

United States District Court  
For the Northern District of California

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E-FILED on 8/3/07

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CHAD BRAZIL and STEVEN SEICK  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

DELL INC. and Does 1-10,

Defendants.

No. C-07-01700 RMW

ORDER DENYING DEFENDANT'S  
MOTION TO STAY PROCEEDINGS AND  
COMPEL ARBITRATION

[Re Docket No. 22]

Plaintiff Chad Brazil and Steven Seick have sued defendant Dell Inc. ("Dell"). Dell asks this court to stay this proposed class action and compel arbitration pursuant to the purchase contract between Dell and each of the plaintiffs. For the reasons stated below, the court denies Dell's motion.

**I. BACKGROUND**

Plaintiffs Chad Brazil and Steven Seick, on behalf of themselves and all other similarly situated California customers, filed this case as a class action pursuant to Fed. R. Civ. P. 23 for actual, compensatory and punitive damages; injunctive relief; disgorgement of profits; restitution; and costs of suit, against Dell for falsely advertising price discounts for its computers and other products and services.

1 Brazil purchased a laptop computer from Dell in December 2006 for personal use; Steven  
 2 Seick purchased a desktop computer from Dell in June 2006 for use in his business. Both purchased  
 3 the Dell products online through Dell's website. They claim that discounts offered to them were  
 4 falsely advertised. Specifically, they allege that the discounts offered were discounts from prices  
 5 that were higher than those normally offered for the "discounted" item. As putative class  
 6 representatives, plaintiffs allege violations of the California Consumers Legal Remedies Act  
 7 ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.* and California's Unfair Competition Law ("UCL"), Cal.  
 8 Bus. & Prof. Code §§ 17200 *et seq.*; false advertising, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;  
 9 breach of contract; negligent and intentional misrepresentation; and unjust enrichment.

10 Dell moves to compel arbitration based on a dispute resolution clause contained in its "Terms  
 11 and Conditions of Sale" that it presents to customers at the time of purchase, and again with the  
 12 shipment of the computer. Pape Decl. ¶ 6, Ex. A ("Agreement" or "Terms and Conditions"). When  
 13 purchasing Dell's products online, customers are presented with hyperlinks to the Agreement during  
 14 the online purchase process and are required to respond to the following selection prior to being able  
 15 to complete their online purchases:

- 16  I agree to Dell's Terms and Conditions of Sale.
- 17  I DO NOT AGREE to Dell's Terms and Conditions of Sale

18 The Terms and Conditions of Sale contain very important information about your  
 19 rights and obligations as well as limitations and exclusions that may apply to you.  
 20 They contain limitations of liability and warranty information. They also contain an  
 21 agreement to resolve disputes through arbitration rather than through litigation.  
 22 Please read them carefully.

23 *Id.* ¶ 11. The words "Dell's Terms and Conditions of Sale" are linked to a page setting forth the full  
 24 Agreement. *Id.* The electronic confirmation of sale sent to customers via email reminded the  
 25 plaintiffs that the purchase was subject to Dell's Terms and Conditions and a copy of the Agreement  
 26 is included inside the box containing the computer. *Id.* ¶ 17.

27 Under the title of the document "U.S. Terms and Conditions of Sale," the Agreement states:

28 **READ THIS DOCUMENT CAREFULLY! IT CONTAINS VERY IMPORTANT  
 INFORMATION ABOUT YOUR RIGHTS AND OBLIGATIONS, AS WELL AS  
 LIMITATIONS AND EXCLUSIONS THAT MAY APPLY TO YOU. THIS  
 DOCUMENT CONTAINS A DISPUTE RESOLUTION CLAUSE.**

1 Directly under this cautionary language, the Agreement states that a customer can reject the terms of  
 2 the contract by returning the product pursuant to "Dell's Return Policy." *Id.* By accepting delivery  
 3 of the computer and failing to return it within the prescribed 21-day period, the customer agrees to  
 4 be bound by the Terms and Conditions. *Id.* at ¶¶ 13, 17.

