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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATHERINE SCOTT, CAROLYN JEWEL, and GEORGE PONTIS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

AT&T INC.; AT&T SERVICES, INC.; AT&T MOBILITY, LLC; TECHNOCOM CORP.; and ZUMIGO, INC.,

Defendants.

Case No. 19-cv-4063-SK

REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS BY DEFENDANTS AT&T INC., AT&T SERVICES, INC., AND AT&T MOBILITY LLC

Date: January 13, 2020
Time: 9:30 AM
Ctrm: C, 15th Floor (San Francisco)
Judge: Hon. Sallie Kim

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INTRODUCTION

Plaintiffs' main objection to enforcement of their arbitration agreements rests on *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), in which the California Supreme Court held that agreements for individual arbitration that would bar claims under the Unfair Competition Law ("UCL") or Consumer Legal Remedies Act ("CLRA") for public injunctive relief violate California public policy. But that argument fails at the outset: Although Plaintiffs have sued under the UCL and CLRA, their complaint seeks private, not public, injunctive relief.

Both *McGill* itself and a number of Ninth Circuit and federal district court decisions confirm that the *McGill* rule is inapplicable when the plaintiffs seek relief principally on behalf of themselves and similarly situated individuals. That is the case here: Plaintiffs seek damages and an injunction to stop the alleged unauthorized sharing of their own and other AT&T customers' location data through data aggregators. In fact, no such sharing is ongoing—having been discontinued before Plaintiffs filed their complaint—and so Plaintiffs lack standing to seek the injunction on which their argument for evading arbitration is predicated. Moreover, that relief would not primarily benefit the public at large, and the *McGill* rule is therefore inapplicable.

Nor can Plaintiffs salvage their inability to qualify for the *McGill* rule by recasting their challenge as an assertion that their arbitration agreements are unconscionable. The Ninth Circuit has held that a waiver of representative relief does not render an arbitration agreement unconscionable. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1264 (9th Cir. 2017). For that and other reasons, Plaintiffs' unconscionability argument fails as a matter of law.

Finally, even if the Court were inclined to hold that Plaintiffs can invoke *McGill*, the Court should await the Ninth Circuit's resolution of the pending petitions for *en banc* consideration of whether *McGill* is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. Those petitions have been pending for more than 21 days, which means that at least one Ninth Circuit judge has "request[ed] or give[n] notice of an intention to request *en banc*

consideration." 9th Cir. R. App. P., Circuit Advisory Committee Note to Rules 35–1 to 35–3, ¶ (2) (indicating that petition will be denied "within 21 days" "[i]f no judge requests or gives notice of an intention to request *en banc* consideration"). Moreover, the equities weigh strongly in favor of a stay. AT&T will suffer irreparable harm if it is forced to litigate this case only to have the *en banc* Ninth Circuit (or the Supreme Court) later confirm that the *McGill* rule is preempted. In contrast, Plaintiffs will suffer no comparable harm from the granting of a stay because, to the extent they suffered any injury, they can be fully compensated by an award of damages.

ARGUMENT

I. *MCGILL* DOES NOT ENTITLE PLAINTIFFS TO AVOID ARBITRATION.

Plaintiffs cannot invoke California's *McGill* rule to evade enforcement of their arbitration agreements for two reasons.

First, as explained in AT&T's Motion to Dismiss, Dkt. No. 73, when, as here, the challenged conduct stopped before the plaintiff files suit, the plaintiff lacks standing to seek an injunction of that conduct, and the request for an injunction must therefore be dismissed. And once it is, there is no plausible basis for Plaintiffs to avoid the enforcement of their arbitration agreements.

Second, even if the challenged conduct had not ceased, the *McGill* rule would be inapplicable because the relief that Plaintiffs seek would not primarily benefit the public—as is required in order to trigger the *McGill* rule.

