PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
Thomas D. Warren (State Bar No. 160921)
twarren@piercebainbridge.com
Claiborne Hane (*pro hac vice* admitted)
chane@piercebainbridge.com
Thomas Popejoy (*pro hac vice* admitted)
tlpopejoy@piercebainbridge.com
335 S. Grand Avenue, 44th Floor
Los Angeles, CA 90071
Telephone: (213) 262-9333
Facsimile: (213) 297-2008

ELECTRONIC FRONTIER FOUNDATION
Aaron Mackey (State Bar No. 286647)
amackey@eff.org
Andrew Crocker (State Bar No. 291596)
andrew@eff.org
Adam D. Schwartz (State Bar No. 309491)
adam@eff.org
815 Eddy Street
San Francisco, California 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Counsel for Plaintiffs

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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. 3:19-cv-04063-JD

PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANTS AT&T INC., AT&T SERVICES, INC., AND AT&T MOBILILITY, LLC TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Date: December 19, 2019
Time: 10:00 A.M.
Location: Ctrm. 11 (San Francisco)
Judge: Hon. James Donato

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INTRODUCTION

Defendants AT&T Services Inc. and AT&T Mobility LLC (together, "AT&T") violated the rights of their customers and the broader public by disclosing individuals' real-time location information without their consent, contrary to federal and state laws and AT&T's own promises. Plaintiffs seek to end AT&T's ongoing privacy violations against the public, and to hold AT&T accountable. AT&T now attempts to severely limit the remedies available to Plaintiffs and the public. The Court should reject AT&T's motion to compel arbitration for several reasons.

First, the arbitration provision is void under California Supreme Court and Ninth Circuit law. AT&T's form contract purports to waive the parties' rights to seek public injunctive relief under California's Unfair Competition Law and Consumers Legal Remedies Act[1] in any forum. This violates California law. *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017). Because the arbitration provision violates California law and because the provision contains a non-severability clause, "the entirety of this arbitration provision shall be null and void." Declaration of Kevin Kelly ("Kelly Decl."), Ex. 4 (ECF No. 35-14) at 8 (§2.2(6)); *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575, 575 (9th Cir. 2019) (finding this exact arbitration agreement was unenforceable).

Second, the Federal Arbitration Act (9 U.S.C. § 2) does not preempt *McGill*. *Blair v. Rent-A-Center, Inc*., 928 F.3d 819, 824-31 (9th Cir. 2019). The FAA's savings clause expressly recognizes that arbitration agreements can be invalidated by generally applicable contract defenses, including (as here) violating public policy and unconscionability.

Third, Plaintiffs plainly seek public injunctive relief under both the UCL and CLRA. Plaintiffs endeavor to protect the general public from AT&T's continuing sale of location data and AT&T's unfair and deceptive statements obscuring their practices that invade privacy.

[1] California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"); Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq*. ("CLRA").

AT&T's arbitration clause is unenforceable under California law for another independent reason: it is unconscionable. Procedurally, it is a contract of adhesion that hid the pertinent terms in a lengthy, dense, and confusing set of nested documents. Substantively, it deprives plaintiffs of the opportunity to seek public injunctive relief, and to use basic discovery tools like depositions.

Finally, AT&T's stay request should be rejected. It asks this Court to ignore binding precedent that renders its arbitration agreements with Plaintiffs unenforceable—thus requiring this litigation to proceed—while the company endeavors to change that law. This is a speculative and unlikely prospect with an open-ended timeline. AT&T has not met its burden to justify such a stay.

STATEMENT OF RELEVANT FACTS

AT&T Falsely Touts Privacy Protection of Highly Sensitive Location Data.

Plaintiffs filed this lawsuit on July 16, 2019, alleging that AT&T and its agents knowingly sold access to customers' real-time and historical location data to unauthorized third parties. AT&T encouraged and facilitated this marketplace by, among other things, shirking its nondelegable duty to ensure that its customers consented to the disclosure of their sensitive data.