5 The Agreement contains a choice of law provision designating Texas as the governing law,  
 6 Agreement ¶ 11, and an arbitration clause, *Id.* ¶ 13. The arbitration clause reads as follows:

7 **Binding Arbitration.** ANY CLAIM, DISPUTE, OR CONTROVERSY . . .  
 8 BETWEEN CUSTOMER AND DELL . . . SHALL BE RESOLVED  
 9 EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION  
 10 ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) . . . .  
 11 NEITHER CUSTOMER NOR DELL SHALL BE ENTITLED TO JOIN OR  
 12 CONSOLIDATED CLAIMS BY OR AGAINST OTHER CUSTOMERS, OR  
 13 ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR CLASS ACTION OR  
 14 IN A PRIVATE ATTORNEY GENERAL CAPACITY.

## 15 II. ANALYSIS

### 16 A. Federal Arbitration Act

17 Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, to overcome  
 18 judicial resistance to arbitration. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.  
 19 Ct. 1204, 1207 (2006); *see also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1268 (9th Cir. 2006).  
 20 The FAA provides that written agreements to arbitrate disputes arising out of transactions involving  
 21 interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds that exist  
 22 at law or in equity for the revocation of any contract." 9 U.S.C. § 2. There are two types of  
 23 challenges to the validity of arbitration agreements: "One type challenges specifically the validity of  
 24 the agreement to arbitrate. [citation omitted] The other challenges the contract as a whole, either on  
 25 a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or  
 26 on the ground that the illegality of one of the contract's provisions renders the whole contract  
 27 invalid." *Buckeye*, 126 S. Ct. at 1208. The Supreme Court has held that a challenge of the second  
 28 type must be brought before an arbitrator. *Id.* at 1210. ("[A] challenge to the validity of the contract  
 as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

Here, however, plaintiffs have challenged the validity of the arbitration clause by way of  
 their opposition to Dell's motion to compel arbitration. Where the court is asked to determine the  
 validity of the agreement to arbitrate, "generally applicable contract defenses, such as fraud, duress,

1 or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."  
 2 *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (citations omitted). When determining  
 3 whether such defenses might apply to any purported agreement to arbitrate the dispute in question,  
 4 "courts generally . . . should apply ordinary state-law principles that govern the formation of  
 5 contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

6 In this case, plaintiffs contend that the agreement to arbitrate is procedurally and  
 7 substantively unconscionable under California law, and therefore invalid. Plaintiffs assert that the  
 8 Agreement is procedurally unconscionable because it is a contract of adhesion and that they lacked  
 9 any meaningful opportunity to negotiate the terms. They also contend that the Agreement was  
 10 substantively unconscionable because it includes the provision set forth above that precludes  
 11 arbitrating any claims on behalf of a class (hereinafter "class action waiver provision").

#### 12 **B. Applicable State Law**

13 As an initial matter, the court must determine which state law to apply. The Agreement's  
 14 choice-of-law provision designates Texas law to govern the contract. Plaintiffs nevertheless argue  
 15 that the choice-of-law clause is invalid because it is contained in a contract of adhesion and because  
 16 applying Texas law would "conflict with time-honored fundamental policies embodied in California  
 17 law protecting consumers." Opp'n at 5. Plaintiffs urge the court to invalidate the choice-of-law  
 18 clause, conduct a choice-of-law analysis, and conclude that California law governs whether the  
 19 parties entered into a valid agreement to arbitrate.

20 A court sitting in diversity applies the choice-of-law rules of the forum state. *Downing v.*  
 21 *Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001). "In determining the enforceability of  
 22 arm's-length contractual choice-of-law provisions, California courts shall apply the principles set  
 23 forth in Restatement section 187, which reflects a strong policy favoring enforcement of such  
 24 provisions." *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464-65 (1992). Restatement  
 25 (Second) of Conflicts of Law §187(2) provides in part:

26 The law of the state chosen by the parties to govern their contractual rights and duties  
 27 will be applied, even if the particular issue is one which the parties could not have  
 28 either (a) the chosen state has no substantial relationship to the parties or the  
 transaction and there is no other reasonable basis for the parties' choice, or (b)  
 application of the law of the chosen state would be contrary to a fundamental policy

1 of a state which has a materially greater interest than the chosen state in the  
 2 determination of the particular issue and which, under the rule of § 188, would be the  
 state of the applicable law in the absence of an effective choice of law by the parties.

