir declaration. Your Honor is exactly right that on the points that Dr. Singer and Dr. Shampine make in their declarations opposing this motion are just uncontested on this record. Counsel is drawing your attention to an aspect of Dr. Singer's declaration that I think was shown to be unavailing because of the nature of the illustration that he was pointing to in that declaration.

It simply is the case, and it is undisputed, that Mr.

Weir omitted to disclose to the Court the various kinds of additional information that an informed and interested reader would have in order to make the kind of calculations that he says are impossible. Both Dr. Singer and Dr. Shampine identified those kinds of information that anyone would have.

THE COURT: He doesn't even say they are impossible. He posits an information universe and says given his premise as to what the information universe is, it's impossible. But it is perfectly obvious that his premise as to what the information universe is simply imaginary.

MR. BIERMAN: That's correct, your Honor. It is self-fulfilling. Because he declares, it's impossible, it's impossible. The universe is broader than what he says, and the various examples of the kind of information that any informed reader, meaning a potential competitor or others who would get this information disclosed to them, would have is replete and set forth in the declarations.

Also, Dr. Shampine identifies several ways that anyone who does this for a living, as opposed to me, your Honor, could back out these numbers in terms of mathematical calculations and application of computer programs. So it is simply false that the information cannot be reverse-engineered.

But your Honor need not reach any of that, because as a matter of law the failure to identify irreparable harm and the failure to exhaust administrative remedies preclude this

motion. Therefore, we, too, would join in asking that your Honor deny the motion for a preliminary injunction in its entirety.
THE COURT: Thank you.
MR. BIERMAN: Thank you.
THE COURT: T-Mobile, anything?
MR. TURNER: Unless your Honor has questions for me, I will rest on the arguments that my co-counsel have made.
THE COURT: Thank you.
Mr. Marchese, anything? Brief.
MR. MARCHESE: Very briefly, your Honor. Given that accuracy and advocacy is important, I believe that counsel for FCC stated that in the FCC CMRS reports the deltas in HHI's were not reported. However, I have here Table C3 of the 15th annual CMRS, report which was published this past June, which in fact has a column for the 2009 HHI values and the 2008 HHI values. I'd like to hand that up to you so you can take a look for yourself.
THE COURT: I can get it through our library. Anything else?
MR. MARCHESE: No, your Honor. Thank you.
THE COURT: Thank you.
I am going to rule on this now.
The plaintiff in this case is a law firm the practice of which includes bringing various arbitrations against AT&T in

relation to the cellular business. I have no idea how big that practice is, but there is some suggestion they may have as many as a thousand arbitrations pending against AT&T.

AT&T is a party to a proposed merger with or acquisition of T-Mobile. They are both significant competitors in the cellular telephone business.

The plaintiff law firm has retained a consultant named Weir. He apparently acts for them in some undefined way with respect to some or all of these arbitrations. He has also on behalf of the plaintiff law firm, and presumably his clients have been involved in administrative proceedings before the Federal Communications Commission with respect to the proposed AT&T/T-Mobile transaction.

In that connection, Mr. Weir, though not the plaintiff's lawyer, was given access by the FCC to various information that I need not detail, subject to the terms of a protective order. The information is regarded by those who provided it and by the FCC as confidential business information, hence the protective order.

Mr. Weir, acting on behalf of the law firm and/or its clients, prepared an affidavit or a declaration that he submitted to the Federal Communications Commission in connection with its review of the T-Mobile/AT&T transaction that has been proposed. That document contains information that either is or was derived from confidential information to

which Mr. Weir was given access under the protective order within the FCC.

Mr. Weir, in observance of the protective order, has not made a good part of his affidavit or declaration, whichever it is, available to the plaintiff law firm. Obviously, he deserves credit to the extent he has observed his obligations. The law firm then filed a Freedom of Information Act request with the FCC seeking an unredacted copy of the paper submitted on their behalf by their own consultant to the FCC with respect to the AT&T/T-Mobile transaction.

The FCC denied the Freedom of Information Act request on July 19, 2001. It advised the plaintiff's law firm of its right to appeal the FOIA denial within the FCC in accordance with 47 C.F.R. section 0.461.

The plaintiff did not avail itself of its right to appeal within the FCC. For a month it did nothing relevant at all. It let that month just slide by. Then, on August 18th it brought this action for a mandatory injunction requiring the FCC to turn over to the law firm the unredacted declaration or affidavit of the law firm's own consultant. Some relatively short period later, it filed this motion for a mandatory preliminary injunction requiring the FCC immediately to turn over the unredacted Weir declaration.

The practicality of what has happened is that the plaintiff law firm, confronted with the FOIA denial, rather

than avail itself of its right to appeal to the general counsel of the FCC, did nothing for a month despite the claim of threatened immediate and irreparable injury, and then bypassed the agency administrative procedure for appeals of FOIA denials altogether and came running to this Court with this application.

In order to prevail on a motion for preliminary injunction in which, as is the case here, the applicant seeks mandatory relief which, if granted, would provide it with all or substantially all of the relief to which it would be entitled if it ultimately won the case, it has to demonstrate a clear or substantial likelihood of success in addition to a clear threat of imminent irreparable injury. That standard is all the more applicable where, as here, the injunction would affect government action taken in the public interest pursuant to a statutory or regulatory scheme. That is precisely what we have here.

Among the multitude of cases that support this standard, which I note the plaintiff's counsel has not even alluded to in their papers, are Jolly v. Coughlin, 76 F.3d 468; Tom Doherty Associates v. Saban Entertainment, 60 F.3d 27; and Krispy Kreme Doughnut Corp. v. Satellite Donuts, 725 F.Supp.2d 389.

Right at the outset, this motion fails because the plaintiff, far from showing any clear or substantial or for

that matter even arguable likelihood of success, has shown none. A party seeking injunctive relief in a FOIA case must demonstrate exhaustion of administrative remedies. Indeed, regardless of whether that is viewed as a jurisprudential or jurisdictional requirement, the failure to exhaust is fatal, at least in all circumstances relevant here. Among the cases to that effect are Wilbur v. CIA, 355 F.3d 675; Taylor v. Appleton, 30 F.3d 1365; Gaudert v. Napolitano, 2010 WL 6634572; and Manfredonia v. SEC, 2009 WL 4505510.

Since it is absolutely undisputed in this case that the plaintiff failed to exhaust available administrative remedies, it probably can't prevail in this case at all. But for present purposes it's enough to say that it surely has not demonstrated the requisite likelihood of success on the merits, and that would be true under the standard that I believe applies or any other standard that anybody has ever applied in this circuit in a preliminary injunction matter.

Secondly, in order to obtain a preliminary injunction, the applicant must show, as I have indicated, a clear threat of imminent irreparable injury. That is just not present here. To begin with, the ostensible basis for this application -- and I'll assume that the only basis for the purpose of these remarks is the contention that the plaintiff's law firm would be irreparably injured without this information because they could not effectively advocate before the FCC on the question

of whether the FCC should approve the AT&T/T-Mobile transaction.

In fact, however, it is undisputed that each and every shred of information in question already has been furnished to the FCC on behalf of this law firm by its retained consultant Mr. Weir. What is truly bizarre about this case is that the plaintiffs are seeking under the Freedom of Information Act request information prepared by their expert and submitted by their expert to the government.

I suppose that it is theoretically possible that the plaintiff law firm are such stupendously spectacular advocates that if they only had the data that appears in the redacted cells of the document filed by their expert with the FCC in support of their contention that the FCC shouldn't approve the transaction, there would be some brilliant insight or piece of advocacy not present in what the expert has said already and not present in other arguments made by the law firm without benefit to those data cells that would sweep the FCC from one side of the ledger to the other, from approving, which may never happen, the transaction to disapproving the transaction.

I may win the Power Ball lottery this weekend. Those things are possible. I'm not even going to hazard a guess as to which is more likely, but it doesn't matter. We are talking about likelihoods in the range of dramatic improbabilities. Common sense makes that crystal clear. A wild improbability is

not a clear and specific showing of a threat of imminent irreparable injury.

What we come down to is the FCC has all the data, they will make out of it what they will. And we are, after all, not talking about rocket science here. The data in question are schedules of Herfindahl index calculations on a geographic area by geographic area, some hundred or more of them. Anybody who takes introductory antitrust law in law school knows what that is. It's a statistical calculation.

It gives rise under the horizontal merger guidelines that have been published by the FCC and the justice department to what one might call, without using the term in the technical sense, a presumption, an indication, depending on where the levels are and what the effect of a transaction on the levels would be, that there either is or is not likely to be an anti-competitive effect sufficient to trigger a violation of Clayton Act section 7, which triggered an FCC denial of whatever authority they have over the proposed transaction.

But it is at best a rule of thumb. Any sophisticated antitrust analysis takes account of the multiple circumstances. I don't mean to suggest these are facts of this marketplace -- I don't know -- but Lord knows that there have been transactions in marketplaces that have had Herfindahl indexes that on the face of it looked troublesome but where the mergers ultimately were determined -- and I use "merger" here in a

nontechnical sense also -- not to present a section 7 problem or some other anticompetition policy problem, because there was great ease of entry, because there was imminent potential entry, because there were substantial economies of scale to be achieved, because there was a failing firm in the industry and the merger saved the failing firm, and on and on and on.

You can take down a copy or read on antitrust law and read I think literally volumes but certainly chapters on all of the factors that go into these analyses above and beyond the Herfindahl index. The likelihood that this information is really important given that the FCC already has it, to the plaintiff lawyers here is just de minimis.

There is another problem with the irreparable injury showing, more than one. The second problem that comes to mind is: Where have they been, the plaintiffs? The FOIA request was turned down on July 19th. For a month no appeal was taken, no FOIA suit was filed, and so forth. There is an abundance of case law in this circuit that a failure to move with alacrity in circumstances where injunctive relief might be appropriate, particularly where unexplained, which is the case here, tends to undermine any claim of irreparable injury. At a certain point it may, and probably does, becomes inconsistent with any claim of irreparable injury.

I don't go so far as to say it's inconsistent here. But in evaluating the sufficiency for showing of irreparable

injury, I do take some account, some modest account, of this unexplained month before the plaintiff's counsel decided to do an end run around the administrative process in the hope of a better result in the federal district court.

A lot more could be said on the subject of the threatened irreparable injury, but the only other thing that I will mention is this. 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 am not aware that it has sought a preliminary injunction yet, but the way these things go, there will either be some kind of a settlement or there will be such a motion in relatively short order.

I must say that in referring to the possibility of settlement, I don't mean to imply any knowledge of what's going on between the government and the companies, none whatsoever. 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. That's all I mean to suggest.

I am going to ask that the United States Attorney's

office inform me fully by the close of business tomorrow of exactly what the state of play with respect to the justice department's situation is. I want to know exactly the status of whether the Hart-Scott-Rodino waiting period has expired and, if not, when it would expire absent some further extension. And I want to be kept apprised on a real-time basis of developments in the case in the district court in Washington.

I do want to be clear that in making the comments I have made about the situation with the justice department and the litigation in Washington, these are common-sense observations, I would reach exactly the same result on all the other grounds to which I have alluded without regard to any of that. I add that really only for emphasis, I suppose, and interest.

If, of course, the circumstances change in Washington and there were an imminent threat that the transaction would close, those comments would become outdated. Nonetheless, it would not overcome the plaintiff's lack of any showing of any real threat of irreparable injury, and it certainly wouldn't overcome their failure to exhaust administrative remedies.