Plaintiffs, who are California residents and AT&T customers, seek public injunctive relief, as well as damages and restitution. Complaint ("Compl.") (ECF No. 1).[2] Plaintiffs allege violations of California's UCL and CLRA, the federal ban on the sale of consumers' location information without consent (47 U.S.C. § 222), and California's Constitution and common law. ¶¶280-343. In particular, Plaintiffs seek public injunctive relief enjoining AT&T from continuing its "violations of the UCL," ¶299, its "violations of the CLRA," ¶342, and requiring a "mandatory cessation" of its "unfair and unlawful practices in order to protect the public . . ." ¶¶299, 342, 343. The injunctive relief would "restrain Defendants from continuing to [] commit its illegal and unfair violations of privacy and to require Defendants to take accurate steps to ensure that any current or historical

[2] All specific references to the Complaint are denoted by paragraph numbers.

location data is properly safeguarded and secured." ¶279(j). Additionally, the public injunctive relief would prohibit AT&T from making material misrepresentations[3] about its practices. AT&T's ongoing representations and omissions misled the public "regarding its location data practices in order *to attract customers* and evade prosecution, while also profiting unfairly from the sale of customer location data." ¶291 (emphasis added); *see also* ¶¶288, 337-38.

AT&T's Form Contract of Adhesion and Arbitration Provision.

AT&T moves to compel arbitration premised on its Wireless Customer Agreement. It contains an arbitration provision that restricts the arbitrator to "award[ing] 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." Kelly Decl., Ex. 4 (ECF No. 35-14) at 8 (§2.2(6)) (emphasis added). This bars the arbitrator from awarding public injunctive relief. Because the arbitration provision claims to apply to "all disputes and claims," *Id*. at 6 (§2.2(1)), it would bar claims for such relief in court. Thus, the provision would bar the parties from seeking public injunctive relief in all forums. The arbitration provision also has a non-severability clause: if the section barring public injunctive relief "is found to be unenforceable, then the entirety of this arbitration provision shall be null and void." *Id*. at 8 (§2.2(6)).

ARGUMENT

I. AT&T's Arbitration Agreements Are Unenforceable Because They Deny the Possibility of Public Injunctive Relief in Any Forum.

a. The Arbitration Provision Is Null and Void Under McGill, Ninth Circuit Precedent, and Its Own Terms.

AT&T's arbitration provision is void because: (a) it waives public injunctive relief claims in any forum, in direct violation of *McGill* and (b) its non-severability provision renders the entire arbitration agreement void. *See Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 822 (9th Cir. 2019);

[3] See ¶¶58, 126, 233-265 for a complete list of false and misleading statements by AT&T.

McArdle, 772 F. App'x at 575; *Tillage v. Comcast Corp.*, 772 F. App'x 569 (9th Cir. 2019). The Ninth Circuit held in *McArdle* that this exact AT&T arbitration provision violates *McGill* and is thus void by its own terms. 772 F. App'x at 575.

Public injunctive relief is a remedy available under certain California consumer protection statutes—including the UCL and CLRA—where the "primary purpose and effect" is "prohibiting unlawful acts that threaten future injury to the general public." *Blair*, 928 F.3d at 824 (quoting *McGill*, 393 P.3d at 87). Under California law, any consumer contract that deprives California residents of their non-waivable rights to pursue such claims is unenforceable. *McGill*, 393 P.3d at 93-94; *accord Blair*, 928 F.3d at 822, 824. This is "the *McGill* rule."

In *McArdle*, the Ninth Circuit concluded that Section 2.2(6) of AT&T's form contract (the same Section at issue here) purports to waive public injunctive relief in any forum. *McArdle*, 772 F. App'x at 575; *see also McArdle v. AT&T Mobility LLC*, 2017 WL 4354998, at *4 (N.D. Cal. 2017) (noting that AT&T agreed with this interpretation).[4] It held that this waiver is unenforceable under *McGill*. *McArdle*, 772 F. App'x at 575. Next, the Ninth Circuit quoted Section 2.2(6)'s non-severability clause, which reads: "If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void." *Id.*; *accord* Kelly Decl., Ex. 4 (ECF No. 35-14) at 8 (§2.2(6)). The Ninth Circuit held that the "text's non-severability clause plainly invalidates the entire arbitration agreement," allowing for "no ambiguities." *McArdle*, 772 F. App'x at 575 (internal quotation marks omitted).