3 Here, it is not disputed that the first prong is met.<sup>1</sup> However, the parties dispute whether the second  
 4 prong—whether application of Texas law in the present case would be contrary to a fundamental  
 5 policy of the State of California—is met. Under the second prong, if there is a fundamental conflict  
 6 with California law, "the court must then determine whether California has a materially greater  
 7 interest than the chosen state in the determination of the particular issue." *Nedlloyd*, 3 Cal. 4th at  
 8 466 (internal citation and quotation marks omitted). If so, the choice of law provision is not  
 9 enforced. *Id.*

### 10 1. Fundamental Conflict

11 Plaintiffs argue that California has a fundamental policy to protect consumers from the  
 12 "oppressive use of superior bargaining strength" and the false advertising alleged in this action,  
 13 while Texas does not have such a policy. In support of this argument, plaintiffs cite Cal. Civ. Code  
 14 § 1668 which provides:

15 All contracts which have for their object, directly or indirectly, to exempt anyone  
 16 from responsibility for his own fraud, or willful injury to the person or property or  
 another, or violation of the law, whether willful or negligent, are against the policy of  
 the law.

17 In *Discover Bank*, the California Supreme Court in held that class action waivers are unenforceable  
 18 only in those limited circumstances where the

19 waiver is found in a consumer contract of adhesion in a setting in which disputes  
 20 between the contracting parties predictably involve small amounts of damages, and  
 21 when it is alleged that the party with the superior bargaining power has carried out a  
 scheme to deliberately cheat large numbers of consumers out of individually small  
 amounts of money.

22 *Id.* at 162-63. *Discover Bank* does not necessarily establish a fundamental policy under Cal. Civ.  
 23 Code § 1668 that forbids class action waivers in all circumstances. *Discover Bank* and the cases that  
 24 have followed it set forth that whether a class action waiver provision will be considered  
 25 unconscionable in California is a fact-specific, case-by-case inquiry. *See, e.g., Cohen v. DirectTV*,  
 26 142 Cal. App. 4th 1442, 1451 (2006) (to determine whether class waiver provision is  
 27

28 <sup>1</sup> It is also undisputed that California law would apply under the rule of § 188 absent an  
 effective choice of law provision.

1 unconscionable, must determine how closely the facts surrounding the waiver at issue approximate  
 2 those in *Discover Bank*, and to the extent they are different, whether they require the conclusion that  
 3 the waiver is unconscionable); *see also Douglas v. U.S. Dist. Court*, 2007 U.S. App. LEXIS 17061  
 4 (9th Cir. July 19, 2007) (per curiam) ("A class action waiver provision thus may be unconscionable  
 5 in California. Whether it is depends on the facts and circumstances developed during the course of  
 6 litigation.").

7 The Ninth Circuit recently made it clear that a district court must assess the facts and  
 8 circumstances of the litigation in order to determine whether a class action waiver provision is  
 9 substantively unconscionable. *Douglas*, 2007 U.S. App. LEXIS 17061, at \*10 (vacating the district  
 10 court's order compelling arbitration because the court "clearly erred" in holding that a class waiver  
 11 provision was consistent with California policy and therefore enforceable as a matter of law).  
 12 California Court of Appeal cases have since held that when similar circumstances as those in  
 13 *Discover Bank* are present, a fundamental public policy is implicated. *See, e.g., Klussman v. Cross*  
 14 *Country Bank*, 134 Cal. App. 4th 1283, 1300 (2005) (stating "*Discover Bank* establishes the  
 15 fundamental nature of California's concern with protecting consumers from unscrupulous practices,  
 16 particularly when only small individual amounts are at issue" and enumerating the California public  
 17 policy interests at stake along with their statutory bases).<sup>2</sup> Thus the court turns to determining how  
 18 closely the facts surrounding the waiver in this case approximate those in *Discover Bank*. *Cohen*,  
 19 142 Cal. App. 4th at 1451.

#### 20 **i. Contract of Adhesion**

21 First, the Agreement appears by its form to be a contract of adhesion under California law. A  
 22 contract of adhesion is defined as "a standardized contract, imposed upon the subscribing party  
 23 without an opportunity to negotiate the terms." *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.  
 24 App. 4th 846, 853 (2001). Generally, a finding of a contract of adhesion suggests a finding of  
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28 <sup>2</sup> Cal. Civ. Code §§ 1668 [exculpatory contracts contrary to policy], 1670.5 [court may refuse to enforce unconscionable contract], 3513 [no waiver of a law established for a public reason].

