AMERICAN ARBITRATION ASSOCIATION

CABLE CONNECTION, INC., an Oklahoma corporation, TV OPTIONS, INC., an Alabama corporation, SWARTZEL ELECTRIC, a California partnership, and ORBITAL SATELLITE, INC., an Ohio corporation, on behalf of themselves and all others similarly situated, **Claimants,** **v.** **DIRECTV, INC., a California corporation, and HUGHES ELECTRONICS CORPORATION, a Michigan corporation,** **Respondents.**	**AAA No. 11 145 00752 04**

CLAIMANTS' MEMORANDUM OF LAW IN SUPPORT OF A CLAUSE CONSTRUCTION AWARD DIRECTING THIS MATTER TO PROCEED AS A CLASSWIDE ARBITRATION

Claimants Cable Connection, Inc., TV Options, Inc., Swartzel Electric and Orbital Satellite, Inc. (collectively "Claimants") respectfully file this memorandum of law in support of a Clause Construction Award, pursuant to Rule 3 of the American Arbitration Association's ("AAA") Supplementary Rules for Class Arbitrations, directing this matter to proceed as a classwide arbitration.

PRELIMINARY STATEMENT

The lone issue before this Panel is whether this arbitration can proceed on behalf of a class of claimants. The arbitration clauses in the relevant contracts are silent regarding whether classwide arbitration is permitted. Indeed, neither the word "class" nor the phrase "class action" are mentioned anywhere in the arbitration clauses. Under these circumstances, California law authorizes classwide arbitration. In the event this Panel finds the arbitration provisions ambiguous by virtue of this silence, California law requires that the ambiguity be interpreted against the drafter of the contracts, in this case the Respondents. In either event, the arbitration provisions at issue in this matter should be interpreted to permit classwide arbitration. Accordingly, a clause construction award should issue directing this matter to proceed as a classwide arbitration.

FACTS

Claimants are former DIRECTV Dealers who sold, installed, repaired and/or maintained DIRECTV services and products across the country. Claimants filed this arbitration on behalf of themselves and on behalf of a class defined as "DIRECTV Dealers who sold, installed, repaired or maintained home satellite service for Respondents from 1996 until the present" (the "Class" or "Class Members"). Claimants allege that Respondents willfully breached contracts, engaged in

unfair business practices, breached their fiduciary duties, violated California antitrust laws, and converted commission payments belonging to Claimants and the Class.

Respondents DIRECTV, Inc. ("DIRECTV") and its parent corporation, Hughes Electronics Corporation ("Hughes") (collectively "Respondents") provide satellite television services to over twelve million customers in the United States.

Claimants and the Class acted as DIRECTV Dealers pursuant to a uniform set of contracts that DIRECTV required all Dealers to sign.[1] In 1996, Respondents required all Dealers to sign the DIRECTV Residential Dealer Agreement (the "RDA"). In or about 1998, Respondents required all Dealers to sign a new contract called the "Sales Agency Agreement." The RDA and the Sales Agency Agreement were prepared by DIRECTV and were presented to Claimants and the Class as non-negotiable.

The RDA includes the following arbitration clause:

> <u>ARBITRATION</u> Any dispute or disagreement arising solely between DIRECTV and Dealer shall be resolved according to binding arbitration conducted in Los Angeles, California in accordance with the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association then in effect (the "Rules"); provided, however, that the parties may seek injunctive relief in any court of competent jurisdiction. Arbitration shall be by a single arbitrator chosen by the parties, provided that, if the parties fail to agree and to appoint a single arbitrator within 30 days from the date a party has made a demand for arbitration, then the arbitrator shall be chosen in accordance with the Rules. The decision of the arbitrator shall be final and binding on the parties and any award of the arbitrator may be entered in any court of competent jurisdiction. Notwithstanding the foregoing, the arbitrator shall not be authorized to award punitive damages with respect to any controversy, claim or

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[1] While Respondents frequently attempted to amend, modify, or otherwise change the terms of the contracts, none of those purported amendments altered the arbitration clauses at issue and, therefore, are not relevant to this clause construction proceeding.