The final point that I would refer to briefly, although it is not anything I'm going to rely on in this ruling at this time, though I reserve the right to do so later if it becomes appropriate, is this contretemps over the affidavits

and what could or couldn't be backed out of the data. I'm troubled, as I think my remarks indicated, by the way this issue surfaced.

The plaintiff moved by order to show cause for a preliminary injunction on August 18th. Judge Daniels in my absence required the filing of answering papers no later than eight days before today. On August 26th the FCC filed its answering papers, including the affidavits of Dr. Singer and also another I think economist.

The burden at least of Dr. Singer's affidavit, I guess it is actually a declaration, now that I look at it, was, at least in part, that a great deal of commercially sensitive information, individual firm-sensitive information, could be backed out of the data that the FCC has withheld and that this is at least in part justification for the FCC's determination that exemption 4 to the FOIA statute justifies withholding those parts of the Weir declaration that were redacted.

Rather than filing any reply papers in support of the preliminary injunction or any affidavits or declarations challenging the declarations submitted by the FCC, the plaintiff waited until September 6th, two days ago, and then filed a document titled "Plaintiff's response to AT&T Mobility's motion to intervene." Apart from saying they had no problem with AT&T intervening, this was not a response to AT&T's motion at all. Not at all. Rather, it was, to use

their word, a challenge to AT&T and to Dr. Singer to show how they can back out carrier-specific market share data from in this case the Department of Justice complaint.

"We say," quoting the plaintiff, "it is mathematically impossible," and they say they are going to call Mr. Weir as a witness today to say so. That surely was not the way to go about it, to put it charitably. If Mr. Weir in fact contends that on the math Dr. Singer is wrong, the thing to have done would have been to submit an affidavit or declaration showing in detail why that is so. And if there were, on a reading of the two affidavits, an issue of fact and if that issue of fact's resolution had been material to the disposition of the motion, a hearing would have been held. But that simply isn't what happened.

As things turn out, the question of who is correct, if anyone, about what can be backed out of the data is immaterial to the disposition of this motion because the plaintiff loses here for failure to exhaust administrative remedies and failure to show a threat of irreparable injury. Nonetheless, if the issue had been material, I would have come out in the same place because a hearing is appropriate where there is a genuine issue of fact framed by affidavits or other sworn proof.

You don't get a hearing because you say in your memorandum, I challenge the party who does not have the burden of proof to show that I'm wrong. That just doesn't fly. It

was the plaintiff's burden to put evidence before this Court that the exemption for determination by the FCC was incorrect, and this they failed to do. They failed to raise an issue of fact in an appropriate way with respect to the Singer declaration.

The position is very much like what happens in criminal cases all the time. Defendants make motions to suppress evidence that were seized in what the government claims were consent searches of apartments or automobiles or whatever. The law is absolutely crystal clear that if there is an affidavit from a person with knowledge that says there was a search and I did not consent and nobody else with authority to do so consented, you get a hearing. If you put in a brief alone, without that affidavit, you do not get a hearing. The same deal, folks, applies here, too. But, as I say, that is all immaterial.

The motion for a preliminary injunction is denied.

I think I will wait to hear from counsel as to what they want to do in terms of scheduling the case more generally. There is no reason why this case can't move promptly if there is really a need. I doubt there is a need right now, but I may be just not fully informed about that.

My law clerk has passed me a note saying that I said the Freedom of Information Act request was denied on July 19, 2001. This is because we are having a commemoration of

9/11/2001 here and I have some remarks to give, so I have 2001 on the brain today. It was actually July 19, 2011.

I look forward to being kept up to date on what is happening with the transaction. Thanks, folks.

(Adjourned)

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-80922-CIV-RYSKAMP/VITUNAC

AT&T MOBILITY LLC,

Plaintiff,

v.

SHANE BUSHMAN, EMILY KOMLOSSY, ALEXIS JUSTAK, DANIEL LEA, MARK NEWMAN, SHARI KOSTOFF, LINDA HAENSEL and JOAN GIBBONS,

Defendants.
_____/

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE comes before the Court pursuant to AT&T Mobility LLC's ("ATTM") motion for preliminary injunction, filed September 9, 2011 **[DE 16]**. The Court held a hearing on the motion on September 15, 2011. Defendants Shane Busman, Emily Komlossy, Alexis Justak, Daniel Lea, Mark Newman, Shari Kostoff, Linda Haensel and Joan Gibbons ("Defendants") responded to the motion on September 22, 2011 **[DE 49]**. The Communication Workers of America; T-Mobile USA, Inc. ("T-Mobile"); and the States of Utah, Alabama, Georgia, Louisiana, New Mexico, West Virginia, North Dakota and Oklahoma have filed *amicus* briefs in support of the motion. This motion is ripe for adjudication.

On March 20, 2011, AT&T Inc. ("AT&T"), 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, leading to the merger of ATTM and T-Mobile, in a transaction valued at approximately $39 billion. 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.

Defendants have initiated separate arbitrations, each seeking to enjoin the merger, or, in the alternative, impose certain conditions on the merger. Counsel for ATTM represented at the September 15 hearing that 24 arbitration demands have been filed and that another 988 arbitrations have been filed and are waiting in the wings. The 24 arbitration demands that have been filed include the demands of the eight Defendants in this matter. ATTM moves to enjoin Defendants from pursuing their pending arbitrations.

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); *Grizzle v. Kemp*, 634 F.3d 1314, 1320 (11th Cir. 2011).

A. ATTM is likely to succeed on the merits.

"[W]hether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Comm'cns Workers of America*, 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 question") (internal quotation marks omitted). Furthermore, the agreement states that "issues relating to the scope and enforceability of the

arbitration provision are for the court to decide." Compl. Ex. A § 2.2(3).

At issue is the meaning of the section of ATTM's arbitration provision prohibiting representative and class actions and barring non-individualized injunctive relief. Section 2.2(6) of the arbitration agreement provides as follows:

> 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). Section 2.2(6) bars Defendants' arbitration demands because (a) Defendants attempt 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."

Defendants cannot circumvent the arbitration clause's restrictions by omitting "representative" and "class" from their demands. The "nature of a pleading" is determined by its "substance, not its label." *Armstrong v. Capshaw, Goss & Bowers, LLP*, 404 F.3d 933, 936 (5th Cir. 2005) (quotation omitted). 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).

Defendants' arbitration demands bear the hallmarks of a class action. Although each arbitration demand is brought by an individual consumer, the arbitrators are not being asked to award relief affecting only the individual claimants, such as an adjustment to an individual rate plan. Rather, each carbon copy arbitration demand asserts a violation of Section 7 of the Clayton Act (15 U.S.C. § 18), and each demand requests the same class-wide relief: enjoining the merger between ATTM and T-Mobile. Granting relief in one arbitration would secure the relief sought by each of the 1,000 or more individuals seeking arbitration. Indeed, granting relief in one arbitration would affect the competing interests of over 120 million current AT&T Mobility and T-Mobile customers, as well as a vast array of other interested third parties.

The demands are also outside the arbitrators' authority because they seek only non-individualized injunctive relief. Defendants do not assert any individual claims, nor do they seek any relief that would affect only the particular claimant initiating the arbitration. No Defendant seeks damages for any injury that the merger allegedly would cause to him or her. Rather, Defendants each request an injunction against the merger or, alternatively, imposition of conditions on the merger. The vast scope of individuals and groups that would be affected by Defendants' claim demonstrates that Defendants do not request individual injunctive relief .

Defendants argue that the limitations contained in Section 2.2(6) should be ignored because Section 2.1 of the agreement states that "[a]rbitrators can award the same damages and relief that a court can award." Compl. Ex. A § 2.1. That language describes arbitration generally,

not the particular arbitration procedure specified in the agreement. Even if there were a conflict between Section 2.1 and Section 2.2(6), the latter would govern, as specific language trumps general language. *See Am. Sav. & Loan Ass'n of Fla. v. Pembroke Lakes Reg'l Ctr. Assocs.*, 908 F.2d 885, 889 n.6 (11th Cir. 1990) ("Under Florida law,...where a contract contains specific and general clauses, the general clauses must yield to the specific clauses.").

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.

B. ATTM will suffer irreparable harm if the arbitrations are not enjoined.

ATTM would suffer irreparable harm absent injunctive relief. "Being 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) (citation omitted). That harm is compounded here because ATTM will be forced to arbitrate the same claim in at least 24 separate, duplicative hearings—all of which must, under the AAA's rulings, occur by early November at the latest. This compressed schedule would interfere with pending government review of the proposed merger.

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. The DOJ seeks a permanent injunction barring consummation of the merger—the same relief Defendants seek here. *See United States v. AT&T Inc.*, No. 1:11-cv-01560 (D.D.C.). Litigation or resolution of the DOJ's action will involve thorough, detailed

consideration of the merger's impact on competition.

The merger also requires the FCC's approval, and AT&T and Deutsche Telekom have applied for same. The FCC review will also entail a detailed analysis of the merger's impact on competition.

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. The commissions in Arizona, Louisiana, and West Virginia have already approved the merger.

ATTM would be forced to participate in the arbitrations at the same time it is engaged in both the DOJ litigation and the FCC proceeding. The same witnesses would be needed in all of these proceedings, forcing ATTM to divert resources and attention away from the government proceedings.

Finally, the arbitration rules governing 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 impossible for anyone to digest and decide these numerous, complex issues within such a short period of time.

C. The balance of hardships favors ATTM.

A preliminary injunction would cause no harm to Defendants. The DOJ's lawsuit invokes the same statutory provision as Defendants' demands and seeks the same relief Defendants seek. The FCC also is assessing the competitive impact of the merger. Defendants cannot claim prejudice from a delay in the arbitrations when these ongoing government

proceedings could give them the relief they seek.

Defendants may seek redress via avenues other than arbitration. Nothing in the arbitration agreement prohibits Defendants from intervening in the DOJ action. Additionally, § Section 2.2(1) of the arbitration agreement explains that the "agreement does not preclude you from bringing issues to the attention of federal, state, or local agencies, including, for example, the Federal Communications Commission" and notes that "[s]uch agencies can, if the law allows, seek relief against us on your behalf." As noted, the FCC is already investigating the merger. Defendants are free to inform the FCC of their concerns regarding the merger.

D. Injunctive relief is in the public interest.

The public interest weighs in favor of issuing a preliminary injunction. A strong public interest exists in ensuring that regulatory agencies and courts hearing government actions are able to consider the merger without the potential for being preempted by arbitrators.

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. 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 any benefit of the merger if it were enjoined in an arbitration in which they had no ability to participate.

Whereas ATTM has satisfied the test for issuance of a preliminary injunction, it is hereby ORDERED AND ADJUDGED that the motion for preliminary injunction, filed September 9,

2011 **[DE 16]**, is GRANTED. Defendants are enjoined from arbitrating the claims set forth in their arbitration demands. No bond is required. It is further

ORDERED AND ADJUDGED that Defendants' motion to compel arbitration, filed September 9, 2011 **[DE 13]**, is DENIED. It is further

ORDERED AND ADJUDGED that Defendants' motion for a hearing on their motion to compel arbitration, filed September 13, 2011 **[DE 30]**, is DENIED as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 23d day of September, 2011.