1 procedural unconscionability,<sup>3</sup> however, California courts have also held that although "adhesion  
2 contracts often are procedurally oppressive, this is not always the case." *Nagrampa*, 469 F.3d at  
3 1281 (citing *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1320). The "standards  
4 for procedural unconscionability are satisfied by a finding that the arbitration provision was  
5 presented on a take-it-or-leave-it basis and that it was oppressive due to an inequality of bargaining  
6 power that result[s] in no real negotiation in the absence of meaningful choice." *Id.* (internal  
7 quotation and citation omitted).

8 Procedural unconscionability concerns the manner in which the disputed contract clause is  
9 presented to and negotiated with the party in the weaker bargaining position. *Nagrampa*, 469 F.3d  
10 at 1280. Procedural unconscionability analysis focuses on oppression or surprise. *Flores*, 92 Cal.  
11 App. 4th at 853. Oppression arises from an inequality of bargaining power and an absence of real  
12 negotiation. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1187 (S.D. Cal. 2005). Surprise  
13 involves the extent to which the terms of the bargain are hidden. *Id.* As for oppression, the  
14 Agreement is a contract of adhesion. There is no real dispute that it was presented to plaintiffs with  
15 no opportunity to negotiate its terms and was drafted unilaterally by a party of superior bargaining  
16 strength. However, Dell asserts that plaintiffs nevertheless had a meaningful choice not to purchase  
17 the Dell products: at the time they purchased the computers, other computer manufacturers were  
18 offering computer purchase under terms and conditions that did not include an arbitration clause.  
19 Although "[t]he California Court of Appeal has rejected the notion that the availability in the  
20 marketplace of substitute employment, goods or services *alone* can defeat a claim of procedural  
21 unconscionability," *Nagrampa*, 469 F.3d at 1283 (emphasis in original), Dell does not rely solely  
22 upon the availability of substitute goods. Dell also provided plaintiffs with a rescission mechanism  
23 in the form of its Return Policy, which gave plaintiffs the opportunity to reject the Agreement,  
24 including the arbitration provision, if they did not agree to the arbitration terms. Thus, because Dell  
25 may reasonably rely on both the availability of substitute goods in the market and the opportunity to  
26 rescind to defeat (or at least mitigate) procedural unconscionability, the oppression prong of the

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27  
28 <sup>3</sup> In California, procedural unconscionability analysis begins with an inquiry into whether an  
agreement is one of adhesion. *Armendariz v. Foundation Health Psychcare Svcs., Inc.*, 24 Cal. 4th  
83, 113 (2000); *Nagrampa*, 469 F.3d at 1281.

1 procedural unconscionability inquiry is not necessarily met. As for surprise, Dell notified plaintiffs  
2 prior to completing the purchase of its arbitration provision by providing notice on the click-  
3 throughs presented during the purchase process that the Terms and Conditions included an  
4 arbitration clause and by providing bold and conspicuous language on the Agreement. Plaintiffs had  
5 access to the Terms and Conditions and express notice of its inclusion of an arbitration provision  
6 prior to and after their purchases, therefore the plaintiffs do not meet the surprise prong.

7       The foregoing discussion of procedural unconscionability highlights one way in which the  
8 present case is distinct from *Discover Bank*. In that case, the defendant effected the amendment  
9 adding the class action waiver in the form of a "bill stuffer" such that the consumer would be  
10 deemed to accept the newly-added provision if the consumer did not close his account. *Discover*  
11 *Bank*, 36 Cal. 4th at 161; *see also Cohen*, 142 Cal. App. 4th at 1451 (also finding that plaintiff was  
12 given an amendment to his customer agreement in the form of a bill stuffer); *cf. Douglas*, 2007 U.S.  
13 App. LEXIS 17061, at \*4-5 (discussing the contract formation implications of changing the terms  
14 and conditions of a customer agreement on a website without notifying the customer). Here, by  
15 contrast, the class action waiver provision was part of the original terms and conditions: plaintiffs  
16 were made aware that the purchase was subject to those original terms and conditions throughout the  
17 purchase process, including having to acknowledge that the Agreement included alternative dispute  
18 resolution terms in order to complete the purchase. However, it appears that substantive  
19 unconscionability, not procedural unconscionability, governs the determination as to whether a class  
20 action waiver provision violates the fundamental public policy set forth in Cal. Civ. Code § 1668.  
21 *Discover Bank*, 36 Cal. 4th at 161 (class action waivers in otherwise enforceable adhesive contracts  
22 may be substantively unconscionable "inasmuch as they may operate effectively as exculpatory  
23 contract clauses that are contrary to public policy"); *see also Klussman*, 134 Cal. App. 4th at 1297-  
24 98 (in which the California Court of Appeal determined that the class action waiver provision was  
25 unconscionable without examining procedural unconscionability).