McGill, Blair, and *McArdle* require denial of AT&T's motion. The Ninth Circuit's decisions in *Blair* and *McArdle* establish that AT&T's arbitration provision is unenforceable under

[4] *See Blair v. Rent-A-Ctr., Inc*., 2017 WL 4805577, at *5 (N.D. Cal. 2017), *aff'd*, 982 F.3d 819 (9th Cir. 2019) (holding that a prohibition on the arbitrator awarding relief to non-parties was unenforceable under *McGill*); *Dornaus v. Best Buy Co*., 2019 WL 632957, at *3 (N.D. Cal. 2019) (same); *McArdle*, 2017 WL 4354998, at *1 (same).

McGill and that the non-severability clause voids the entire arbitration provision.

b. *McGill* Is Not Preempted by the Federal Arbitration Act.

Under the Federal Arbitration Act (FAA), agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under the FAA's savings clause, arbitration agreements can be invalidated by "generally applicable contract defenses," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), that "apply equally to arbitration and non-arbitration agreements." *Sakkab v. Luxottica Retail N. Am., Inc*., 803 F.3d 425, 432 (9th Cir. 2015).

The "*McGill* rule" applies to *all* contracts and is neither directed at nor disfavors or interferes with arbitration. In *Blair*, the Ninth Circuit held that the *McGill* rule is not preempted by the FAA. 928 F.3d at 824-31.[5] The *Blair* court concluded that the *McGill* rule falls within the FAA's savings clause because it is a "generally applicable contract defense" that "applies equally to arbitration and non-arbitration agreements" and is thus a "ground for the revocation of any contract." *Id.* at 827-28 (internal quotation marks and ellipsis omitted). *See also McArdle*, 772 F. App'x 575 ("we hold that California's *McGill* rule is not preempted by the Federal Arbitration Act."); *Tillage*, 772 F. App'x 569 (same).[6] The Ninth Circuit further concluded that the *McGill* rule does not interfere with the fundamental attributes of arbitration, another potential basis for FAA preemption, because it does not "mandate procedures that interfere with arbitration" or otherwise "sacrifice the principal advantage of arbitration—its informality," among other reasons. *Blair*, 928

[5] Even prior to *Blair*, district courts overwhelmingly held that the *McGill* rule falls within the FAA's savings clause. *Delisle v. Speedy Cash*, 2019 WL 2423090, at *10 (S.D. Cal. 2019), *appeal filed* No. 19-55794 (9th Cir. July 10, 2019) (collecting cases and noting "one recent exception").

[6] *See also McArdle*, 2017 WL 4354998, at *4 ("The *McGill* rule is a generally-applicable contract defense . . . . [T]he parties are free to contract for any procedures they choose for arbitrating, or litigating, public injunctive relief claims."); *Roberts v. AT&T Mobility LLC*, 2018 WL 1317346, *6 (N.D. Cal. 2018); *Dornaus*, 2019 WL 632957, at *5 ("the *McGill* rule is a generally-applicable contract defense").

F.3d at 828-31 (internal quotation marks and brackets omitted).

c. Plaintiffs Seek Public Injunctive Relief to Benefit the General Public.

AT&T's assertion that "Plaintiff's do not . . . seek to change AT&T's marketing to the public at large" is erroneous. (Mot. at 11). Plaintiffs seek to stop AT&T's false advertising and deceptive business practices that are directed to the public at large, not just existing customers and the putative Class. AT&T's website and marketing materials falsely tout, among other things, that it "will protect your privacy and keep your personal information safe," that it "will not sell your personal information to anyone, for any purpose. Period," and that it does not "sell, trade or share" their CPNI without legal authority. ¶¶235, 244.[7] AT&T's statements seek to mollify concerns that the general public has and to make them feel more secure about becoming AT&T customers. ¶¶288, 291, 337-38.