S/Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T MOBILITY LLC,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SANDRA SMITH,	:	NO. 11-cv-5157
	:	
Defendant.	:	

ORDER

AND NOW, this 6th day of October, 2011, upon consideration of (1) Defendant's Motion to Compel Arbitration and to Dismiss Complaint (Doc. No. 10), (2) Memorandum of Law in Support of Defendant's Motion to Compel Arbitration and to Dismiss Complaint (Doc. No. 11), (3) Plaintiff AT&T Mobility LLC's Motion for Preliminary Injunction (Doc. No. 16), (4) Memorandum of Points and Authorities in Support of Plaintiff AT&T Mobility LLC's Motion for Preliminary Injunction (Doc. No. 24), (5) Memorandum as an *Amicus Curiae* of Communication Workers of America in Support of Plaintiff AT&T Mobility LLC's Motion for Preliminary Injunction (Doc. No. 22), (6) T-Mobile USA Inc.'s *Amicus Curiae* Brief in Support of Plaintiff AT&T Mobility LLC's Motion for Preliminary Injunction (Doc. No. 23), (7) Plaintiff AT&T Mobility LLC's Memorandum of Law in Opposition to Defendant's Motion to Compel Arbitration (Doc. No. 26), and (8) Defendant's Memorandum of Law in Opposition to AT&T Mobility LLC's Motion for Preliminary Injunction (Doc. No. 28), it is hereby ORDERED as follows:

1. Plaintiff AT&T Mobility LLC's Motion for Preliminary Injunction (Doc. No. 16) is GRANTED. Defendant Sandra Smith is enjoined from arbitrating the claims set forth in her arbitration demand.

2. Defendant's Motion to Compel Arbitration and to Dismiss Complaint (Doc. No. 10) is DENIED.

I. Factual Background and Procedural History

The parties do not seriously disagree about the facts giving rise to this dispute. Plaintiff AT&T Mobility (ATTM) seeks to merge with T-Mobile USA, Inc. (T-Mobile) in a transaction valued at approximately $39 billion. (Doc. No. 1 ¶ 1). The U.S. Department of Justice ("DOJ"), the Federal Communications Commission ("FCC"), and various state regulators are in the midst of scrutinizing the proposed merger. (Doc. No. 24, at 5). On August 31, 2011, the DOJ filed suit in the United States District Court for the District of Columbia alleging that the ATTM / T-Mobile merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18.[1] Congress has joined the fray, requesting briefings on the DOJ's decision to challenge the merger.[2]

Defendant, Sandra Smith, "is among 1,109 AT&T customers who, represented by the same counsel, have each filed separate arbitrations that are each aimed at enjoining and/or remedying" the effects of the ATTM / T-Mobile merger. (Doc. No. 27, at 1). Bursor & Fisher P.A. ("Bursor") represents Smith in both this matter and the arbitration, and also represents the 1,000-plus other AT&T customers who have filed arbitration demands in an attempt to stop the

[1] See United States v. AT&T Inc., No. 1:11-cv-01560 (D.D.C.).

[2] See Sarah Jerome, *House GOP Wants Answers on DOJ Suit Against AT&T*, National Journal (Sept. 9, 2011), http://www.nationaljournal.com/tech/house-gop-wants-answers-on-doj-suit-against-at-t-20110909.

merger. Scott A. Bursor, name partner of Bursor & Fisher, describes the "Fight the Merger" campaign as follows:

> There is a real groundswell against this merger. Thousands of AT&T customers filed comments at the FCC opposing it, and we expect a similar number will be interested in pursuing the issue in arbitration. AT&T's contracts prohibit consolidation or class arbitration, so if 100 arbitrations are filed, each must be handled as an individual case. If AT&T wins 99 of those cases, they lose. There is strength in numbers, and we only need to win one to stop the merger.[3]

ATTM portrays Smith's arbitration demand as "part of a scheme to pressure ATTM into settling meritless claims." (Doc. No. 1 ¶ 1). On the other hand, Smith, through her counsel, contends that ATTM invited "enterprising lawyers" to bring thousands of duplicative serial arbitrations as an alternative to class actions, which ATTM's arbitration agreement prohibits. (Doc. No. 28, at 10, 18). In other words, Smith argues that she (and the 1,000-plus other Bursor-represented AT&T customers who filed duplicative arbitration demands) has complied with ATTM's arbitration agreement to the letter. (Doc. No. 18, at 18).

ATTM moves to enjoin Smith from pursuing her impending arbitration, arguing that Smith's arbitration demand falls outside the scope of the arbitration agreement. Conversely, Smith moves to compel arbitration and to dismiss this complaint, arguing that she brought the arbitration individually, not as part of a "class" or "representative" proceeding, and therefore her dispute is arbitrable under the agreement. These motions and associated arguments represent two sides of the same coin. Therefore, we address them together and, for the reasons discussed

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[3] *Multiple AT&T Customers File Arbitration Cases Challenging AT&T's Takeover of T-Mobile: Bursor & Fisher Law Firm Announces New Website, www.FightTheMerger.com, Offering to Represent AT&T Customers Opposing the Merger* (July 22, 2011), http://www.bursor.com/news/20110722FightTheMerger/.

below, grant ATTM's motion for a preliminary injunction and deny Smith's motion to compel arbitration and dismiss the complaint.

II. Legal Analysis

A. The Court Has Authority To Decide Whether Smith's Arbitration May Proceed

Before reaching the primary question of whether to compel or enjoin Smith's arbitration, we must first determine the scope of our authority. Specifically, we must answer two threshold questions before compelling or enjoining arbitration: "(1) Did the parties seeking or resisting arbitration enter into a valid arbitration agreement? (2) Does the dispute between those parties fall within the language of the arbitration agreement?" John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998). Neither party contests the validity of the arbitration agreement, so we turn to the second step of the analysis.

The Supreme Court recently addressed consumer arbitration agreements in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), so it makes sense to start there. According to Concepcion, courts should view arbitration agreements as contracts and enforce them according to their terms. See Concepcion, 131 S. Ct. at 145-46. When interpreting a contract, the express terms of the contract control. See Restatement (Second) of Contracts § 203(b). Therefore, we look to the language of the ATTM / Smith arbitration agreement to see what powers it allocates to the Court. (See Doc. No. 1, Ex. A, hereinafter "arbitration agreement").

The relevant clause of the agreement states, "[a]ll issues are for the arbitrator to decide, except that *issues relating to the scope and enforceability of the arbitration provision are for the court to decide*." Arbitration agreement § 2.2(4) (emphasis added). Thus, the arbitration agreement gives the Court, not the arbitrator, the authority to determine whether a particular

dispute is arbitrable, i.e., the "scope...of the arbitration provision."

This interpretation comports with the general principle that "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (internal quotations and citations omitted). Here, the parties have not "clearly and unmistakably" provided otherwise, so this Court must determine whether the dispute in question is arbitrable.

If we conclude that the dispute is not arbitrable, we have the power enjoin arbitration if appropriate. See John Hancock, 151 F.3d at 136 ("[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); see also Gray Holdco, Inc. v. Cassady, No. 10–4325, 2011 WL 3606864, at *6 (3d Cir. Aug. 17, 2011) ("[A] district court's action in exercising its equitable powers to grant a preliminary injunction was not inconsistent with the FAA and that a party does not waive its right to seek a preliminary injunction by entering into an arbitration agreement."). Additionally, the American Arbitration Association ("AAA") apparently recognizes a court's authority to enjoin its proceedings in this case. (Doc. No. 28-3, Ex. 7 ("Accordingly, in the absence of an agreement by the parties or a *court order staying this matter*, the AAA will proceed with the administration of the arbitration.")) (emphasis added).

To determine whether this dispute is arbitrable, the Court must ascertain the "scope...of the arbitration provision." Arbitration agreement § 2.2(4). Several sections of the agreement speak to the arbitrability of disputes:

> AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement is intended to be broadly interpreted.

Arbitration agreement § 2.2(1) (bold in original).

> **You agree that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by jury or to participate in a class action**.

Arbitration agreement § 2.2(1) (bold in original).

> 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. If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

Arbitration agreement § 2.2(6) (bold and capitalization in original).

We find these provisions to be quite clear: claims brought in an "individual capacity" are arbitrable, while claims brought in any "class or representative proceeding" are prohibited. In other words, as the arbitration agreement explicitly states, the arbitrator may not "preside over any form of representative or class proceeding." Therefore, to determine the propriety of arbitrating Smith's dispute, we must determine whether she brings her claim in her "individual capacity," or rather as part of "any form of representative or class proceeding."

ATTM additionally argues that we should enjoin Smith's arbitration because Section 2.2(6) of the agreement "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.'" (Doc. No. 24, at 28-32). That is not entirely accurate. Section 2.2(6) 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." (emphasis added). Fairly read, this clause addresses the remedies an arbitrator may award, not whether a particular dispute may be properly arbitrated in the first instance. Stated differently, the aforementioned clause, by its terms, does not constrain the nature of relief an individual party may seek, but rather limits what relief an arbitrator ultimately awards.

Here, Smith's arbitration seeks to enjoin the AT&T / T-Mobile merger or, in the alternative, seeks divestitures and other remedies as may be appropriate to preserve competition in the relevant markets. (Doc. No. 28, at 14). The arbitration agreement does not prohibit Smith from *seeking* such remedies (assuming, of course, she brought the action in her "individual capacity" and not as part of any "class or representative proceeding"), although the agreement may prohibit the arbitrator from *awarding* the requested relief. This is not a "question of arbitrability" properly before the court at this time, so we do not resolve it. We do note that a district court may vacate an arbitrator's award if the arbitrator exceeds his powers in granting the award. See 9 U.S.C. § 10(a)(4); Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1129-34 (3d Cir. 1972) (vacating arbitrator's award as exceeding the arbitrator's authority). Therefore, if Smith's arbitration proceeds, and the arbitrator grants what ATTM believes to be improper relief,

ATTM can challenge the award at that time.[4]

B. A Preliminary Injunction Barring Smith's Arbitration Is Warranted

The standard for issuing a preliminary injunction is well established. The party seeking the injunction must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); PB Brands, LLC v. Patel Shah Indian Grocery, 331 Fed. App'x 975, 978 (3d Cir. 2009) (citing Winter). ATTM meets all four requirements, so a preliminary injunction should issue.

1. ATTM Is Likely To Succeed On The Merits Because Smith Improperly Brought Her Arbitration As Part Of "Any Form Of A Representative Or Class Proceeding"

As discussed *supra*, under the arbitration agreement, if Smith brought her claim in her "individual capacity," then her dispute is arbitrable. On the other hand, if Smith is part of "any form of a representative or class proceeding," then the arbitrator cannot preside over it.

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[4]Defendant contends that ATTM has taken inconsistent positions on the arbitrability of claims seeking broad injunctive remedies in prior cases concerning the same arbitration agreement. (Doc. No. 28, at 21, 22, 31, 32). According to Defendant, ATTM previously argued *for* the arbitrability of claims seeking broad injunctive relief, while here, ATTM argues *against* arbitrability of such claims. The Court shares Defendant's concerns. At least one district court has accepted ATTM's position that public injunctive relief claims can be arbitrated under ATTM's arbitration agreement. See Nelson v. AT & T Mobility LLC, No. C10–4802 TEH, 2011 WL 3651153, at *1-5 (N.D. Cal. Aug. 18, 2011) (granting ATTM's motion to compel arbitration of public injunctive relief claims). That said, the prior cases at least arguably involve different factual and legal circumstances from the matter here, so ATTM's positions do not appear to be directly contradictory. Further, neither party has briefed the issue of judicial estoppel, so the Court declines to reach it. See New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001) (explaining that the doctrine of judicial estoppel protects the integrity of the judicial system by preventing a party from taking a position in a legal proceeding, succeeding, and then taking a contrary position in a later proceeding).

Nominally, Smith filed her arbitration demand as an individual. In seeking to enjoin the ATTM / T-Mobile merger, she does not explicitly purport to represent anyone but herself. However, that fact alone does not end the analysis.