When assessing whether the relief requested in a complaint would primarily benefit the public, courts must consider the various forms of relief sought in the aggregate, not on a request-by-request basis. If backward-looking monetary relief is "the heart of Plaintiffs' claims," and the requested injunction is "merely incidental to vindicating Plaintiffs' alleged injuries," the relief requested cannot be said to primarily benefit the public. *Johnson v. JP Morgan Chase Bank, N.A.*, 2018 WL 4726042, at *7 (C.D. Cal. Sept. 18, 2018); *see also Wright v. Sirius XM Radio Inc.*, 2017 WL 4676580, at *9 (C.D. Cal. June 1, 2017) (holding that *McGill* rule was

inapplicable even though complaint sought an injunction against failing to disclose the challenged practice publicly, because the benefit to the public was merely "incidental" to the relief benefiting the plaintiff and similarly situated individuals).

Even assuming counterfactually that there were an ongoing practice of sharing location data with data aggregators, "any benefit bestowed on the public" by Plaintiffs' requested injunction "would be incidental to Plaintiffs' primary purpose of seeking redress for their own injuries." *Johnson*, 2018 WL 4726042, at *7. As in *Johnson*, Plaintiffs seek monetary relief on behalf of themselves and other similarly situated California customers of AT&T—namely, "the full amount of damages sustained by Plaintiffs and Class members as a consequence of AT&T's" alleged unlawful conduct, "restor[ation] to the parties in interest money or property taken as a result of AT&T's unfair competition," and punitive damages. Dkt. No. 1 ¶¶ 285, 299, 311, 321, 333–35, 342, 343E. This relief is the "heart of" their claims and dwarfs any benefit that the public at large might obtain from their requested injunction.

Indeed, even if the requested injunction were considered in isolation, it would not be primarily for the benefit of the public. The injunction that Plaintiffs seek would require "cessation of AT&T's practices and proper safeguarding of current and historical location data." *Id.* ¶¶ 299, 342; *see also id.* at 343C. That relief would benefit only Plaintiffs and the putative class of customers—not the general public. Indeed, Plaintiffs request it only on behalf of "Plaintiffs and the Class." *Id.* ¶¶ 299, 342. Because it would primarily benefit the plaintiffs and similarly situated customers—and not the public at large—it "does not constitute public injunctive relief," and the *McGill* rule is therefore inapplicable. *McGill*, 393 P.3d at 90; *see also* Mot. at 3, 9–11 (collecting cases).

Plaintiffs argue that injunctions that benefit only putative class members still qualify as "public" injunctions (Opp. 7). The problem for them is that the sole case on which they rely for this proposition—*Cardenas v. AmeriCredit Financial Services Inc.*, 2010 WL 3619851 (N.D. Cal. Sept. 13, 2010)—is no longer good law. Three years after *Cardenas* was decided, the *en banc* Ninth Circuit held that an injunction that would benefit only the class of individuals who

were allegedly harmed by the defendants' conduct is a "private"—not a "public"— injunction. *Kilgore v. KeyBank*, 718 F.3d 1052, 1060–61 (9th Cir. 2013) (en banc). And the California Supreme Court confirmed that ruling in *McGill* itself, declaring that "[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—***or to a group of individuals similarly situated to the plaintiff***—does ***not*** constitute public injunctive relief." 393 P.3d at 90 (emphasis added).

Perhaps aware that *Cardenas* is a dead letter, Plaintiffs resort to pretending that their complaint seeks to enjoin advertising to the public. Opp. 6. But no such claim is actually pleaded. Plaintiffs point to allegations about a letter AT&T sent in June 2018 to a U.S. senator (Opp. 6 & n.7 (citing Dkt. No. 1 ¶¶ 58, 126)) and to statements in AT&T's privacy policy incorporated into customers' contracts (*id.* (citing Dkt. No. 1 ¶¶ 234–65, 291, 338)). But none of these challenged statements constitutes ***ongoing*** advertising ***directed at the public*** that the complaint requests this Court to enjoin. And tellingly, Plaintiffs do not even assert a claim under California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* Plaintiffs therefore cannot avoid arbitration by merely mouthing an unexplained and conclusory request for "public injunctive relief against AT&T's unfair and unlawful practices in order to protect the public" (Dkt. No. 1 ¶¶ 299, 342). As other federal district judges have admonished, a plaintiff's "vague and generalized allegations regarding the 'general public,' 'rights of the public,' and the 'public interest' do not adequately request public injunctive relief" when, as here, the complaint actually seeks relief affecting only the defendant's customers. *Bell-Sparrow v. SFG*Proschoicebeauty*, 2019 WL 1201835, at *5 n.9 (N.D. Cal. Mar. 14, 2019); *see also, e.g.*, *Johnson*, 2018 WL 4726042, at *6–7 (compelling arbitration despite *McGill* because "[t]he Court finds these prayers for monetary relief to be the heart of Plaintiffs' claims," and the "generalized request for [an] injunction [was] merely incidental"); *Croucier v. Credit One Bank, N.A.*, 2018 WL 2836889, at *4 (S.D. Cal. June 11, 2018) (compelling arbitration of purportedly "public injunction" claims that, in reality, sought a "private" injunction); *Rappley v. Portfolio Recovery Assocs., LLC*, 2017