AT&T deceived Plaintiffs, the putative Class, and the public with these false and misleading statements that obscure its unfair and deceptive business practices. As a remedy, Plaintiffs seek to enjoin AT&T's ongoing unfair and deceptive advertising to prospective wireless customers. Doing so would "benefit 'the public directly by elimination of deceptive practices,' but [it] do[es] not otherwise benefit the plaintiff[s]." *Blair*, 928 F.3d at 824 (quoting *McGill*, 393 P.3d at 90). *See also Ferguson v. Corinthian Colleges*, 2012 WL 27622, *4 (C.D. Cal. 2012) (plaintiff's claims seeking "to prevent Defendants from deceiving vulnerable consumers . . . [about] the true cost of attendance" were claims for public injunctive relief, in part because "these claims, by definition, seek to protect *future* students.") (emphasis in original). Plaintiffs' injunction halting AT&T's deceptive advertising is a quintessential example of a public injunction that "has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill* at 86.

[7] See ¶¶58, 126, 233-65 for a complete list of false and misleading statements by AT&T.

In fact, Plaintiffs brought this case for the "primary purpose" of "obtain[ing] a public injunction stopping AT&T from disclosing its customers' location data and misleading prospective customers about its practices." Declarations of Katherine Scott, George Pontis, and Carolyn Jewel, ¶3. This injunction would benefit (a) existing AT&T customers whose data has already been collected and sold, (b) future AT&T customers whose data would otherwise be collected and sold if the practice continued, and (c) unsuspecting members of the general public who would otherwise be misled by AT&T's false and deceptive statements.

Indeed, a court has rejected AT&T's assertion that the injunctive relief sought is private in nature because it could benefit the putative class, noting that if that were true, a UCL claim for injunctive relief would never be considered a public injunction because the scope is always defined by the class. *Cardenas v. AmeriCredit Fin. Servs. Inc*., 2010 WL 3619851, at *9 (N.D. Cal. 2010).

Defendants cite a string of district court cases for the proposition that if a plaintiff's relief "amounts to private injunctive relief on behalf of the class" then *McGill* is inapplicable. (Mot. at 3). All of these cases are inapposite. Illustratively, in one of these cases, the plaintiff did not even plead injunctive relief. *Bell-Sparrow v. SFG*Proschoicebeauty*, 2019 WL 1201835, at *5 n.9 (N.D. Cal. 2019) (the complaint's "'Prayer for Relief' makes no mention of such [public injunctive] relief, let alone injunctive relief of any kind.").

In other cases, the plaintiffs did not allege that defendants had deceived the general public, just existing customers. *Sponheim v. Citibank, N.A.*, 2019 WL 2498938, at *5 (C.D. Cal. 2019) ("Sponheim's claims arise out of the contractual rights and obligations between Citibank and its customers, not deceptive advertising or marketing to the general public as in McGill."); *Johnson v. J.P. Morgan Chase Bank, N.A.*, 2018 WL 4726042, at *7 (C.D. Cal. 2018) (the plaintiffs didn't allege "any facts about the public availability of the [agreement], nor does it allege that the public availability of the document constitutes false advertising"); *Croucier v. Credit One Bank, N.A*.,

2018 WL 2836889, at *5 (S.D. Cal. 2018) (compelling arbitration after the defendant called the plaintiff (and no one else) over 100 times, and the plaintiff only added a public injunctive relief claim after the defendant moved to compel arbitration); *Wright v. Sirius XM Radio, Inc.*, 2017 WL 4676580, at *9 (C.D. Cal. 2017) (the only injunctive relief sought was for existing customers who had already purchased lifetime subscriptions); *Rappley v. Portfolio Recovery Assocs., LLC*, 2017 WL 3835259, at *6 (C.D. Cal. 2017) (the plaintiff sought relief on behalf of a specific subgroup whose debt had already been purchased by the defendant and were harmed by unlawful debt collection practices). And in AT&T's final case, the court was unpersuaded that a "plaintiff's failure to seek public injunctive relief necessarily renders *McGill* inapplicable." *McGovern v. U.S. Bank N.A.*, 362 F. Supp. 3d 850, 859 (S.D. Cal. 2019); *see also id.* at 854 & 857 (finding the plaintiff lacked Article III standing for public injunctive relief and it was "merely incidental to [the plaintiff's] primary aim of gaining compensation for injury").

Regardless, Plaintiffs plead that AT&T directed its false and misleading statements to the general public. ¶¶235-265. The Complaint clearly articulates how AT&T's deceptive practices affect the public at large who may be deciding which company to use as their wireless service provider. ¶¶288, 291, 337. Plaintiffs' public injunctive relief would benefit the general public by preventing AT&T from continuing to falsely and deceptively market its services.