In this circuit and elsewhere, courts consistently prioritize substance and function over form when characterizing the nature of a dispute or claim. See Jarbough v. Attorney General of U.S., 483 F.3d 184, 189 (3d Cir. 2007) ("We are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim. To do otherwise would elevate form over substance and would put a premium on artful labeling."); Armstrong v. Capshaw, Goss & Bowers, LLP, 404 F.3d 933, 936 (5th Cir. 2005) ("We have frequently instructed district courts to determine the true nature of a pleading by its substance, not its label."). This is particularly true in the context of "class" or "representative" proceedings.

For example, the Eastern District of Pennsylvania recently remarked that the Class Action Fairness Act (CAFA) "calls upon federal district court judges to look beyond the face of a complaint when determining whether federal jurisdiction exists over a matter that *appears to be a class action in all but name*." West Virginia ex rel. McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 452-53 (E.D. Pa. 2010) (emphasis added). Likewise, the Fifth Circuit refused to elevate form over function, seeing through the formal label of a dispute (*parens patriae*) and recognizing that the action was, in fact, a mass action under CAFA. See Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 423, 430 (5th Cir. 2008). In the preclusion context, the Ninth Circuit similarly emphasized the primacy of substance over mere labels, noting "that binding current members of an association to the results of prior litigation conducted by that association is considered especially appropriate when the *litigation resembles a class action in substance, if*

not in form." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1083-84 (9th Cir. 2003) (emphasis added). Judge Jack Weinstein has even coined a term-"quasi-class action"- to describe a collection of multiple, similar suits brought by different individuals. See In re Zyprexa Prods. Liability Litig., 467 F. Supp. 2d 256, 269-70 (E.D.N.Y. 2006).

The "function over form" principle serves an important purpose: avoiding undesirable strategic behavior on the part of litigants. See Jarbough, 483 F.3d at 189 (elevating form over substance "would put a premium on artful labeling."). This reasoning rings true in both litigation and arbitration contexts. Therefore, in interpreting the arbitration agreement as it applies to Smith's arbitration demand, we look not only at the formal label of her demand, but also at the true nature of her claim.

Here, Smith is but one of over 1,000 people who, represented by the same firm, filed essentially identical arbitration demands, all seeking the same, non-individualized relief: injunction of the AT&T / T-Mobile merger. We must determine whether this constitutes any form of a "representative" or "class" proceeding. For guidance, we turn again to Concepcion. Concepcion confirms that the Federal Arbitration Act ("FAA") embodies a "liberal federal policy favoring arbitration." Concepcion, 131 S. Ct. at 1745. However, that policy does not extend to "class" arbitrations. See id. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). The Concepcion Court discusses several hallmarks of class arbitration, as distinguished from individual arbitration, that are particularly troublesome. We find these hallmarks to be useful guideposts in our effort to properly characterize Smith's claim.

First, Concepcion laments that "the switch from bilateral to class arbitration sacrifices the

principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Id. at 1751. Here, the multiple, functionally identical arbitrations filed by Smith and others would likely result in "procedural morass," not "final judgment." Consider the following issues that are likely to arise. Does an arbitrator have the power to enjoin a merger that the FCC, DOJ, and various state agencies are concurrently reviewing? Would enjoining the merger exceed the scope of the parties' arbitration agreement? Would one arbitrator be bound by the findings and decision of another? In the DOJ's parallel challenge of the merger, would the District Court for the District of Columbia be bound by principles of preclusion to accept the arbitrator's decision? What if different arbitrators reach inconsistent results? Grappling with these issues would almost certainly generate the "procedural morass" the Concepcion Court seeks to avoid.

Second, the Concepcion Court worries that class arbitrations will not adequately protect absent parties. See id. at 1751-52 ("[I]t is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied."). In Smith's case, an arbitrator's decision, either for or against the merger, will profoundly affect many absent parties' interests. T-Mobile has a huge, $39-billion stake in the outcome of the arbitration, but T-Mobile is not a party to the arbitration. Other absent parties that would lack protection in these arbitrations include cellular technology consumers; public interest groups that both oppose and support the merger; mobile computing technology businesses (again, that both oppose and support the merger); and the numerous government bodies that are also evaluating the merger.

Finally, "arbitration is poorly suited to the higher stakes of class litigation." Concepcion, 131 S. Ct. at 1752. The reason for this is simple. Class arbitration is characterized by greatly

increased risk to defendants, and "[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. (citations omitted). For example, Judge Posner in Rhone-Poulenc Rorer discussed the very real problem of so-called "blackmail" settlements, i.e., settlements induced by a small probability of an immense judgment in a class action, and declined to force defendants to stake the outcome of their companies on a single trial. See 51 F.3d at 1297-1300 (7th Cir. 1995). Smith's arbitration epitomizes these risks. The immense magnitude of the risk, i.e., the fate of a $39 billion merger, may pressure ATTM to settle claims that it believes to be meritless.

Thus, Smith's arbitration bears all the hallmarks of "class arbitration" laid out in Concepcion. Additionally, the common usage of the word "representative" encompasses Smith's arbitration here. Webster's Third New International Dictionary defines "representative" as "serving to represent, portray, *or typify* : characterized by representation" and "serving as a characteristic example: *illustrative of a class*: conveying an idea of others of the kind." (emphasis added). Smith's arbitration certainly "typifies" and is "illustrative of" the class of arbitrations at issue here: the same law firm represents all 1,000-plus people who filed arbitration demands, including Smith; all demands are functionally identical; and all demands, including Smith's, seek the same, indivisible relief, i.e., enjoining or restructuring the proposed ATTM / T-Mobile merger.

Smith argues that "AAA has already determined the demands for arbitration are not class or representative actions, and that they were properly filed." (Doc. No. 28, at 25) (emphasis in original). That misstates AAA's position. AAA made an "administrative determination that

Claimant has met the filing requirements by filing a demand for arbitration providing for administration by the AAA under its Rules." (Doc. No. 28-3, Ex. 7). The fact that AAA determined Smith met its filing requirements says little about whether AAA believes Smith's action is part of a "class" or "representative" proceeding. Even if AAA had definitively concluded that Smith's arbitration was not a class or representative action, the arbitrability of Smith's dispute is for this Court, not AAA, to decide, as discussed in detail *supra*.

Smith also argues that, in Concepcion, "AT&T specifically told the Supreme Court that the arbitration agreement was designed to incentivize customers and an 'enterprising lawyer' to bring '4,700...serial arbitrations.'" (Doc. No. 28, at 16-19). In other words, Smith asserts that she and the other requestors are only doing what ATTM suggested they do under the arbitration agreement. Although seemingly in tension with ATTM's position in this case, ATTM made this "enterprising lawyer" statement in a very different context than the one presented here. Concepcion involved a "putative class action alleging, among other things, that AT & T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free." Concepcion, 131 S. Ct. at 1744. The Concepcions' dispute with ATTM stemmed from a $30.22 sales tax charge. See id. Unlike Smith and the other requestors here, the Concepcions did not seek to enjoin a multi-billion dollar merger on antitrust grounds. The fact that ATTM took one position in one factual circumstance does not preclude ATTM from taking a different position in an entirely different context.

In any event, the Supreme Court certainly did not adopt or ratify ATTM's "enterprising lawyer" argument in deciding Concepcion. See id. at 1753 (noting that "the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their

attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled," but making no mention of an "enterprising lawyer" filing 4,700 serial arbitrations).[5] ATTM's position in Concepcion, a case involving facts distinctly different from the facts in this matter, does not decide the issue here.

Finally, we recognize that the Supreme Court disapproved of the "virtual representation" doctrine in Taylor v. Sturgell, 553 U.S. 880 (2008), a case cited by neither party, but one we believe warrants some discussion. In Taylor, two friends brought successive requests under the Freedom of Information Act (FOIA), each seeking the same information. Id. at 885. In holding that the second party's request was not precluded by the first party's, the Supreme Court articulated the limits of non-party preclusion and rejected a broad theory of "virtual representation" in the preclusion context. See id. at 893-904.

For several reasons, Taylor does not control the issue here, i.e., whether an arbitration demand is properly characterized as "individual" on the one hand, or rather "class" or "representative" on the other. First, Taylor was decided before Concepcion, which altered the landscape of consumer arbitration agreements. Second, Taylor dealt with non-party preclusion, while the instant dispute revolves around contract interpretation. A determination that Smith's arbitration is a form of representative or class proceeding, and therefore outside the scope of the arbitration agreement, does not implicate the same non-party protection concerns that motivated

[5]Again, the parties did not brief the "judicial estoppel" question, and the Court declines to reach it here. However, we note that the "judicial estoppel" analysis involves consideration of "whether the party has succeeded in persuading a court to accept that party's earlier position." See New Hampshire v. Maine, 532 U.S. at 750. Here, ATTM seems to have failed to persuade the Supreme Court to accept its "enterprising lawyer filing 4,700 serial arbitrations" argument.

the Taylor Court. See Taylor, 553 U.S. at 898-901. Finally, Taylor left open the possibility that a different, more flexible approach to representative actions may be warranted in "public law" litigation, i.e., matters in which "the plaintiff has a reduced interest in controlling the litigation 'because of the public nature of the right at issue.'" See id. at 902-03 (noting that "in contrast to the public-law litigation contemplated in Richards, a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefitting the public at large".). Smith's arbitration undoubtedly constitutes a "public law" matter, i.e., the consummation or injunction of a multi-billion dollar merger, so the law tolerates a more flexible approach.

For all the reasons discussed *supra*, ATTM is likely to succeed on the merits of its claim that Smith's arbitration constitutes "any form of a representative or class proceeding," and is therefore barred by the arbitration agreement.

2. ATTM Will Suffer Irreparable Harm If The Arbitration Is Not Enjoined

Absent injunctive relief, ATTM will suffer irreparable harm. To begin, forcing a party to arbitrate a claim it did not agree to arbitrate constitutes *per se* irreparable harm. See PaineWebber Inc. v. Hartmann, 921 F.2d 507, 514-15 (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. Here, ATTM's arbitration agreement explicitly forbids "any form of a representative or class proceeding." As detailed *supra*, Smith's arbitration is a form of representative or class proceeding, and requiring ATTM to arbitrate Smith's claim would work a *per se* irreparable harm on ATTM.

Additionally, the combination of the large number of duplicative arbitrations and the

short time frame for each arbitration would irreparably harm ATTM by diverting its resources, attention, and witnesses away from the concurrent government proceedings. It is undisputed that the DOJ has challenged the proposed ATTM / T-Mobile merger under Section 7 of the Clayton Act, the same basis for the challenges brought by Smith and the other 1,000-plus individuals in their arbitration demands.[6] The FCC and numerous state regulators are also evaluating the transaction.

Further, Smith's arbitration, as well as the other functionally identical arbitrations brought as part of the "Fight the Merger" campaign, would proceed on an extremely compressed schedule. Under AAA's arbitration rules currently being applied to the arbitration proceedings, the arbitrations will take place by early November at the latest. (Doc. No. 24, at 36). Each hearing must be completed in one day, unless the arbitrator grants an extension. (Doc. No. 24, at 36). The rules also require an arbitrator to issue an award within fourteen (14) days of the hearing (Doc. No. 24, at 38). Compelling ATTM to participate in numerous, imminent, duplicative arbitrations, each on an expedited basis, while embroiled in litigation with the DOJ and attempting to convince the FCC and various state agencies that the proposed merger is not anti-competitive, would cause ATTM irreparable harm. ATTM would be obligated to allocate time, resources, and witnesses to the arbitration proceedings, which will purport to decide the very same issues that the DOJ, FCC, and state regulators are currently grappling with. If the ATTM / T-Mobile merger fails, it should fail because reasoned, informed analysis indicates that the merger will harm competition, not because multiple, carbon-copy arbitrations stretch ATTM too thin.