> dispute, nor shall any party seek punitive damages with respect to any controversy, claim or dispute, nor shall any party seek punitive damages relating to any matter arising out of, or relating to, this Residential Dealer Agreement, in any forum. The cost of the arbitrator hereunder, including the cost of the record or transcripts thereof, if any, administrative fees, attorneys' fees and all other fees involved shall be paid by the party determined by the arbitrator to be not the prevailing party, or otherwise allocated in an equitable manner as determined by the arbitrator.

As the Panel can see, the RDA arbitration clause does not mention anything about classwide arbitration. In fact, it is completely silent on the issue. The RDA does include a choice of law clause, which states "[t]his Residential Dealer Agreement shall be construed in accordance with and be governed by the laws of the Sate of California, applicable to contracts made and to be performed entirely within the State of California by residents thereof."

The Sales Agency Agreement includes the following arbitration clause:

> **ARBITRATION**. (a) any dispute or claim arising out of the interpretation, performance, or breach of this Agreement, including without limitation claims alleging fraud in the inducement, shall be resolved only by binding arbitration, at the request of either party, in accordance with the rules of the American Arbitration Association, modified as herein provided. The arbitrators shall be, to the fullest extent available, either retired judges or selected from a panel of persons trained and expert in the subject area of the asserted claims. If the claim seeks damages of less than $250,000, it shall be decided by one arbitrator. In all other cases, each party shall select one arbitrator, who shall jointly select the third arbitrator. If for any reason a third arbitrator is not selected within one month after the claim is first made, the third arbitrator shall be selected in accordance with the rules of the American Arbitration Association. The arbitrators shall apply California substantive law to the proceeding, except to the extent Federal substantive law would apply to any claim. The arbitration shall be conducted in Los Angeles, California. An award may be entered against a party who fails to appear at a duly noticed hearing. The arbitrators shall prepare in writing and provide to the parties an award including factual findings and the reasons on which their decision is based. The arbitrators shall not have the

> power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error. The decision of the arbitrators may be entered and enforced as a final judgment in any court of competent jurisdiction. The parties shall share equally the arbitrator's fees and other costs of the arbitration. (b) Notwithstanding the foregoing, the following shall not be subject to arbitration and may be adjudicated only by the Los Angeles County, California Superior Court or the U.S. District Court for the Central District of California: (1) any dispute, controversy, or claim relating to or contesting the validity of DIRECTV's right to offer DBS Service to the public or any of DIRECTV's Trade Secrets or Marks; and (2) the request by either party for preliminary or permanent injunctive relief, whether prohibitive or mandatory, or provisional relief such as writs of attachment or possession. (c) This Section and any arbitration conducted hereunder shall be governed by the United States Arbitration Act (9 U.S.C. Section 1, et seq.). The parties acknowledge that the transactions contemplated by this Agreement involve commerce, as defined in said Act. This Section 18.12 shall survive the termination or expiration of this Agreement.

Like the RDA arbitration clause, the above arbitration clause in the Sales Agency Agreement neither expressly permits nor expressly prohibits arbitration on behalf of a class.

ARGUMENT

A. California Law Applies

In Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S.Ct. 2402 (2003), homeowners brought two purported state-court class actions against a commercial lender for allegedly violating South Carolina's Consumer Protection Code. The contracts between the homeowners and the lender required all contract-related disputes to be arbitrated. The lender opposed classwide arbitration. Eventually both cases ended up before the South Carolina Supreme Court, which consolidated the proceedings. The South Carolina Supreme Court found the contracts at issue silent regarding classwide arbitrations and held, pursuant to South Carolina law, that the contracts therefore permitted classwide arbitration.

The United States Supreme Court granted certiorari to determine whether the South Carolina Supreme Court's holding was consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1-16. The Supreme Court eventually vacated the judgment below, holding that the question of "whether the contracts forbid class arbitration" is one for the arbitrator to answer, not the courts. 539 U.S. at 452-53, 123 S.Ct. at 2407.