II. AT&T's Arbitration Agreements Are Unconscionable and Thus Unenforceable.

AT&T's arbitration agreements are unconscionable under California law, and thus void. Under the FAA's "saving clause," arbitration agreements are subject to "generally applicable contract defenses," including "unconscionability." *Concepcion*, 563 U.S. at 339. "A contract is unconscionable if [1] one of the parties lacked a meaningful choice in deciding whether to agree and [2] the contract contains terms that are unreasonably favorable to the other party." *OTO, L.L.C. v. Kho*, 447 P.3d 680, 689 (Cal. 2019). These procedural and substantive elements are evaluated on a

"sliding-scale." *Id.* at 689-90. Courts consider "all relevant circumstances." *Id.*

a. AT&T's Arbitration Agreements are Procedurally Unconscionable.

AT&T's proffered arbitration agreements operate on "oppression and surprise," and are procedurally unconscionable for numerous reasons. *OTO*, 447 P.3d at 690.

First, they are oppressive "contracts of adhesion," that is, "standardized" contracts "offered by the party with superior bargaining power on a take-it-or-leave-it basis." *Id*. AT&T requires in-store customers to assent by means of a "signature-capture device," Declaration of Lara Schneiber ("Schneiber Decl.") (ECF No. 35-20), ¶ 3, similar to the many countertop screens that consumers click through every day, *id*., Ex. 2 (ECF No. 35-22). Likewise, remote customers must assent by "push[ing] a button" on their phone. Declaration of Paula Berg ("Berg Decl.") (ECF No. 35-1), ¶¶ 11-12. Either way, AT&T provides customers "only the opportunity to adhere to the contract or reject it." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010); *see also Lozano v. AT&T Wireless*, 2003 WL 25548566, at *3 (C.D. Cal. 2003).

Second, procedural unconscionability exists where "[t]he customer is forced to go to another source to find out the full import of what he or she is about to sign." *Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1406 (2003). Here, the full import of AT&T's consumer contract is "artfully hidden" within a complex web of separate materials. *Id.* AT&T's signature-capture devices variously reference a "customer service summary," a "features brochure," a "rate plan," a "terms of service," and a "wireless customer agreement." Berg Decl., Exs. 2 (ECF No. 35-2 at 4); 7 (ECF No. 35-3 at 6); 13 (ECF No. 35-4 at 8); 17, 20 (ECF No. 35-5 at 7, 18); 23 (ECF No. 35-6 at 9); 29 (ECF No. 35-7 at 11); 35 (ECF No. 35-8 at 14); 38 (ECF No. 35-9 at 10). These items in turn incorporate still more documents. For example, the customer service summaries incorporate unspecified "other details" located somewhere on AT&T's massive att.com/wireless. Berg Decl., Exs. 3, 5 (ECF No. 35-2 at 5-8, 11-21); 8 (ECF No. 35-3 at 7-13); 14 (ECF No. 35-4 at 9-12); 16, 18 (ECF No. 35-5 at 1-5, 8-12);

21, 24 (ECF No. 35-6 at 1-4, 10-13); 27, 30 (ECF No. 35-7 at 3-7, 12-17); 33 (ECF No. 35-8 at 5-10); 36, 39 (ECF No. 35-9 at 1-6, 11-16).

Third, AT&T's "prolix" contracts, *OTO*, 447 P.3d at 690, contain many lengthy documents with hyperdense legalese. *See, e.g.,* Kelly Exh. 7 (a 57-page customer agreement); Berg Exh. 5 at pp. 16-20 (five pages containing more than 5,000 words with no indentation).