WL 3835259, at *5–6 (C.D. Cal. Aug. 24, 2017) (same); *Wright*, 2017 WL 4676580, at *9–10 (same).[1]

Even if the complaint did include a specific request to order AT&T to alter or stop its public advertising relating to the sharing of location data, that request would be but a small appendage to their primary requests for monetary and private injunctive relief benefiting themselves and the putative class of AT&T's California customers. Indeed, Plaintiffs ***admit*** in their opposition (at 7) that they "brought this case for the 'primary purpose' of … stopping AT&T from disclosing its customers' location data," which is quintessentially private relief for putative class members, not the public at large. And as the Ninth Circuit has explained, relief that "may benefit the general public incidentally" but that primarily would remedy a private dispute—such as the relief sought here—is "private." *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 824 (9th Cir. 2019).

Judge Selna confronted precisely this scenario in *Wright*. In that case, the plaintiff sought an injunction requiring the defendant to honor its customers' "lifetime subscriptions"—relief that Judge Selna held "only seeks private relief" because it "solely benefit[s] the putative class members." 2017 WL 4676580, at *9. Like Plaintiffs here, the plaintiff in *Wright* tacked on a request for an injunction barring the defendant from "'making such material misrepresentations and failing to disclose or actively concealing its practice of regularly canceling and limiting or prohibiting transfers of lifetime subscriptions.'" *Id.* Judge Selna held that these "vague, generalized allegations do not request public injunctive relief" because the relief requested by the complaint "must 'by and large' benefit the general public." *Id.* (quoting *McGill*, 393 P.3d at 89).

[1] The absence here of a request for "injunctive relief to alter broadly-directed advertising" that is "argue[d]" to be "misleading to the general public" thus distinguishes this case from the Court's recent ruling in *Olosoni v. HRB Tax Group, Inc.*, No. 3:19-cv-3610-SK (N.D. Cal. Nov. 5, 2019) (ECF No. 51, at 7). In *Olosoni*, the Court held that the *McGill* rule was applicable because the "'primary beneficiary'" of the relief sought was the general public, which would benefit from an injunction to halt advertising "designed to lure in a large swath of the general public." *Id.* at 6–7 (quoting *Blair*, 928 F.3d at 824). Plaintiffs here do not seek an injunction to cease or modify advertising "directed at the general public." *Id.*

Just as in *Wright*, the relief Plaintiffs here seek "by and large" benefits class members only—and "any benefit to the public is merely 'incidental.'" *Id.* (quoting *McGill*, 393 P.3d at 89).

In fact, the purportedly "public" aspect of the relief that Plaintiffs seek here is entirely speculative. If Plaintiffs prevail on their main request for injunctive relief—to halt the already discontinued information sharing—their (non-existent) request to enjoin AT&T's public statements about the practice would be moot: If the disclosure of customer data is halted, the statements that Plaintiffs purport to challenge would no longer be "false" under Plaintiffs' own theory. For this reason, too, "there is no real prospective benefit to the public at large from the relief sought" in Plaintiffs' complaint, and thus they cannot be considered to be seeking a "public" injunction. *Kilgore*, 718 F.3d at 1061.

For all of these reasons, Plaintiffs cannot evade enforcement of their arbitration agreements under *McGill*.