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[6] See United States v. AT&T Inc., No. 1:11-cv-01560 (D.D.C.).

3. The Balance Of Hardships Tips In Favor Of ATTM

As discussed immediately above, permitting Smith's arbitration to proceed at this time would cause ATTM irreparable harm. In comparison, an injunction would only slightly prejudice Smith. To begin, Smith's arbitration demand invokes the same statutory provision (Section 7 of the Clayton Act) and seeks the same ultimate relief (an injunction of the merger) as the DOJ's lawsuit. The FCC is also assessing the competitive impact of the merger as part of its review. These government proceedings may very well result in the precise relief Smith demands, which minimizes the hardship an arbitration injunction would impose on Smith.

Second, Smith's private arbitration seeking to enjoin the merger is premature in light of the ongoing governmental proceedings, so delaying Smith's arbitration pending government review of the merger does not unfairly burden Smith. In this regard, we agree with the Seventh Circuit's decision in South Austin Coalition Community Council v. SBC Communications Inc., 191 F.3d 842 (7th Cir. 1999), which affirmed a district court's dismissal of private antitrust litigation challenging a merger because the suit was 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." Id. at 843. Judge Easterbrook's reasoning in reaching this result persuades us:

> Courts often wait for agencies, even when the agencies' views are not legally conclusive-not only because the agencies may have something helpful to say, but also because what the agencies do may shape the litigation...Until the agencies have had their say, it is impossible to perform the sort of antitrust analysis that is integral to a potential competition case, and it therefore would be a waste of everyone's time to proceed. Antitrust litigation can be very costly; an expensive challenge to a moving target is worse than pointless.

South Austin, 191 F.3d at 844-45. Here, AT&T may have to make significant divestitures to appease government regulators.[7] In the words of Judge Easterbrook, this merger is a "moving target," and permitting Smith's arbitration to proceed at this relatively early stage of government review would likely do more harm than good.

Finally, we note that preliminarily enjoining Smith's arbitration does not leave Smith without recourse. The arbitration agreement "does not preclude [Smith] from bringing issues to the attention of federal, state, or local agencies, including, for example, the Federal Communications Commission. Such agencies can, if the law allows, seek relief against [ATTM] on your behalf." Arbitration agreement §2.2(1). As noted previously, the FCC is already investigating the merger, and nothing prevents Smith from bringing her concerns to the FCC's attention.

4. The Public Interest Weighs Heavily In Favor Of Enjoining Smith's Arbitration

As discussed *supra*, one of the concerns Concepcion expressed with respect to class arbitration is the inability to adequately protect the interests of absent parties. That concern looms large here. The public - including ATTM and T-Mobile customers; T-Mobile itself; public interest organizations; and the mobile computing technology industry as a whole - has a vested interest in ensuring that the ATTM / T-Mobile merger review is both transparent and thorough. Importantly, parties that oppose the merger, such as Ms. Smith, share this interest with parties that champion it. An open, comprehensive, well-informed merger review benefits the

[7] See Spencer E. Ante & Gina Chon, *AT&T Fires Back At DOJ*, Wall Street Journal (Sept. 10, 2011), http://online.wsj.com/article/SB10001424053111904836104576560940430102076.html.

public at large by precluding "bad" mergers and permitting "good" ones. The FCC, DOJ, and other government regulators should be free to protect this public interest without worrying that a single arbitrator in a private proceeding (or, more likely, the conflicting decisions of various arbitrators in functionally equivalent, duplicative proceedings) will preempt their review.

Finally, the public has a strong interest in avoiding the kind of "anomalous court forum shopping" that appears to be going on here. By Scott Bursor's own admission, "AT&T's contracts prohibit consolidation or class arbitration, so if 100 arbitrations are filed, each must be handled as an individual case. *If AT&T wins 99 of those cases, they lose. There is strength in numbers, and we only need to win one to stop the merger.*"[8] The late Richard Nagareda, an expert in class actions and complex litigation, described this "anomalous court" dilemma in the class action certification context, but the same principles apply here. When deciding where to file a national market class action, class counsel strategically seeks out the one "anomalous court," i.e., the one court that would certify the class action, even though many other courts would not. See Richard A. Nagareda, *Common Answers For Class Certification*, 63 Vand. L. Rev. En Banc 149, 155-57 (2010). This poses a problem because "a single positive trumps all the negatives," meaning that class counsel needs only to find one court to certify his case, even if hundreds of other courts would disagree. See id.

Here, counsel flaunts his ability to "stop the merger," even if 99 out of 100 arbitrators agree that the merger should proceed. Permitting one "anomalous" arbitrator to decide the fate of

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[8] *Multiple AT&T Customers File Arbitration Cases Challenging AT&T's Takeover of T-Mobile: Bursor & Fisher Law Firm Announces New Website, www.FightTheMerger.com, Offering to Represent AT&T Customers Opposing the Merger* (July 22, 2011), http://www.bursor.com/news/20110722FightTheMerger/. (emphasis added).

a $39-billion merger would do a grave disservice to the public interest.

III. Conclusion

For the aforementioned reasons, ATTM has met the requirements for the issuance of a preliminary injunction. Plaintiff AT&T Mobility LLC's Motion for Preliminary Injunction (Doc. No. 16) is therefore GRANTED. Defendant Sandra Smith is enjoined from arbitrating the claims set forth in her arbitration demand. Accordingly, Defendant Sandra Smith's Motion to Compel Arbitration and to Dismiss Complaint (Doc. No. 10) is DENIED.

BY THE COURT:

/s/ Legrome D. Davis

Legrome D. Davis, J.

EXHIBIT 4

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

AT&T MOBILITY LLC, Plaintiff, v. RICHARD GONNELLO, JUAN MONTEVERDE, LEAF O'NEAL, JARED POPE and BRYAN RODRIGUEZ, Defendants.	Civil Action No. 1:11-CV-5636 PKC

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND DISMISS COMPLAINT

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I. AT&T'S PERSONAL ATTACKS ON DEFENSE COUNSEL ARE DUPLICITOUS, WRONG, AND IRRELEVANT TO THE MERITS OF THIS MOTION

AT&T's opposition brief seeks to poison the well with personal attacks on the integrity and motivations of defendants' counsel with inflammatory language describing "counsel's scheme to coerce a settlement by subjecting AT&T … to more than a thousand separate *ultra vires* arbitrations." Opp. Mem. at 1 (Dkt. No. 40). To date there has been no settlement communication from either side. The claimants and their counsel are asserting their claims in arbitration, as is their right and obligation under the terms of the parties' agreement. There is no "scheme" – just an inflammatory personal attack by AT&T to distract from the company's hypocrisy with regard to the arbitration agreement.

Just a short time ago, AT&T sang a very different tune before the United States Supreme Court. AT&T specifically told the Supreme Court that the arbitration agreement was designed to incentivize customers and an "enterprising lawyer" to bring "4,700 … serial arbitrations." *Concepcion*, AT&T October 2010 Reply Brief for Petitioner at 18-19, 9/27/11 Bursor Decl. Exh. 3 (Dkt. No. 45-1). AT&T did not present this to the Supreme Court as a danger, a drawback, or a form of "abuse." On the contrary, AT&T presented this in a favorable light – something the arbitration agreement was designed not only to permit, but to encourage.

AT&T's August 2010 Supreme Court brief relied heavily on the "incentives" and "premiums" that AT&T built into the arbitration agreement, which AT&T described as "features that are designed to encourage consumers to pursue claims through bilateral arbitration." *Id.* at 6. These include a $10,000 minimum recovery for the customer plus double attorneys' fees if an arbitral award exceeds AT&T's last "written settlement offer made before an arbitrator was selected." Customer Agreement § 2.2(6), Complaint Exh. A (Dkt. No. 1).

AT&T has repeatedly argued – in many, many cases – that these "incentives" and "premiums" make it feasible for customers to vindicate their claims despite the class action waiver. For example, AT&T's brief to the Ninth Circuit stated: "nothing would stop an enterprising lawyer from recruiting clients to file notices of dispute against ATTM and then taking advantage of the incentives in the arbitration provision to obtain significant settlements." *Laster v. AT&T Mobility LLC*, 1/5/09 Opening Brief of AT&T Mobility at 40, 9/27/11 Bursor Decl. Exh. 9 (Dkt. No. 45-2). AT&T discussed the prospects for an "enterprising lawyer" to utilize the incentives and premiums of the arbitration agreement again in *Concepcion*:

> "Similarly mistaken is the assertion by some amici that, if class actions are unavailable, attorneys would have no incentive to represent customers in arbitrations. … [N]othing would stop an enterprising lawyer from creating a Notice of Dispute mill – advertising for clients and then using the incentives ATTM has created to obtain settlements well in excess of the value of each client's claim. One group of amici inadvertently makes this very point. They note that after issuing a press release announcing a lawsuit against ATTM, they were contacted by 4,700 customers with similar complaints. They easily could have filled out Notices of Dispute for each of these 4,700 customers and either obtained acceptable settlements or had the opportunity to pursue the premiums in serial arbitrations. That would have been more than enough financial incentive for most lawyers."

Concepcion, AT&T October 2010 Reply Brief for Petitioner at 18-19, 9/27/11 Bursor Decl. Exh. 3(Dkt. No. 45-1). AT&T elaborated that "lawyers and consumer advocates may disseminate information about alleged wrongdoing in the matter of their choosing," including through "blogs, internet forums, and other media." *Id.* at 19. Thus, AT&T specifically structured the arbitration agreement to prohibit any form of class action, consolidation, or joinder, and to provide instead for a system of duplicative "serial arbitrations" in which individual customers and their "enterprising lawyers" would pursue the incentives and premiums that AT&T built into the agreement for that very purpose.

Defendants and their counsel have followed that agreement to the letter. We have done exactly what AT&T described. We are pursuing the contractual incentives AT&T designed and created. We have complied with the agreement in every respect. We have brought our claims in the only forum where they are permitted – mandatory arbitration.

II. QUESTIONS OF ARBITRABILITY ARE FOR THE COURT, BUT QUESTIONS OF REMEDIES ARE FOR THE ARBITRATOR

AT&T attacks a straw man with its lengthy argument that questions of arbitrability are for the court to decide. That is not in dispute. Defendants' motion forthrightly acknowledged that questions of arbitrability are for the court. But the question of arbitrability – i.e., whether the parties' dispute falls within the scope of the agreement "to arbitrate **all disputes and claims** between us"[1] – is a narrow one. And it is not really the focus of AT&T's argument. Instead, AT&T asks the court to determine what type of relief may be sought in the arbitration. The key statement in AT&T's brief is this: "***Determining whether a dispute falls within the contours of an arbitration agreement requires looking at the relief sought.***" Opp. Mem. at 12 (Dkt. No. 40) (emphasis added, internal quotation marks omitted). That is the key statement because it demonstrates that AT&T is not really arguing about arbitrability – whether the dispute is within the scope of the agreement to arbitrate. Instead AT&T is arguing about what remedies may be sought in arbitration. AT&T invites the error the Supreme Court described when it cautioned courts to avoid deciding the merits of a dispute "under the guise of deciding arbitrability." *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 647 (1986). AT&T would have this Court jump past the merits, to render a hypothetical decision on what remedies might be awarded, under the guise of deciding arbitrability.

[1] Customer Agreement § 2.2(1) (bold in original), Complaint Exh. A (Dkt. No. 1).