Fourth, plaintiffs, like most consumers, did not actually read the signature-capture screen or anything beyond it because the documents are long, dense, and complex and plaintiffs had no power to modify their terms. Scott Decl. ¶ 5; Pontis Decl. ¶ 6; Jewel Decl. ¶6. It is of no moment whether, as AT&T materials claim, the company provided those documents or made them available. *See, e.g.,* Schneiber Decl. at Par. 3. Plaintiffs do not recall receiving or having access to such information. Scott Decl. ¶¶ 9-11; Pontis Decl. ¶¶ 9-11; Jewel Decl. ¶¶ 9-11.[8]

Fifth, AT&T buried information about arbitration in its prolix documents, and unconscionability exists when "the allegedly unconscionable provision is hidden." *OTO*, 447 P.3d at 690. Tellingly, the signature-capture device language and service summaries either do not mention arbitration at all or, when they do, they fail to emphasize or explain it. Berg Decl. Exs. 2 (ECF No. 35-2 at 4); 13, 15 (ECF No. 35-4 at 8, 14); 17, 20 (ECF No. 35-5 at 7, 18); 23 (ECF No. 35-6 at 9); 26 (ECF No. 35-7 at 2); 32 (ECF No. 35-8 at 4) (device did not mention arbitration); *id*. at Exs. 7 (ECF No. 35-3 at 6); 29 (ECF No. 35-7 at 11); 35 (ECF No. 35-8 at 14); 38 (ECF No. 35-9 at 10) (device did not explain arbitration); *id*. at Exs. 3, 5 (ECF No. 35-2 at 5-8, 11-21); 8 (ECF No. 35-3

[8] While some of AT&T's customer service summaries contain form statements that "I have read" various documents, none of these summaries are signed. Berg Exs. 3, 5 (ECF No. 35-2 at 8, 14); 14 (ECF No. 35-4 at 12); 21, 24 (ECF No. 35-6 at 4, 13). And while some of AT&T's signature-capture screens state "I have read this agreement," there is no indication which singular agreement this means, there is no indication that such agreement contains an arbitration provision, and these words are immediately surrounded by gobbledygook. Berg Exs. 15 (ECF No. 35-4 at 14); 26 (ECF No. 35-7 at 2); 32 (ECF No. 35-8 at 4). Plaintiffs do not recall reading any of these "I have read" clauses. *See* Scott Decl. ¶¶ 6, 11; Pontis Decl. ¶¶ 7, 11; Jewel Decl. ¶¶ 7, 11.

at 7-13); 14 (ECF No. 35-4 at 9-12); 16, 18 (ECF No. 35-5 at 1-5, 8-12); 21, 24 (ECF No. 35-6 at 1-4, 10-13); 27, 30 (ECF No. 35-7 at 3-7, 12-17); 33 (ECF No. 35-8 at 5-10): 36, 39 (ECF No. 35-9 at 1-6, 11-16) (service summary did not explain arbitration). AT&T's lengthy customer agreements do not fully explain arbitration, *see, e.g.,* Kelly Decl., Ex. 7 (ECF No. 35-17) at 12-14, as they incorporate the rules of the American Arbitration Association (AAA), *id.* at 13, which are another 43 pages of legalese. Declaration of Kevin Ranlett (ECF No. 35-18), Ex. 1 (ECF No. 35-19).

Sixth, AT&T's contracts are misleading regarding the scope of relief under arbitration. The customer agreement falsely states that arbitrators "can award the same damages and relief that a court can award." Kelly Decl., Ex. 7. (ECF No. 35-17) at 12. Yet the arbitration agreement limits relief only to the individual, explicitly prohibiting class-wide damages and public injunctive relief. *Id*. at p. 14.

Seventh, AT&T binds customers to terms and conditions that "may be changed from time-to-time" and tells them to check a webpage "or other appropriate location" regularly to learn about any changes. Berg Decl., Ex. 5 (ECF No. 35-2) at 17. *See also* Berg Decl., Exs. 3 (ECF No. 35-2 at 8); 14 (ECF No. 34-4 at 12); 21, 24 (ECF No. 35-6 at 4, 13) (incorporating "changes to terms" into the agreement). Importantly, "the degree of procedural unconscionability is enhanced when a contract binds an individual to later-provided terms." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013).

b. AT&T's Arbitration Agreements are Substantively Unconscionable.

"Substantive unconscionability examines the fairness of a contract's terms," including whether they are "unfairly one-sided." *OTO*, 447 P.3d at 692-93. Here, AT&T's attempt to use the arbitration agreement to deny public injunctive relief is substantively unconscionable, for all the reasons discussed above. *See also Delisle*, 2019 WL 2423090, at *5-12 (holding that waiver of public injunctive relief is substantively unconscionable).