II. PLAINTIFFS' AGREEMENTS ARE NOT UNCONSCIONABLE.

Plaintiffs next ask the Court to invalidate their arbitration agreements as unconscionable. But their arguments rest on outdated law, mischaracterizations of their agreements, and the same faulty *McGill* analysis that fails for the reasons explained above.

As the "party asserting that a contractual provision is unconscionable," Plaintiffs "bear[] the burden of proof." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016). To invalidate an agreement, "[b]oth procedural and substantive unconscionability must be present" (*id.*), though the amount of each that must be shown depends on a "sliding scale" (*Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016)). The less procedurally unconscionable a contract is, the "more substantively oppressive" its terms must be "and vice versa." *Id.*

A. At Best, Plaintiffs Have Shown Only a Slight Degree of Procedural Unconscionability.

Plaintiffs place much emphasis on the standardized nature of AT&T's contracts. Opp. 9. But "[o]rdinary contracts of adhesion" are "indispensable facts of modern life that are generally enforced." *Baltazar*, 367 P.3d at 11. Absent some "other indication of oppression or surprise," the adhesive nature of the contract establishes only "some [relatively low] degree of procedural

unconscionability," and the contract is "enforceable unless the degree of substantive unconscionability is high." *Poublon*, 846 F.3d at 1261 (quoting *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 751 (Cal. 2015)).

Plaintiffs cannot show any oppression or surprise in the manner in which they agreed to arbitrate. AT&T's records demonstrate that each Plaintiff ***repeatedly*** attested to having received AT&T's terms of service or wireless customer agreement. Dkt. No. 35-1 (Berg Decl.) ¶¶ Exs. 2, 7, 13, 15, 17, 20, 23, 26, 29, 32, 35, 38. Each of those agreements highlighted AT&T's arbitration provision in bold, all-caps font at the ***top*** of the ***very first page***. *See* Dkt. No. 35-10 (Kelly Decl.) Ex. 4, at 1 ("**THIS AGREEMENT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR CLASS ACTIONS, AND ALSO LIMITS THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE**"); *see also id.* Exs. 1–3, 5–7, at 1 (same). And each Plaintiff signed his or her name at least once immediately beneath an acknowledgment that "I have reviewed and agree to the rates, terms, and conditions for the wireless products and services described in the Wireless Customer Agreement (including limitation of liability and ***arbitration provisions***) and the Customer Service Summary, both of which were made available to me prior to my signing." Dkt. No. 35-10 (Schnieber Decl.) ¶ 7 (emphasis added)*; see also* Dkt. No. 35-1 (Berg Decl.) Ex. 7 (Plaintiff Scott's September 20, 2013 signature under acknowledgement of arbitration provision); *id.* Ex. 17 (Plaintiff Pontis's September 13, 2015 signature); *id.* Exs. 29, 35, 38 (Plaintiff Jewel's February 8, 2017, and March 4 and 7, 2017 signatures).[2]

Plaintiffs' argument that AT&T's arbitration provision is somehow "buried" in "hyperdense legalese" (Opp. 10) is thus directly rebutted by the contract documents themselves,

[2] Even if AT&T had not specifically highlighted the arbitration provision in its contract, contrary to Plaintiffs' suggestion (Opp. 10–11), AT&T "was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to [Plaintiffs'] attention." *Sanchez*, 353 P.3d at 751.

which are the best evidence of their content. Fed. R. Evid. 1002. There is nothing hidden about a contract provision that is highlighted on the first page and referenced in the signature block.