AT&T cites no case in which a court determined the scope of an agreement to arbitrate, or enjoined an ongoing arbitration, based on "looking at the relief sought." On the contrary, the authority of the arbitrator to grant a particular form of relief is for the arbitrator to decide in the first instance, and not for the court. The Supreme Court made this clear in *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 765 (1983), stating: "just as in any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator."

Sunoco, Inc. v. Honeywell Int'l, Inc., 2005 WL 2559673 (S.D.N.Y. Oct. 13, 2005) is also directly on point. Sunoco sought a preliminary injunction against an ongoing arbitration on the ground that "Honeywell's demand for arbitration exceeded the scope of the Agreement" by seeking an ultra vires remedy. *Id.* at *1. Sunoco argued that the arbitration agreement permitted the arbitrator to award damages only for time periods in the year 2005 and later, and did not permit the arbitrator to retroactively award damages for earlier time periods prior to 2005, "characterizing [this] as an issue as to the 'scope' of the arbitration and of the arbitrator's jurisdiction." *Id.* at *2. The court denied Sunoco's motion, which it described as "an impermissible attack on an ongoing arbitration proceeding." *Id.* at *4. The court explained that "the proper mechanism for any attack on the arbitrator's decision on the issue is through … [an] action to vacate a final award, and not through an application for injunctive relief to prevent" the arbitration from moving forward. *Id.* at *3.

WR Grace and *Sunoco* both demonstrate that the question of what remedies the arbitrator may award is for the arbitrator to decide in the first instance, subject to judicial review under 9 U.S.C. § 10 only after a final arbitral award is made. AT&T argues this leads to "absurd

results" because "if a party were to file a demand for class-wide arbitration – which undisputedly is expressly forbidden under § 2.2(6) – a court could do nothing to stop it, but instead must leave the question to the arbitrator." Opp. Mem. at 14 (Dkt. No. 40). AT&T's argument is wrong for at least three reasons. First, because AAA would not administer such a demand. *See* AAA Policy on Class Arbitrations, available at http://www.adr.org/sp.asp?id=28779 ("The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder …."). Second, because it is inconceivable that an arbitrator would just disregard the limitations of § 2.2(6). And third, in the extremely unlikely event that AAA administered such a case, and the arbitrators disregarded the limitation, the court certainly *could* do something to stop it. Under 9 U.S.C. § 10(a)(4), the court could vacate the award on the ground that "the arbitrators exceeded their powers."

III. AT&T HAS CONCEDED THE CLAYTON ACT CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRTION AGREEMENT

AT&T does not dispute that the Clayton Act claims asserted in these arbitrations are within the scope of the agreement to arbitrate. On the contrary, AT&T admits "certain claims under Section 7 of the Clayton Act, which is the claim that Defendants are asserting in their arbitration demands, can be encompassed within the arbitration agreement." 9/15/11 Hearing Tr. at 4:18-21, 9/27/11 Bursor Decl. Exh. 13 (Dkt. No. 45-2). But AT&T offers no basis to distinguish "certain" Clayton Act claims from others. The parties agreed "to arbitrate **all disputes and claims** between us." Customer Agreement § 2.2(1) (bold in original), Complaint Exh. A (Dkt. No. 1). AT&T itself has described the scope of this arbitration clause as "all-encompassing."[2] It has no exclusions.

[2] *See, e.g.*, AT&T Motion to Compel Arbitration in *Hendricks v. AT&T Mobility, LLC* at 7:14-17 ("[T]here can be no denying that Hendricks' claims fall within the broad scope of his

(footnote continued...)

IV. AT&T HAS CONCEDED – AND THE SUPREME COURT HAS HELD – THAT "THE ARBITRATOR MAY AWARD THE CLAIMANT ANY FORM OF INDIVIDUAL RELIEF (INCLUDING … INJUNCTIONS) THAT A COURT COULD AWARD"

AT&T has represented – repeatedly – that arbitrators can award the same individual relief that a court could award. The agreement itself states that "Arbitrators can award the same damages and relief that a court can award." Customer Agreement § 2.1, Complaint Exh. A (Dkt. No. 1). In *Concepcion* (and many other cases) AT&T stated that the arbitrator could award "any form of individual relief" that a court could award:

> "Full remedies available: The arbitrator may award the claimant ***any form of individual relief (including*** statutory attorneys' fees, statutory damages, punitive damages, and ***injunctions) that a court could award***."

Concepcion, AT&T August 2010 Brief for Petitioner at 6 (emphasis added), 9/27/11 Bursor Reply Decl. Exh. 4 (Dkt. No. 45-1).[3] In the same brief, AT&T repeatedly distinguished this arbitration agreement from exculpatory contracts by pointing to the absence of any limitation on available remedies. *See id.* at 20-21 ("All of the cases in which contracts have been declared exculpatory involve provisions that affirmatively limit remedies. The requirement of bilateral

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(...footnote continued)
agreement to arbitrate 'all disputes and claims' between himself and ATTM. The plain language of ATTM's arbitration provision is **all-encompassing** and 'intended to be broadly interpreted.'") (emphasis added), 9/27/11 Bursor Decl. Exh. 17 (Dkt. No. 45-2). *See, e.g., Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009) ("ATTM's arbitration provision is **all-encompassing**, extending to 'all disputes and claims' between Plaintiff and ATTM.") (emphasis added).

[3] AT&T has made this exact same statement characterizing the remedies available under its arbitration agreement many times. *See, e.g.*, AT&T's 7/7/11 Motion to Compel Arbitration in *Hendricks v. AT&T Mobility LLC* at 4:21-23 ("**Full remedies available:** The arbitrator may award the claimant any form of individual relief (including statutory attorneys' fees, statutory damages, punitive damages, and injunctions) that a court could award."), 9/27/11 Bursor Decl. Exh. 2 (Dkt. No. 45-1); 1/5/09 Opening Brief of AT&T Mobility LLC in *Laster v. AT&T Mobility LLC* at 9 (same), 9/27/11 Bursor Decl. Exh. 9 (Dkt. No. 45-2).

arbitration in ATTM's arbitration provision does not do that."); *id.* at 44 ("All of the cases applying the exculpatory-clause statute outside the arbitration context involve affirmative limitations on the ability to pursue legal rights and remedies. The arbitration agreement does *not* impose any such limitations.") (italics in original). The Supreme Court accepted this characterization of the agreement, stating that "***the arbitrator may award any form of individual relief, including injunctions*** and presumably punitive damages." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1744 (2011) (emphasis added).

V. AT&T HAS CONCEDED THAT A COURT COULD AWARD AN INDIVIDUAL LITIGANT INJUNCTIVE RELIEF AGAINST A PROPOSED MERGER

The claimants seek injunctive relief available to individual private plaintiffs under the antitrust laws. Indeed, AT&T's counsel has already admitted in the AAA proceedings that the relief sought would be available to an individual litigant in a court proceeding. *See* 8/2/11 Letter from Neal S. Berinhout to AAA at 2 (conceding that "individuals could sue in court for the public injunctions [defendants'] seek") (underlining added), 9/27/11 Bursor Decl. Exh. 8 (Dkt. 45-2).[4]

Notwithstanding that admission, AT&T contends that an injunction against a proposed merger is "non-individualized injunctive relief." Opp. Mem. at 4 (Dkt. No. 40). But that is not correct. If the same relief is available to an individual litigant in an individual non-class, non-

[4] The relief sought, which would enjoin AT&T's takeover of T-Mobile, or alternatively require divestitures or other conditions to the proposed merger, is available to individuals under the Clayton Act. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986) ("[T]he legislative history of § 16 [of the Clayton Act] is consistent with the view that § 16 affords private plaintiffs injunctive relief."); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 427 (1st Cir. 1985) ("[C]ourts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers."); *Federal Trade Commission v. International Paper Company*, 241 F.2d 372, 373 (2d Cir. 1956) ("Individuals may also have injunctive relief against threatened loss or damage by a violation of the anti-trust laws under the same conditions and principles as govern the granting of injunctions by courts of equity, that is to say, district courts.") (underlining added).

representative case in a court of law, then it is a "form of individual relief." *Concepcion*, 131 S.Ct. at 1744. To the extent there is a dispute about the nature of the relief sought and whether it fits within § 2.2(6), that is a question for the arbitrator. *See* Customer Agreement § 2.2(3) ("All issues are for the arbitrator to decide, except that issues relating to the scope and enforceability of the arbitration provision are for the court to decide."). However, claimants' arguments on the merits of that issue have been set forth at some length in Defendants' Memorandum Of Law In Opposition To AT&T Mobility LLC's Motion For Preliminary Injunction at pp. 23-29 (Dkt. No. 44). Those arguments are incorporated herein by reference.

CONCLUSION

For the foregoing reasons the Court should issue an order (i) compelling AT&T to arbitrate its claims on an individual basis, (ii) denying AT&T's motion for preliminary injunction, and (iii) dismissing this action.

Dated: September 30, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott A. Bursor, hereby certify that this motion and related documents were electronically filed and served on all counsel via the Court's ECF system.

/s/
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EXHIBIT 5

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

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

PLAINTIFF AT&T MOBILITY LLC'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

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INTRODUCTION

Defendants' motion to compel arbitration seeks to enlist this Court in effectuating their counsel's scheme to coerce a settlement by subjecting AT&T Mobility LLC ("ATTM") to more than a thousand separate *ultra vires* arbitrations each seeking the same relief: an injunction prohibiting the proposed merger of ATTM and T-Mobile USA.[1] Defendants' counsel is betting that ATTM will be forced to settle due to:

- the economic burden of litigating a flood of separate high-stakes arbitrations that Defendants' counsel refuses to consolidate, any one of which could result in an order purporting to prohibit the $39 billion proposed merger;

- the reality that the complex factual and legal issues presented by the claimants' Clayton Act claims cannot be fairly litigated in these arbitrations, because the currently applicable AAA rules require each arbitrator to hold a merits hearing within 30 days of appointment and to issue a ruling within 14 days of closing the hearing (in contrast, the federal district court hearing the Department of Justice's challenge to the merger has scheduled a ***six-week*** trial, to commence after a five-month preparation);[2] and

- the inevitability that the arbitrations will interfere with ATTM's ability to present its position effectively in the Department of Justice litigation and the ongoing Federal Communications Commission proceeding, each of which involve the same issues—and therefore the same witnesses and knowledgeable company officials and lawyers.[3]

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[1] The American Arbitration Association ("AAA") has accepted 24 cases for administration (two of which have since been stayed by the U.S. District Court for the Northern District of California). Decl. of Kevin Ranlett ¶ 18 (Dkt. No. 10). Defendants' counsel have filed many more arbitrations—a total of 1,132, as of September 22, 2011. Supp. Decl. of Kevin Ranlett ¶ 3. Whether the other 1,108 arbitrations will proceed may turn on the attempt by Defendants' counsel to compel ATTM to pay the costs for those arbitrations, an issue that is before the U.S. District Court for the Northern District of California in another action brought by Defendants' counsel. *See* Ranlett Supp. Decl. ¶¶ 4-5 & Ex. 1.

[2] Ranlett Supp. Decl. ¶ 6 & Ex. 2.

[3] In the Department of Justice action, discovery is underway and both fact and expert discovery must be completed by January 2012, with experts identified in November 2011 and initial expert reports due in December 2011. Ranlett Supp. Decl. Ex. 2 at 4, 7-8.