26       Defendant argues that *Discover Bank* only applies to "consumer" contracts and since plaintiff  
27 Seick bought his computer for his business, he is not a consumer. *See* Cal. Civ. Code § 1761(d)  
28 (which limits a consumer under the Consumer Remedies Act to one who buys for "personal, family,

1 or household purposes"). The rationale of *Discovery Bank*, however, does not apply only to  
 2 consumers under the Consumer Remedies Act but rather may apply to other types of customers,  
 3 such as an individual like Seick buying a computer for his business.

4 **ii. Scheme to Deliberately Cheat Large Numbers of Consumers**

5 Second, here, as in *Discover Bank*, "it is alleged that the party with the superior bargaining  
 6 power has carried out a scheme to deliberately cheat large numbers of consumers." Plaintiffs have  
 7 alleged that Dell advertises "limited time" specific-dollar discounts from expressly referenced  
 8 former prices, but that the discounts are false because the reference prices are inflated beyond Dell's  
 9 true regular prices. First Am. Complaint ("FAC") ¶¶ 17-24.<sup>4</sup> Plaintiffs set forth examples of  
 10 advertisements directed to the consumer public that offer specific-dollar discounts off of advertised  
 11 prices that were higher than the true regular prices, *id.* ¶¶ 21-22, as well as free upgrades and add-ons  
 12 and rebates that are not actually discounts because Dell marks up the true regular price of the  
 13 product to which those upgrades, add-ons and rebates pertain, *id.* ¶¶ 25-34. They also allege  
 14 particular instances in which the plaintiffs were offered specific-dollar discounts off of advertised  
 15 prices that were higher than the true regular prices. *Id.* ¶¶ 57, 63. Taken together, plaintiffs'  
 16 complaint alleges that Dell has carried out a scheme to cheat large numbers of consumers.

17 **iii. Small Damages Amounts**

18 Finally, as in *Discover Bank*, the amount of damages plaintiffs claim are small. Plaintiffs  
 19 argue that they seek only damages in the amount of the difference in the cost to them caused by the  
 20 alleged inflation of the price from which the discounts were taken from the usual price of the  
 21 discounted item. Opp'n at 7. Such alleged damages would, as required by *Discover Bank*,  
 22 predictably be small, given that they allegedly represent discounts from prices that were elevated  
 23 from a normally-lower price for the purposes of generating up to a few hundred dollars in the sale of  
 24 Dell products and services.

25 **iv. Conclusion**

26 Based upon the allegations of the complaint, it appears that the circumstances surrounding  
 27 the class action waiver in Dell's Agreement are comparable to those in *Discover Bank*. Thus, per

28 \_\_\_\_\_  
<sup>4</sup> Plaintiffs also allege that these discounts are sometimes not truly time-limited either.

1 *Klussman*, the inclusion of the class action waiver violates fundamental California policies,  
 2 "including the statutory policies against exculpatory waivers, prohibiting enforcement of  
 3 unconscionable contract provisions and against waivers of laws established for a public purpose," in  
 4 the particular factual circumstances presented by this case. *Klussman*, 134 Cal. App. 4th at 1300;  
 5 *see also id.* at 1297 (although *Discover Bank* "did not reject all class action waivers, it did denounce  
 6 waivers such as the one in this case"). It appears that Texas would enforce arbitration clauses  
 7 containing class action waivers such as the one at issue here.<sup>5</sup> *See, e.g.*, Opp'n at 8; Reply at 6.  
 8 Therefore, it appears that Texas law conflicts with California public policy in the circumstances  
 9 presented by this case.

## 10 2. Greater Interest

11 Dell asserts that plaintiffs have failed to establish that California has a materially greater  
 12 interest in this dispute than that of Texas. According to Dell, Texas has at least a comparable  
 13 interest in protecting its resident business's expectations of consistent legal standards as does  
 14 California in protecting its consumers. Dell further asserts that Texas, like California, has an interest  
 15 in preventing false internet pricing. Reply at 5. Although it is a close call, the court nevertheless  
 16 finds that California has stated a strong interest in "protecting its citizens from 'take it or leave it'  
 17 agreements that incorporate one-sided protections," *Klussman*, 134 Cal. App. 4th at 1299, and thus  
 18 finds that California has a greater interest in this dispute than does Texas. Accordingly, under the  
 19 facts of this case and purely in the context of these claims for false advertising,<sup>6</sup> the court declines to  
 20 enforce the Texas choice of law in the Dell Agreement and will instead apply California law.