The undisputed evidence also contradicts Plaintiffs' suggestion that they were "forced to go to another source" to learn that their agreements included an arbitration provision. Each Plaintiff admits signing the signature-capture devices during their AT&T store transactions. *See* Dkt. No. 63-1 (Scott Decl.) ¶ 7; Dkt. No. 63-2 (Jewel Decl.) ¶ 7; Dkt. No. 63-3 (Pontis Decl.) ¶ 7. Since May 2, 2010, AT&T has displayed its full contract terms—including the arbitration provision—on the signature-capture device itself and specifically offered customers the opportunity to scroll through and print those terms before clicking "Accept" and signing their names. Dkt. No. 35-20 (Schnieber Decl.) ¶¶ 5–7. And as noted above, each Plaintiff completed that signature-capture process at least once since May 2010. *See also* Dkt. No. 35-1 (Berg Decl.) ¶¶ 14–16, 20–22, 28–37. Moreover, in every transaction in which the full terms were not on the signature-capture device itself, the Plaintiff was physically handed a printed copy of the contract containing the arbitration provision. *Id.* ¶¶ 9–10, 20–21, 24–26 (Scott's and Pontis's 2009 transactions and Jewel's 2008 transactions). The arbitration provision was not concealed from Plaintiffs.

To the contrary, the real cause of Plaintiffs' purported lack of knowledge of the arbitration provision is not any unfairness in the contracting process, but rather their own admitted failure to read the signature-capture devices they signed or contracts provided to them. *See* Opp. 10 ("plaintiffs … did not actually read the signature-capture screen or anything beyond it"). But under California law, "even when a customer is assured it not necessary to read a standard form contract with an arbitration clause, 'it is generally unreasonable, in reliance on such assurances, to neglect to read a written contract before signing it.'" *Sanchez*, 353 P.3d at 751 (quoting *Rosenthal v. Great Western Fin. Sec. Corp.*, 926 P.2d 1061 (1996)). As another judge in this District explained in rejecting a similar challenge to the same AT&T signature-capture process as at issue here, "[i]f a party could get out of a contract by arguing that he did not recall making it, contracts would be meaningless." *Blau v. AT&T Mobility*, 2012 WL 10546, at

*4 (N.D. Cal. Jan. 3, 2012); *see also id.* at *5 (rejecting unconscionability challenge to AT&T's arbitration provision); *Hendricks v. AT&T Mobility LLC*, 823 F. Supp. 2d 1015, 1022-23 (N.D. Cal. 2011) (AT&T customer agreements are only "minimally procedurally unconscionable"); *accord Powell v. AT&T Mobility, LLC*, 742 F. Supp. 2d 1285, 1289-91 (N.D. Ala. 2010) (rejecting procedural unconscionability challenge under Alabama law).

Equally meritless is Plaintiffs' assertion (Opp. 11) that they were misled by the arbitration provision's statement that "[a]rbitrators can award the same damages and relief that a court can award" (Kelly Decl. Ex. 4, § 2.1 (Dkt. No. 35-14)) into believing that "class-wide" relief would be available in arbitration. Having asserted that they did not read the contract, they cannot claim to be confused by its language. In any event, Plaintiffs neglect to mention that the very next sentence states, in bold, that **"[a]ny arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted."** *Id.* In context, no one could be confused by the arbitration provision.

For the same reason, Plaintiffs' contention that the contracts "do not fully explain arbitration" (Opp. 11) is wrong. They cannot complain that they misunderstood a document that they never read. In any event, the arbitration provision in fact begins with a plain-English description of arbitration: "Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts." Kelly Decl. Ex. 4 § 2.1 (Dkt. No. 35-14). And although Plaintiffs complain that the contract incorporates the AAA's Consumer Arbitration Rules by reference rather than reprinting them in full, contracts that call for dispute resolution in court are not required to attach the court's rules of civil procedure. Thus, even if California law deemed the failure to attach the AAA rules to be unconscionable—and the Ninth Circuit has held that it does not (*Poublon*, 846 F.3d at 1262)—the FAA would preempt it for treating arbitration agreements less favorably than other dispute-resolution agreements. *See, e.g., Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025, at *4–5 (C.D. Cal. June 13, 2014); *Doe v. CashCall, Inc.*,

2013 WL 12116340, at *6 (C.D. Cal. Dec. 9, 2013); *Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 932–33 (N.D. Cal. 2012).[3]

In sum, Plaintiffs have at best shown a modicum of procedural unconscionability due to the adhesive nature of their agreements; they have shown no other "oppression or surprise."