The relief that Defendants' motion seeks is the converse of the relief sought in ATTM's pending motion for a preliminary injunction; Defendants request an injunction compelling ATTM to arbitrate, while ATTM seeks an injunction prohibiting Defendants from pursuing arbitration. The relevant legal issues are identical as well. Defendants' motion to compel arbitration should be denied for the same reasons that ATTM's preliminary injunction motion should be granted: Defendants' Demands for Arbitration seeking to enjoin the ATTM/T-Mobile merger fall far outside the scope of their arbitration agreements, and Defendants are simply wrong in asserting that this Court lacks the power to determine whether a claim is arbitrable. To the contrary, binding Supreme Court precedent—and ATTM's arbitration provision—make clear that this is precisely the sort of "gateway" issue that this Court must determine.

Indeed, for these reasons, Judge Ryskamp of the U.S. District Court for the Southern District of Florida has just granted ATTM's motion for a preliminary injunction against eight identical arbitrations—brought by eight claimants who are represented by the same counsel as Defendants—and denying those claimants' parallel motion to compel arbitration. *See* Order, *AT&T Mobility LLC v. Bushman*, NO. 9:11-cv-80992-KLR (S.D. Fla. Sept. 23, 2011) ("*Bushman* Order") (attached as Ranlett Suppl. Decl. Ex. 3). As Judge Ryskamp held, "[w]hether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Id.* at 2 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting in turn *AT&T Techs., Inc. v. Comm'cns Workers of Am.*, 475 U.S. 643, 649 (1986)) (internal quotation marks omitted). "Furthermore," Judge Ryskamp pointed out, ATTM's arbitration "agreement states that 'issues relating to the scope and enforceability of the arbitration provision are for the court to decide.'" *Id.* at 2-3 (quoting Section 2.2(3) of ATTM's provision). And in deciding those

issues, Judge Ryskamp concluded that ATTM's arbitration provision "bars Defendants' arbitration demands." *Id.* at 3.

This Court should reach the same conclusion.

STATEMENT

ATTM's papers in support of its motion for a preliminary injunction contain a detailed statement of the facts and procedural history. *See* ATTM's Mem. in Supp. of Mot. for Prelim. Inj. at 4-11 (Dkt. No. 9). We incorporate that statement by reference.

ARGUMENT

It is quite telling that Defendants do not even attempt to explain how their Demands seeking injunctions prohibiting the ATTM/T-Mobile merger—and thereby affecting many millions of individuals and thousands of companies—could possibly be arbitrable under agreements that expressly preclude "any form of a representative or class proceeding" and forbid non-individualized injunctions by limiting "declaratory or injunctive relief" to declarations or injunctions "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). *See also Bushman* Order at 3-5 (concluding that ATTM's arbitration provision prohibits demands for arbitration identical to Defendant's demand).

Rather, Defendants' entire argument is that this Court lacks the power to decide that issue and must compel ATTM to arbitrate even if the Demands do in fact fall far outside the scope of their arbitration agreements. That assertion ignores binding Supreme Court precedent and basic common sense.

Most critically, Defendants fail even to mention in their motion either *Howsam* or *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court's leading decisions addressing the division of authority between an arbitrator and a court. In *Howsam*, the Court

held that "the question of arbitrability[] is an issue ***for judicial determination*** unless the parties ***clearly and unmistakably*** provide otherwise." 537 U.S. at 83 (emphasis added; internal quotation marks and alteration omitted) (citing, *inter alia*, *First Options*, 514 U.S. at 944). The issue presented by ATTM's preliminary-injunction motion and Defendants' motion to compel arbitration—whether Defendants' Demands constitute impermissible representative actions seeking non-individualized injunctive relief that is beyond the power of the arbitrator to grant—falls squarely within the questions of arbitrability that can and must be decided by this Court.[4]

A. *Howsam* And *First Options* Make Clear That This Court Has The Power And Obligation To Decide Questions Of Arbitrability.

Because arbitration "is a matter of consent, not coercion" (*Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)), "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (*United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

In *First Options*, the Supreme Court observed that parties to arbitration agreements typically do not consider "the significance of having arbitrators decide the scope of their own powers" and that parties who want the arbitrators to decide the reach of their own authority would say so explicitly. 514 U.S. at 945. Based on these "assumption[s] about the parties'

[4] Although Defendants protests that a court may not interfere in ongoing arbitrations (Mem. at 1, 10, 12-14 & n.5), they elsewhere acknowledge that "the FAA allows a district court to compel or enjoin arbitration as the circumstances may dictate." *Id.* at 10. In fact, it is well established that Section 4 of the FAA authorizes courts to enjoin ongoing arbitrations. *See*, *e.g.*, *First Options*, 514 U.S. at 946 (a party to an arbitration clause may pursue "an independent court decision on the question of arbitrability * * * by trying to enjoin the arbitration"); *Sterling Fin. Inv. Group, Inc. v. Hammer*, 393 F.3d 1223, 1225-26 (11th Cir. 2004) (citing Section 4 in affirming a district court's order enjoining arbitration from proceeding in an improper location); ATTM Mem. in Supp. of Mot. for Prelim. Inj. at 14 (citing cases). This Court has both the authority and the obligation to enjoin the *ultra vires* arbitration that Defendant has brought.

expectations," the Court adopted an "'interpretive rule'" (*Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 n.1 (2010)) for arbitration agreements: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 514 U.S. at 944 (internal quotation marks and alterations omitted); *see also Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208 (1991) ("a party cannot be forced to arbitrate the arbitrability question") (internal quotation marks omitted).

In *Howsam* the Court set forth the standard for determining whether an issue qualifies as a question of arbitrability. Characterizing these as "gateway question[s]," the Court defined them as issues that contracting parties "would likely have expected a court to have decided" and "are not likely to have thought * * * that an arbitrator would" determine. 537 U.S. at 83.

The Supreme Court articulated the principles set forth in *First Options* and *Howsam* in order to "avoid[] the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 83-84; *see also First Options*, 514 U.S. at 945. The strong presumption that questions of arbitrability are to be decided by the court—and the inclusion within that category of all questions that the parties are likely to have thought sufficiently significant to be decided by a court—ensures that arbitration agreements will be enforced ***only*** "according to their terms and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (internal quotation marks omitted); *see also* 9 U.S.C. § 4 (arbitration must "proceed in the matter provided for in such agreement"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'") (quoting *Volt*, 489 U.S. at 478).

Defendants recite a variety of statements by courts to the effect that there is a strong federal policy favoring arbitration, including the Supreme Court's statement that "any doubts concerning" whether arbitration agreements should be construed to cover a dispute "should be resolved in favor of arbitration." Mem. at 10-11 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). But Defendants' reliance on these statements is "legally erroneous," as the Supreme Court put it in *First Options*, "for there is no strong arbitration-related policy" with respect to the "who decides" question—*i.e.*, whether this Court or an arbitrator should resolve whether Defendants' Demands are subject to arbitration in the first place. 514 U.S. at 947. In other words, "[a]lthough the Court has * * * long recognized and enforced a 'liberal federal policy favoring arbitration agreements,' it has made clear that there is an exception to this policy: 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*, 537 U.S. at 83 (quoting *Moses H. Cone*, 460 U.S. at 24-25) (second emphasis added; second set of internal quotation marks omitted); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2859-60 (2010) ("We have applied the presumption favoring arbitration * * * only where it reflects * * * a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is * * * best construed to encompass the dispute.").

In fact, far from there being a federal policy in favor of arbitrating questions of arbitrability, a party who contends that the arbitrator alone can decide these questions must satisfy the "heightened standard" of "'clear and unmistakable' evidence" of the parties' intent to

prevent courts from deciding the issue. *Rent-A-Center*, 130 S. Ct at 2777 n.1 (quoting *First Options*, 514 U.S. at 944) (alterations omitted).

In short, the Supreme Court has consistently declared that there is a presumption in favor of having ***courts*** decide gateway questions of arbitrability—and a corresponding presumption ***against*** allowing arbitrators to decide such questions. *See AT&T Techs.*, 475 U.S. at 649; *First Options*, 514 U.S. at 944; *Howsam*, 537 U.S. at 83; *Rent-A-Center*, 130 S. Ct. at 2777 n.1. Defendants have not made the requisite showing by "clear and unmistakable evidence" that the parties intended to have the arbitrator decide whether Defendants' Demands are permitted under the parties' arbitration agreement. Nor could they, because the agreements state 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). Accordingly, the plain language of ATTM's arbitration agreements reflects the parties' express intent to require that courts, not arbitrators, decide gateway issues of arbitrability.

Pointing to the provision of the arbitration agreements providing that the parties "agree to arbitrate **all disputes and claims**," Defendants argue that the sole issue for the Court is whether their causes of action under the Clayton Act are covered by the arbitration agreement. Mem. at 11-12 (citing Compl. Ex. A § 2.2(1)). But any argument that an agreement to arbitrate "all disputes and claims" provides the requisite "clear and unmistakable" agreement to arbitrate ***questions of arbitrability*** is frivolous in view of the agreement's ***express*** reservation to "the court to decide" all "issues relating to the scope and enforceability" of the agreement. Compl. Ex. A §2.2(3). Far from displacing *Howsam*'s standard, the parties' arbitration agreement adopts the very same division of authority between the arbitrator and the court.

B. ATTM's Complaint And Preliminary Injunction Motion Present A Question Of Arbitrability That This Court Must Decide.

1. ATTM's challenge to Defendants' Demands falls well within the *Howsam* standard.

Under *Howsam*, an issue is a "gateway question of arbitrability" if the "contracting parties would likely have expected a court to decide" the issue and are not "likely to have thought * * * that an arbitrator would do so." 537 U.S. at 83. For example, a "dispute about whether the parties are bound by a given arbitration clause" or "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" are both questions "for the court." *Id.* at 84.

ATTM argues in its complaint and preliminary injunction motion that Defendants' Demands are not arbitrable because they violates the express limitations set forth in Section 2.2(6) of the arbitration agreements, which provides that "the arbitrator may not * * * preside over ***any form of a representative or class proceeding***" and 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***." Compl. Ex. A § 2.2(6) (emphasis added). The question whether the Demands violate this limitation on the scope of permissible arbitration constitutes a "gateway question of arbitrability" under *Howsam*, for three reasons.

First, the text of the arbitration agreement makes clear that Section 2.2(6) imposes critical limitations on the scope of permissible arbitration that the parties would have expected a court, rather than an arbitrator, to apply. Indeed, Section 2.2(6)'s prohibition against both "any form of a representative or class proceeding" and non-individualized injunctive relief is so critical that the arbitration agreement specifies that, in the event that the prohibition is not enforced, "the entirety of this arbitration agreement shall be null and void." Compl. Ex. A

§ 2.2(6). Stated another way, if those restrictions are not honored, no arbitration may take place at all. *See Cruz v. Cingular Wireless LLC*, __ F.3d __, 2011 WL 3505016, at *2 (11th Cir. Aug. 11, 2011) ("[a] so-called blow-up clause provides that if the class action waiver 'is found to be unenforceable, then the entirety of this arbitration provision shall be null and void'").

Given the central importance of these restrictions, it strains credulity to believe that the parties intended to leave their enforcement to an arbitrator—and take the risk that an arbitrator might misapply the provision, permitting an arbitration to proceed in violation of Section 2.2(6), and leaving the party with little opportunity to obtain review and reversal of the arbitrator's erroneous determination.[5] As the Supreme Court has noted, "[t]he willingness of parties to enter into [arbitration] agreements * * * would be drastically reduced * * * if a[n] * * * arbitrator had the power to determine his own jurisdiction." *AT&T Techs.*, 475 U.S. at 651 (internal quotation marks omitted). Moreover, it is particularly "hard to believe that defendants would bet the company with no effective means of review." *Concepcion*, 131 S. Ct. at 1752.