AT&T's arbitration regime is also substantively unconscionable because it deprives Plaintiffs of the depositions they need to explore the complex facts of this case. *See* Ranlett Decl., Ex. 1 (ECF No. 35-19) at 21 (the arbitrator "may" direct the parties to disclose documents, other information, and the identity of witnesses, but "[n]o other exchange of information" is allowed). Such denial of depositions is unconscionable. *See, e.g., Baxter v. Genworth N. Am. Corp*., 16 Cal. App. 5th 713, 727–30 (Cal. Ct. App. 2017); *Unimax Express, Inc. v. Costco North America, Inc*., 2011 WL 5909881, *4 (C.D Cal. 2011); *Brookdale Senior Living, Inc. v. Hardy*, 2015 WL 13446704, at *4 (W.D. Wash. 2015).

III. The Court Should Deny Defendants' Alternative Request for Stay.

AT&T argues that Plaintiffs' case should be stayed pending a potential *en banc* review of the Ninth Circuit's unanimous holdings in *McCardle* and *Tillage* that the FAA does not preempt *McGill.* AT&T also seeks a stay premised on the remote possibility of Supreme Court review. (Mot. 12). However, AT&T fails to meet the extraordinarily high standard for a stay on this basis.

"Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109–10 (9th Cir. 2005) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). The moving party must show the balance of interests weighs in favor of a stay, considering (1) "possible damage which may result from the granting of a stay"; (2) the "hardship or inequity which a party may suffer in being required to go forward"; and (3) the "orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* at 1110.

Here, the balance of interests overwhelmingly weighs against a stay. Plaintiffs and the putative Class have already been injured and remain at risk of additional harm while their data remains insecure. AT&T incorrectly asserts that the only harm to Plaintiffs is delay of resolution. (Mot. at 15). But Plaintiffs allege ongoing and future harms, including that unsuspecting members of the general public may be deceived by AT&T's false statements. In *Lockyer*, the Ninth Circuit denied a stay where (as here) the plaintiffs sought "injunctive relief *against ongoing and future harm"* to "protect" the "interests of [] consumers of [] California," so there was "more than just a 'fair possibility'" that a stay would have caused harm. *Lockyer,* 398 F.3d at 1112 (emphasis added).

AT&T's purported harm is not legally cognizable. AT&T argues that it "would be 'serious[ly]' if not 'irreparabl[y]' injured if this case were to proceed to discovery, motion practice, and potentially to trial" if it were later overturned on jurisdictional grounds. (Mot. at 13). That is not a valid reason in this Circuit: "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis." Lockyer,* 398 F.3d at 1112.

AT&T also claims that "[t]here is high probability of [] harm," because it believes that if the Ninth Circuit "does not correct the problem itself *en banc*" that Supreme Court review is "likely." (Mot. at 14). But the chance that Supreme Court will review *Blair,* never mind overturn it, is entirely speculative. The Supreme Court grants certiorari in fewer than two percent of cases per year[9]— a fact district courts cite as a reason for denying a stay.[10] Here, no petition for certiorari has even been filed.

AT&T fails to cite a single stay based solely on a pending petition for *en banc* review. To

[9] *See* Frequently Asked Questions, Supreme Court of the United States, http://www.supremecourt.gov/faq.aspx.

[10] *See, e.g., 1st Media, LLC v. doPi Karaoke, Inc.*, 2013 WL 1250834, at *1 n.1 (D. Nev. 2013) (denying stay pending petition for certiorari and citing low ratio of petitions granted annually).

the contrary, a court in this district held that "the possibility that an *en banc* hearing may be held is not sufficient grounds on which to defer ruling on this issue." *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1156 (N.D. Cal. 2015). Instead, AT&T relies almost entirely on stays where a certiorari petition had been granted or at least submitted. *Nationstar Mortg., LLC v. RAM LLC*, 2017 WL 1752933 (D. Nev. 2017) (petition already submitted); *Milkowski v. Thane Int'l. Inc.*, 2008 WL 11342962 (C.D. Cal. 2008) (already submitted); *Roman v. Northrop Grumman Corp.*, 2016 WL 10987312 (C.D. Cal. 2016) (already submitted); *McElrath v. Uber Techs., Inc*., 2017 WL 1175591 (N.D. Cal. 2017) (already granted in related case); *Kim v. CashCall, Inc.*, 2017 WL 8186683 (C.D. Cal. 2017) (already granted in related case); *Provo v. Rady Children's Hosp.-San Diego*, 2015 WL 6144029 (S.D. Cal. 2015) (already submitted); *Cherny v. AT&T, Inc.*, 2010 WL 2572929 (C.D. Cal. 2010) (already submitted). AT&T's remaining citations are unavailing.[11]