B. Plaintiffs Fail to Identify Any Viable Basis for Finding Substantive Unconscionability.

"[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." *Baltazar*, 367 P.3d at 11; *Sanchez*, 353 P.3d at 741. Because Plaintiffs have shown only minimal procedural unconscionability, the amount of substantive unconscionability here must be "high"—that is, Plaintiffs' agreement must be "'overly harsh'" or "'shock the conscience.'" *Poublon*, 846 F.3d at 1261 (quoting *Sanchez*, 353 P.3d at 751). Far from meeting that standard, Plaintiffs' arbitration agreements contain several terms that favor ***Plaintiffs***—including cost-free arbitration and a minimum arbitral award of $10,000, plus double attorneys' fees, if the arbitrator awards the plaintiff more than AT&T's last settlement offer. Dkt. No. 35, at 6–7. In light of these features, the Supreme Court recognized that AT&T customers are "*better off* under their arbitration agreement[s] with AT&T than they would have been as participants in a class action." *AT&T Mobility LLC v. Concepcion*, 563 U.S.

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[3] Plaintiffs also suggest that their arbitration agreements are procedurally unconscionable because the change-in-terms clause in their service contracts means that the arbitration provision could be amended. Opp. 11. But Plaintiffs do not allege that AT&T has changed the terms since they last agreed to the arbitration provision (or before then, for that matter). Thus, Plaintiffs "do[] not have standing to challenge the change-in-terms provision" as unconscionable "because it has never been applied to [them]." *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1362165, at *5 (N.D. Cal. Apr. 11, 2011). In any event, Plaintiffs' argument that the arbitration provision is unfair because AT&T could unilaterally change it is based on a false premise. The arbitration provision affords customers 30 days to reject any changes to it other than changes to the address to which notices of dispute must be sent. *E.g.*, Kelly Decl. Ex. 4 § 2.2(7) (Dkt. No. 35-14). Finally, Plaintiffs' attack on the change-in-terms provision is actually a substantive unconscionability argument—and one that the Ninth Circuit already has rejected. *See Poublon*, 846 F.3d at 1268–69 (holding that the argument that a "dispute resolution provision is substantively unconscionable because it unfairly permits [the drafter] to change the arbitration rules unilaterally" is "meritless").

333, 352 (2011). Plaintiffs' attempts to paint their arbitration agreements as substantively unconscionable despite these features fall flat.

Plaintiffs argue first that their arbitration agreements are substantively unconscionable under *McGill*. But that argument fails because, as discussed above, Plaintiffs' agreements do not in fact run afoul of *McGill*. Moreover, the Ninth Circuit has recognized that, even if a representative-action waiver is unenforceable, that "does not make [an arbitration] provision substantively unconscionable." *Poublon*, 846 F.3d at 1264.

Second, Plaintiffs contend that the AAA Consumer Arbitration Rules "deprive[] Plaintiffs of the depositions they need" to develop their case. Opp. 12. But their argument rests on a selective quotation from the AAA Rules. In asserting that, besides an exchange of documents and witness lists, "'[n]o other exchange of information … is contemplated under'" the AAA's Consumer Arbitration Rules (*id.* (quoting Ranlett Decl. Ex. 1 at 21 (Dkt. No. 35-19))), Plaintiffs neglect to quote the remainder of the Rule: "unless the arbitrator determines further information exchange is needed to provide for a fundamentally fair process." Ranlett Decl. Ex. 1 at 20 (R-22(c)). Thus, the arbitrator can allow depositions when needed. In fact, the AAA Consumer Due Process Protocol confirms that "[a]rbitrators should have the authority to require additional discovery when necessary, such as requiring the deposition of witnesses unable to appear in order to preserve their testimony." Supp. Decl. of Kevin Ranlett Ex. 1 at 29. Confronted with nearly identical language authorizing the arbitrator to "allow additional discovery" as necessary, the California Court of Appeal rejected an argument that the arbitration agreement was unconscionable. *Sanchez v. Carmax Auto Superstores Cal., LLC*, 168 Cal. Rptr. 3d 473, 478–79 (Ct. App. 2014). And that fact readily distinguishes the cases that Plaintiffs cite (Opp. 12), which involved unyielding limits on discovery that the plaintiffs were able to show "were inadequate to vindicate their statutory rights." *Baxter v. Genworth N. Am. Corp.*, 224 Cal. Rptr. 3d 556, 569 (Ct. App. 2017); *Brookdale Senior Living Communities, Inc. v. Hardy*, 2015 WL

13446704, at *4 (W.D. Wash. June 5, 2015).[4] Moreover, beyond their inaccurate statement about the AAA rules, Plaintiffs have not even attempted to show that they would be unable to make their case in arbitration. *Cf. Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 92 (2000) ("where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs").