Second, recent Supreme Court decisions confirm the significance of the Section 2.2(6) limitations and reinforce the conclusion that the parties would have expected a court to determine whether an arbitration demand violates those limitations.

The Supreme Court explained in *Concepcion* and *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), that class arbitration is fundamentally different from the traditional, bilateral form of "arbitration as envisioned by the FAA." *Concepcion*, 131 S. Ct. at 1753. First, in a class arbitration the arbitrator "no longer resolves a single dispute between

[5] Under the FAA, judicial review of arbitral awards "focuses on [arbitrator] misconduct rather than mistake" in determining the law or facts, and "parties may not contractually expand the grounds or nature of judicial review." *Concepcion*, 131 S. Ct. at 1752 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008)); *see also* 9 U.S.C. § 10(a) (setting forth limited grounds for overturning arbitral award).

the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. 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). Fourth, unlike individual arbitration, class arbitration "*requires* procedural formality" in order to ensure "the protection of absent parties," even though it is "unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator." *Concepcion*, 131 S. Ct. at 1750-51.

Section 2.2(6) excludes the very class and representative claims that were the subject of *Concepcion* and *Stolt-Nielsen*—and, for the reasons we have explained (ATTM Memo. in Supp. Mot. for Prelim. Inj. at 17-22), Defendants' Demands bear all the hallmarks of such claims. *Accord Bushman* Order at 4 ("Defendants' arbitration demands bear the hallmarks of a class action."). Given the dramatic differences between these claims and traditional arbitration—differences specifically catalogued by the Supreme Court—the only possible conclusion is that the parties would have expected a court to determine whether a particular arbitration demand violates the Section 2.2(6) limitations. Because arbitration demands that violate those limitations are not "arbitration as envisioned by the FAA" and "lack[] its benefits" (131 S. Ct. at 1753), it is inconceivable that the parties agreed to assign questions about whether the Demands may go forward to an arbitrator rather than the courts.

Third, the Supreme Court in *Howsam* pointed to the Revised Uniform Arbitration Act of 2000, which draws a distinction between "issues of substantive arbitrability" and "issues of procedural arbitrability." 537 U.S. at 84-85 (internal quotation marks omitted). As the Court

noted, "'in the absence of an agreement to the contrary, issues of substantive arbitrability * * * are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.'" *Id.* at 85 (quoting 7 U.L.A. § 6 cmt.2; emphasis omitted) After *Concepcion* and *Stolt-Nielsen*, there can be little question that the issue of whether a demand for arbitration pursuing representative claims with class-wide effect qualifies as a question of "substantive arbitrability." *See Stolt-Nielsen*, 130 S. Ct. at 1776 (identifying "just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration"); *Concepcion*, 131 S. Ct. at 1751-53 (same).

2. Defendants' exceptionally narrow view of this Court's authority is contrary to Supreme Court precedent.

Defendants nonetheless argue that the Court's power to decide disputed issues is limited solely to the question whether their underlying causes of action under the Clayton Act are within the coverage of the arbitration agreements. Mem. at 10-14. But the pertinent question under *Howsam* is whether "contracting parties would likely have expected a court to have decided" the issue and are not "likely to have thought * * * that an arbitrator would do so." 537 U.S. at 83.[6] For the reasons we have discussed above (*see* Part B.1, *supra*), the parties' disagreement over whether Defendants' Demands comply with Section 2.2(6) of the arbitration agreements is of such central importance to the parties' agreements and the arbitrator's authority under them that it is inconceivable that the parties would have expected an arbitrator to resolve that question. *Cf. First Options*, 514 U.S. at 945 (presuming that parties would not have agreed to allow "arbitrators [to] decide the scope of their own powers").

[6] Indeed, *Howsam* identified the question "whether an arbitration clause * * * applies to a particular type of controversy" as but one example of a "gateway question of arbitrability" for the court to decide. 537 U.S. at 83-84.

Defendants have not cited a single case holding that, when an arbitration agreement includes express limitations on the scope of permissible arbitration and the arbitrator's authority such as Section 2.2(6), the *Howsam* standard allocates resolution of those questions to the arbitrator. Most of Defendants' cases either pre-date or do not cite *Howsam*, and in any event do not support their contentions.

For example, in *John Hancock Mutual Life Insurance Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998), the court declared that "the *sin[e] qua non* of arbitrability is simply stated: that a valid arbitration [agreement] exists ***and*** the dispute falls ***within the contours*** of that agreement." *Id.* at 137 (emphasis added). Determining whether a dispute "falls within the contours" of an arbitration agreement requires looking at the relief sought; it is undeniable that the "contours" of ATTM's provision are defined by the limitations on Section 2.2(6), without which the arbitration provision would be "null and void."

Defendants' reliance on *Warren Bros. Co v. Cardi Corp.*, 471 F.2d 1304 (1st Cir. 1973), and *Elzinga & Volkers, Inc. v. LSSC Corp.*, 838 F. Supp. 1306 (N.D. Ind. 1993), likewise is misplaced. *Warren* applies state law rather than the FAA (471 F.2d at 1307 & n.2), which applies here. And the language Defendants cite (Mem. at 14) stands only for the unexceptional proposition that ***once*** a dispute is determined to be arbitrable, the court should not proceed to decide the merits of the underlying claims. The question here is whether Defendants' Demands are arbitrable. Similarly, in *Elzinga*, the court held that the disputed issue—the validity of the assignment of the arbitration agreement to the party invoking arbitration—was for the court to resolve. 838 F. Supp. at 1310-11. The court held that "the issue of assignment * * * is one that this court must now decide because "referral to arbitration of the issue of assignability would require the ***arbitrator to ultimately determine his jurisdiction*** by examining contract law

principles, which is a function ***reserved for the court***." *Id.* at 1311 (emphasis added; citing *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986)).

Defendants cite two cases for the proposition that the FAA requires the arbitrator to decide in the first instance any limits on the scope of his or her powers, subject to judicial review after a final award. Mem. at 13 n.5. But in those cases, judicial intervention was improper because the arbitrations had been properly commenced by agreement of the parties or by court order; in that situation—not present here—Section 10 of the FAA bars judicial review of interlocutory awards. *See Compania Panemena Maritima San Gerassimo, S.A. v. J. E. Hurley Lumber Co.*, 244 F.2d 286, 288 (2d Cir. 1957) ("It should not be the function of the District Court, ***after having ordered an arbitration to proceed***, to hold itself open as an appellate tribunal to rule upon any questions of evidence that may arise in the course of the arbitration.") (emphasis added); *Sunoco, Inc. v. Honeywell Int'l, Inc.*, 2005 WL 2559673, at *3 (S.D.N.Y. Oct. 13, 2005) (denying injunction of in-progress arbitration because, "***[h]aving chosen to submit that issue to the arbitrator***, the proper mechanism for any attack on the arbitrator's decision on the issue is through [a] cause of action to vacate a final award") (emphasis added). Neither case speaks to the court's obligation under 9 U.S.C. § 4 to enjoin an *ultra vires* arbitration before it commences. And unlike *Sunoco*, where the court held that review was premature in part because "Sunoco ha[d] not shown that it w[ould] suffer irreparable harm" if forced to wait until after arbitration had ended (*id.*), ATTM's complaint is "fit for * * * review at this time" because the threat of forced participation in an unauthorized representative action or class arbitration "demonstrate[s] sufficient hardship" to warrant immediate judicial review under *Stolt-Nielsen*, 130 S. Ct. at 1767 n.2. *See Bushman* Order at 5-6.

Finally, Defendants' position would lead to absurd results. In fact, Defendants admit that, under their reasoning, if a party were to file a demand for class-wide arbitration—which undisputedly is expressly forbidden under Section 2.2(6)—a court could do nothing to stop it, but instead must leave the question to the arbitrator. *See* Mem. at 12 ("[e]ven assuming for sake of argument [that] these are really class action cases in disguise, they would still fall within the scope of 'all disputes and claims' subject to arbitration under the terms of the parties' agreement"); *id.* at 13 n.5 ("The question of what remedies might be involved in any of these arbitrations is for the arbitrator to decide in the first instance, subject to judicial review under the FAA only after a final arbitral award has been made.") (relying on cases decided before *Stolt-Nielsen*).

In other words, Defendants say, any party (or lawyer) who wishes to pursue a forbidden class or representative arbitration could do so without court intervention simply by filing hundreds of demands for such arbitrations and hoping that a rogue arbitrator will entertain one—in which case ATTM would suffer the very class arbitration it expressly contracted to avoid before being able to seek court assistance. At a minimum, that party or lawyer could put ATTM to the expense associated with the *ultra vires* arbitration. And here, Defendants' counsel seek to put ATTM to that expense a thousand times over.

That, however, is not the law. The right to compel arbitration under the FAA is not a right to require arbitration of an unspecified sort and to let the arbitrator figure out the rest so long as the causes of action are covered by the clause—especially when the remaining questions are at the heart of the arbitration agreement. Instead, the FAA requires that arbitration take place "in accordance with the terms of the agreement." 9 U.S.C. § 4; *see also Concepcion*, 131 S. Ct. at 1748. That is why, "[u]nder the FAA, a party to an arbitration agreement may petition a

[federal] court for an order directing that 'arbitration proceed ***in the manner provided for in such agreement***.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting 9 U.S.C. § 4) (emphasis added). By contrast, Defendants' petition requests an order directing that arbitration proceed in a manner that is ***forbidden*** by the arbitration agreement. That request is wholly at odds with the FAA.

3. The Court has the power to decide whether Defendants' arbitrations may proceed even under their cramped view of the Court's authority.

Even if Defendants were correct that the sole duty of a court is to assess whether a "dispute" is subject to arbitration (Mem. at 14), that test is satisfied here.

Defendants ignore that a "dispute" is more than just a cause of action. Every legal dispute has two elements—the legal basis for the plaintiff's claim (the cause of action) ***and*** the specific relief sought that would redress his or her grievance. *Cf.*, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that the plaintiff had an actionable dispute with respect to damages, but not with respect to injunctive relief). That fundamental principle is reinforced by the fact that ATTM's arbitration provision itself defines a "Notice of Dispute"—the equivalent of an informal complaint initiating the arbitration process—as having two components: A customer must "(a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought." Compl. Ex. A § 2.2(2). And that is why, time after time, courts have compelled arbitration under ATTM's provision, expressly declaring that arbitration must proceed on an individual, rather than class-wide, basis in accordance with the arbitration provision.[7]

[7] *See*, *e.g.*, *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153, at *4 (N.D. Cal. Aug. 18, 2011) (compelling arbitration on an individual basis because the FAA preempts California law that does "not permit arbitration of public injunctive relief claims"); *Johnson v. AT&T Mobility LLC*, 2010 WL 5342825, at *5, *9 (S.D. Tex. Dec. 21, 2010) (compelling arbitration even though the agreement "prevent[s] Plaintiff from pursuing claims on behalf of other consumers"); *Francis v. AT&T Mobility LLC*, 2009 WL 416063, at *10 (E.D. Mich. Feb. 18, 2009) ("Defendant AT&T's motion to compel arbitration of [plaintiff's] claims on an individual basis is hereby GRANTED.").

Indeed, Defendants' argument is particularly surprising because their counsel is arguing in a related case involving the same arbitration agreement that a court must decide whether his clients or ATTM must pay the filing fees for some of these duplicative arbitrations. *See* page 1 n.1, *supra*. If Defendants were correct that the court may decide only whether the cause of action is covered by the agreement, then that petition to compel arbitration would have to be dismissed.

CONCLUSION

Defendants' motion to compel arbitration should be denied.

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