In reaching its conclusion, the Supreme Court stated that the question "concerns contract interpretation and arbitration procedures." 539 U.S. at 453, 123 S.Ct. at 2407 (emphasis added). "Interpretation of private contracts is ordinarily a question of state law." Volt Info. Sciences, Inc. v. Board of Tr.s of Leland Stanford Jr. Univ., 489 U.S. 468, 474, 109 S.Ct. 1248, 1253 (1989); see also, Green Tree, supra, 539 U.S. at 450, 123 S.Ct. at 2406. Both the RDA and the Sales Agency Agreement specify that California law shall apply.

B. California Law Authorizes Classwide Arbitration

In Blue Cross of California v. Superior Court, 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779 (Cal. Ct. App. 1998), plaintiffs brought a class action against the defendant insurance carrier. Defendant moved to compel arbitration, pursuant to arbitration provisions in the policies, and to stay the judicial proceedings. The lower court granted the insurer's motion to compel and to stay the judicial proceedings of the individual plaintiffs, but refused to stay the judicial proceedings as they pertained to the class claims and ruled that if a class was certified the matter would be referred for classwide arbitration. The defendant sought relief from the appellate court, arguing that California law allowing classwide arbitration was preempted by the Federal Arbitration Act.

The court of appeals in Blue Cross denied the insurers writ, holding that the Federal Arbitration Act "does not preclude application of the California classwide arbitration rule." 67

Cal.App.4th at 59-60. In addition, the court of appeals concluded that "when [an] arbitration agreement between [] parties is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the [Federal Arbitration Act]." See also, Cruz v. Pacificare Health Sys., Inc., 30 Cal.4th 303, 319, 133 Cal.Rptr.2d 58, 70 (2003) ("[I]n this state we recognize classwide arbitration as a means of bringing collective legal action by parties bound to an arbitration agreement."); Volt Info. Sciences, Inc. v. Board of Tr.s of Leland Stanford Jr. Univ., 489 U.S. 468, 475, 109 S.Ct. 1248, 1254 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules . . . ..")

At the time the Court of Appeal issued its opinion in Blue Cross, and for several years thereafter, California trial court judges had the authority to determine whether classwide arbitration was appropriate in a particular case. The Supreme Court's decision in Green Tree, however, has changed that. Today, the question of whether an arbitration agreement permits classwide arbitration is a decision for the arbitrator, not the trial court. 539 U.S. at 452-53, 123 S.Ct. at 2407. Significantly, the Supreme Court did not overrule or abrogate California's "classwide arbitration rule."

In Cole v. Long John Silver's Rest.s Inc., AAA No. 11 160 00194 04, a case decided after Green Tree, plaintiff's filed a class action complaint against Respondents with the American Arbitration Association. The parties sought a clause construction award to determine whether the matter could proceed as a classwide arbitration. (A copy of the Clause Construction Award of Arbitrator, dated January 15, 2004 ("Cole Clause Construction Award"), is attached as Exhibit A to the Affidavit of Daniel A. Osborn ("Osborn Aff.").) The Arbitrator in Cole found the contract at

issue in that case "silent as to whether plaintiffs may enforce their contractual right via a collective or class action." (Cole Clause Construction Award at 1.) The Arbitrator ultimately determined that "the contract cannot be construed as prohibiting a class or collective action." In reaching this conclusion, the Arbitrator relied, in part, on the South Carolina Supreme Court's rationale from the Green Tree case which permitted classwide arbitration when an arbitration agreement is silent. (Cole Clause Construction Award at 4-5.) This is the same conclusion reached by the California appellate court in Blue Cross, supra. See also, Bagpeddler.com v. U.S. Bancorp., AAA No. 111 181 00322 04, discussed further below, (Faced with an agreement that did not "state explicitly whether representing a class in a class action [was] a procedural remedy available to" claimant, the Arbitrator found that "the arbitration clause in question permit[ted] th[e] arbitration to proceed on behalf of a class.") (A copy of the Clause Construction Award, dated September 2, 2004 ("Bagpeddler Clause Construction Award"), is attached as Exhibit B to the Osborn Aff.); Goldstein v. Ibase Consulting, LLC, AAA No. 11 160 02760 03, (In this arbitration under the Fair Labor Standards Act, the Arbitrator was called on to determine whether the arbitration could proceed as a class action or collective arbitration when "the contract between the parties is silent" on the issue. The Arbitrator concluded that "[t]he contract cannot be construed as prohibiting a class or collective action under the FSLA.") (A copy of the Clause Construction Award of the Arbitrator, dated March 29, 2004 ("Goldstein Clause Construction Award"), is attached as Exhibit C to the Osborn Aff.)