Finally, to the extent that Plaintiffs' position is that California law requires that the same discovery be available in arbitration as in court, such a rule would interfere with a hallmark of arbitration—more streamlined proceedings—and be preempted by the FAA. *Dotson v. Amgen, Inc.*, 104 Cal. Rptr. 3d 341, 348 (Ct. App. 2010) ("[A]rbitration is meant to be a streamlined procedure. Limitations on discovery, including the number of depositions, is one of the ways streamlining is achieved."); *Sanchez*, 168 Cal. Rptr. 3d at 478-79 (recognizing the same). Indeed, the Supreme Court noted that state law "finding unconscionable" all "consumer arbitration agreements that fail to provide for judicially monitored discovery … would have a disproportionate impact on arbitration agreements" and would be an "obvious illustration" of a rule preempted by the FAA. *Concepcion*, 563 U.S. at 341–42.

In sum, Plaintiffs' unconscionability challenge to their arbitration agreements lacks merit.

III. THE BALANCE OF EQUITIES FAVORS A STAY, ESPECIALLY GIVEN THAT THE CHALLENGED CONDUCT HAS CEASED.

Even if the Court were to conclude that it is bound by *McGill* and *Blair* to invalidate Plaintiffs' arbitration agreements, the Court should exercise its broad discretion to stay these proceedings pending the conclusion of *en banc* and, if necessary, Supreme Court review in *McArdle* and *Tillage*. *Cf. Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) (recognizing a district court's broad power to stay proceedings where such stay would

[4] Plaintiffs also cite *Unimax Express, Inc. v. Cosco North America, Inc.*, 2011 WL 5909881 (C.D. Cal. Nov. 28, 2011), but it has no relevance here. There, the court found substantive unconscionability because the contract imposed the burden on one side to initiate a proceeding within a very limited window "at pain of forfeiting any defense." *Id.* at *4. Plaintiffs identify no similar provision here.

advance "the prompt and efficient determination of the cases pending before it").

Plaintiffs do not dispute that an *en banc* or Supreme Court decision in *McArdle* and *Tillage* overturning the *McGill* rule would squarely govern these proceedings and require arbitration of Plaintiffs' claims. That undeniable fact distinguishes this case from *Dister v. Apple-Bay East, Inc.*, in which the court found the "impact" of appellate proceedings in another case to be "at most, speculative." 2007 WL 4045429, at *5 (N.D. Cal. Nov. 15, 2007) (cited at Opp. 15).

Plaintiffs argue principally that the balance of equities weighs against a stay. But Plaintiffs' analysis is deeply flawed. As a threshold matter, Plaintiffs' argument is premised on the erroneous attempt to cast their suit as one primarily for the benefit of the general public (Opp. 13), when, in fact, it is not. *See supra*, at 2-6. Because the primary beneficiaries of any judgment in this case would be Plaintiffs and, potentially, the putative class, *Lockyer v. Mirant Corp*., 398 F.3d 1098 (9th Cir. 2005) (discussed at Opp. 12–13) and like cases involving ***wholly public*** relief are inapplicable here.

More importantly, Plaintiffs cannot claim that they or the putative class could suffer any harm as a result of the requested stay because the challenged conduct—the sharing of location data with data aggregators—has ceased. *See supra*, at 2. Any harm therefore could be remedied at the end of the case by an award of damages, and there is no need to expedite proceedings in order to avoid an ongoing harm to Plaintiffs or any putative class members.