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23  
 24 <sup>5</sup> Although plaintiffs do argue that Texas would not enforce the Agreement, it appears to be an  
 alternative position to their main argument regarding choice of law.

25 <sup>6</sup> To be clear, the court does not hold that a class action waiver provision such as the one at issue  
 26 here (or even the identical provision in Dell's Agreement) would be considered unconscionable  
 27 under other circumstances than those presented here. Other courts have held the class waiver  
 28 provision in Dell's Agreement to be enforceable in circumstances involving, for instance, warranty  
 claims. *See, e.g., Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018 (N.D. Cal. 2007) (Hamilton, J.);  
*Carideo v. Dell Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 1753511, at \*3 (W.D. Wash. June 18, 2007). The  
 instant order does not purport to address nor does it apply to the facts or circumstances of those  
 cases.

1 **C. Unconscionability of the Arbitration Clause**

2 Under California law, an agreement is enforceable unless it is both procedurally and  
 3 substantively unconscionable. *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th  
 4 83, 114 (2000). Both procedural and substantive unconscionability must be present in order for the  
 5 court to refuse to enforce a contract under the doctrine of unconscionability. *Wilens v. TD*  
 6 *Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 753 (2003). The more substantively oppressive a  
 7 contract term is, the less evidence of procedural unconscionability is required to conclude that the  
 8 term is unenforceable, and vice versa. *O'Hare v. Municipal Resource Consultants*, 107 Cal. App.  
 9 4th 267, 272 (2003); *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76, 87 (2003).

10 As set forth above, plaintiffs assert that the Agreement is procedurally unconscionable  
 11 because it is a contract of adhesion and they lacked any meaningful choice to negotiate the terms and  
 12 that the Agreement was substantively unconscionable because it includes the class action waiver  
 13 provision. The court has concluded in the course of its conflict of laws analysis that the class action  
 14 waiver was procedurally unconscionable under California law because it is a contract of adhesion  
 15 imposed upon the plaintiffs by a party with superior bargaining power. Although, as set forth above,  
 16 the court believes that the plaintiffs had meaningful alternatives and a chance to rescind the contract,  
 17 thereby reducing the procedural unconscionability, it has also concluded that the class action waiver  
 18 provision is substantively unconscionable under California law – considerably so, given that this  
 19 case exhibits similar circumstances to those in *Discover Bank*. Because the class waiver provision is  
 20 part of the arbitration provision and central to the mechanism to resolving the dispute between the  
 21 parties, it cannot be severed.

22 Accordingly, the court finds that the arbitration provision substantively unconscionable and  
 23 that the arbitration provision is therefore invalid and unenforceable under § 2 of the FAA.<sup>7</sup> The  
 24 court declines to order the parties to arbitration.

25  
 26  
 27 <sup>7</sup> Dell asserts that the FAA preempts California rules against class action waivers. The California  
 28 Supreme Court addressed this issue squarely in *Discover Bank* and concluded that nothing in the  
 FAA prohibits California courts from not enforcing an arbitration agreement that "completely  
 inoculate[s] parties against class liability." *Discover Bank*, 36 Cal. 4th at 172.


United States District Court  
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**III. ORDER**

For the foregoing reasons, the court denies defendant's motion to stay these proceedings and compel arbitration. This denial shall be without prejudice to defendant renewing its motion should facts or circumstances develop that would materially impact this court's assessment of the application of the principles articulated by *Discover Bank*. As agreed at the hearing on this matter, the parties shall appear for a case management conference on Friday, August 31, 2007 at 10:30 a.m.

DATED: 8/2/07

  
\_\_\_\_\_  
RONALD M. WHYTE  
United States District Judge

1 **Notice of this document has been electronically sent to:**

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10 Counsel are responsible for distributing copies of this document to co-counsel that have not  
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14 **Dated:** 8/3/07

/s/ MAG  
**Chambers of Judge Whyte**

United States District Court  
For the Northern District of California

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