The last factor considers whether a stay would serve the "orderly course of justice." This factor also weighs in favor of denying a stay. "[T]he public interest almost always lies in prompt resolution of disputes on the merits." *BNSF RR. Co. v. O'Dea*, 2009 WL 10701773, at *4 (D. Mont. 2009) (denying motion to stay pending resolution of a filed petition for a writ of certiorari). The Ninth Circuit has long held that "[a] stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007), *citing Leyva v. Certified Grocers of Cal., Ltd.,* 593 F.2d 857, 864 (9th Cir. 1979).

AT&T cannot assert that a stay will only cause a reasonable delay. AT&T cannot even predict when it will know whether an *en banc* review has been granted, much less when the Ninth Circuit will issue an opinion. "As it is unclear when the Ninth Circuit will render its opinion, [the] request

[11] For example, in *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1420 (9th Cir. 1984) (Mot. at 11), the Ninth Circuit found that *none* of the defendants' claims were arbitrable, and so the district court did not err in staying arbitration and continuing its own proceedings.

for a stay is open-ended and would require both parties to simply sit and wait for months on the sidelines of their own action." *Dister v. Apple-Bay E., Inc.*, 2007 WL 4045429, at *5 (N.D. Cal. 2007). Even after the Ninth Circuit orders a response to an *en banc* petition, the petition can languish for years. *See, e.g., In re Nat'l Sec. Letter*, 863 F.3d 1110, 1114 (9th Cir. July 7, 2017) (*en banc* petition pending); ECF, No. 16-16082 (9th Cir.) at Dkt. 90 (order of Oct. 2, 2017, to respond to *en banc* petition); ECF, No. 16-16067 (9th Cir.) at Dkt. 102 (response of Dec. 5, 2017).

Moreover, when courts grant stays during the pendency of certiorari petitions, a chief factor is the known and *short* duration of the stay. *See, e.g., Nationstar*, *2 (stay is "expected to be reasonably short"); *Milkowski*, *2 ("[t]he Court anticipates that the Supreme Court will likely act on [the certiorari] Petition by early Fall [2-3 months]"); *Roman*, *3 (court approves "a *brief* stay, to ascertain whether the Supreme Court will grant the petition for a writ of certiorari") (emphasis added); *Provo*, *2 (stay will cause "less than one year delay"); *Cherny*, *1, *2 (certiorari outcome expected "in early May of this year [3 months]"). Here, there is no such certainty of a short delay.

In sum, a stay here would permit ongoing and future legal injury to the Plaintiffs and general public, but AT&T would only be "damaged" by having to continue to defend itself in a suit (which is not a legal hardship). Also, the unknown and inherently indefinite delay would not serve the orderly course of justice. The Court should deny the stay and allow this case to proceed.

CONCLUSION

Plaintiffs ask this Court to deny AT&T's motion to compel arbitration and stay proceedings.

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Respectfully submitted,

/s/ Thomas D. Warren

Thomas D. Warren (State Bar No. 160921)
twarren@piercebainbridge.com
PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
335 S. Grand Avenue, 44th Floor
Los Angeles, CA 90071
Telephone: (213) 262-9333
Facsimile: (213) 297-2008

Claiborne Hane (*pro hac vice* admitted)
chane@piercebainbridge.com
Thomas Popejoy (*pro hac vice* admitted)
tlpopejoy@piercebainbridge.com
PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
277 Park Avenue, 45th Floor
New York, NY 10172
Telephone: (212) 484-9866
Facsimile: (646) 968-4125

Aaron Mackey (State Bar No. 286647)
amackey@eff.org
Andrew Crocker (State Bar No. 291596)
andrew@eff.org
Adam D. Schwartz (State Bar No. 309491)
adam@eff.org
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, California 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993