On the other side of the ledger, however, AT&T would be irreparably harmed if a stay were denied. Plaintiffs are mistaken in asserting that the irreparable harm to AT&T of being forced to litigate claims when it is contractually entitled to more streamlined arbitral proceedings is "not legally cognizable." Opp. 13. The Ninth Circuit has squarely held that "the advantages of arbitration—speed and economy—are lost forever" when a party who is entitled to arbitration is forced instead to proceeding in court, thus causing "serious" if not "***irreparable***" injury. *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) (emphasis added). The *Lockyer* panel did not (and could not, as a three-judge panel) abrogate that well-established

principle of law. 398 F.3d at 1112. Rather, the passage that Plaintiffs quote out of context merely acknowledges that "*without more*"—*i.e.*, absent a contractual right to arbitrate—"being required to defend a suit … does not constitute a 'clear case of hardship or inequity.'" *Id.*

And the burden and expense of being forced to litigate this case while appellate review in *McArdle* and *Tillage* remains ongoing would be enormous. Plaintiffs seek certification of a class of persons "who were or are AT&T wireless subscribers residing in California between 2011 and the present[.]" Dkt. No. 1 ¶ 276. The cost of class-certification discovery alone (a non-issue in arbitration) would reach well into the six figures. That does not even take into account merits discovery, or the motion practice in which the parties would almost certainly engage (including motions to dismiss, motions for summary judgment, and discovery-related motions). The Court's resources, too, would be taken up by the need to oversee the litigation and resolve these motions, which would delay the Court's consideration of other cases. All of this effort would be wasted if the *en banc* Ninth Circuit or Supreme Court confirms that this case belongs in arbitration.

Indeed, the early stage of this litigation counsels strongly in favor of a stay. It also serves to distinguish this case from *1st Media, LLC v. doPi Karaoke, Inc.*, in which the court denied a stay because the case before it had already "been pending over five years." 2013 WL 1250834, at *1 (D. Nev. Mar. 27, 2013) (cited at Opp. 13 n.10).

Contrary to Plaintiffs' contention, the possibility that the Ninth Circuit will grant *en banc* review in *McArdle* and *Tillage* is far from remote. As Plaintiffs ultimately acknowledge, the Ninth Circuit is actively considering the petitions for rehearing *en banc* in those cases, having specifically directed the plaintiffs to respond to the petitions. *See McArdle v. AT&T Mobility LLC*, No. 17-17246 (Sept. 9, 2019), ECF No. 66; *Tillage v. Comcast Corp.*, No. 18-15288 (Sept. 9, 2019), ECF No. 65. The plaintiffs-appellees in those actions filed their responses on September 30, 2019. *McArdle*, No. 17-17246, ECF No. 67; *Tillage*, No. 18-15288, ECF No. 66. The fact that the petitions have not been denied despite more than 21 days having passed since the filing of the petitions means that at least one Ninth Circuit judge has "request[ed] or give[n]

notice of an intention to request *en banc* consideration." 9th Cir. R. App. P., Circuit Advisory Committee Note to Rules 35–1 to 35–3, ¶ (2).

Plaintiffs invocation of the bromide that the Supreme Court grants certiorari in only a small fraction of cases (Opp. 13 & nn. 9–10) puts them on no firmer ground. The relevant inquiry here is not the abstract likelihood of *en banc* review in ***general***, but the likelihood of rehearing and reversal in *McArdle* and *Tillage*. And as previously explained in AT&T's motion (Dkt. No. 35, at 14–15), the likelihood that those decisions will not survive further appellate review is significant—both because of their extraordinary impact on contracts in California and because they sharply conflict with a long line of Supreme Court precedent. Indeed, in the last eight years alone, the Supreme Court has reversed California or Ninth Circuit decisions invalidating arbitration agreements at least five times. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (reversing Ninth Circuit); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (same); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (reversing California Court of Appeal); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (reversing Ninth Circuit); *Concepcion*, 563 U.S. at 351–52 (same).

CONCLUSION

The Court should compel Scott, Jewel, and Pontis to arbitrate their claims in accordance with their agreements and stay this action pending the outcome. In the alternative, the Court should stay these proceedings pending resolution of appellate proceedings in *McArdle* and *Tillage*.

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