The Supreme Court of California addressed the important policy reasons for permitting classwide arbitration in Keating v. Superior Court, 31 Cal3d 584, 183 Cal.Rptr. 360 (1982), rev'd other grounds by, Southland Corp. V. Keating, 465 U.S. 1 (1984). In Keating, the California Supreme Court noted that it had "repeatedly emphasized the importance of the class action device

for vindicating rights asserted by large groups of persons." 31 Cal3d at 609. The court later explained that "[i]f the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, ad for chilling the effective protection of interests common to a group, would be substantial." Id. Finally, the court acknowledged that "[i]f . . . an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing many individuals claims, it may well be oppressive and may defeat the expectations of the nondrafting party." 31 Cal3d at 610.

Because the arbitration clauses at issue in this case are silent regarding classwide arbitration, and California law permits classwide arbitration under these circumstances, a clause construction award should issue finding that classwide arbitration is permitted in this case.

C. California Law Requires Ambiguous Contract Provisions To Be Interpreted Against the Drafting Party

Under California law, "ordinary rules of contract interpretation apply to [an] arbitration clause." Maggio v. Winward Capital Mgmt. Co., 80 Cal.App.4th 1210, 1214, 96 Cal.Rptr.2d 168, 171 (Cal. Ct. App. 2000). In Maggio, a dispute arose between the parties regarding whether the arbitration clause required the arbitration to be conducted by the AAA. Although the appellate court ultimately found that the arbitration clause was unambiguous, citing, in part, to California Civil Code § 1654, it noted that "[a]ny ambiguity in the language of the arbitration clause must be interpreted against the drafter." 80 Cal.App.4th at 1215, 96 Cal.Rptr.2d at 172.

In Lawrence v. Walzer & Gabrielson, 207 Cal.App.3d 1501, 256 Cal.Rptr. 6 (Cal. Ct. App. 1989), plaintiff filed suit alleging legal malpractice and breach of fiduciary duty. Defendant sought

to compel arbitration pursuant to an arbitration provision in the retainer agreement and the lower court refused. On appeal, the court in Lawrence affirmed the denial of the motion to compel arbitration, noting, in part, that

> The arbitration clause in the present case was part of a retainer agreement drafted by defendant attorneys and presented to plaintiff client for her signature. It was not the product of negotiation. "[T]he language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Civ.Code, § 1654.)

207 Cal.App.3d at 1507, 256 Cal.Rptr. at 10. See also Victoria v. Superior Court, 40 Cal.3d 734, 222 Cal.Rptr. 1 (1986) ("[A]mbiguities in standard form contracts are to be construed against the drafter." 40 Cal.3d at 739, 222 Cal.Rptr. at 3. "If the arbitration clause is adhesive, ambiguities will be subject to stricter construction against the party with the stronger bargaining power." 40 Cal.3d at 742, 222 Cal.Rptr. at 5.); Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 820 n. 16, 171 Cal.Rptr. 604, 611 n. 16 (1981) ("The rule requiring the resolution of ambiguities against the drafting party "applies with peculiar force in the case of a contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language." (citation omitted).)

In Bagpeddler.com v. U.S. Bancorp., AAA No. 111 181 00322 04, claimant filed a demand for arbitration against Respondents with the American Arbitration Association. The parties sought a determination from the arbitrator as to "whether the contract 'precludes conducting [the] arbitration as a class action.'" (Bagpeddler Clause Construction Award at 3.) The Arbitrator in Bagpeddler found the agreement ambiguous under Georgia law. (Bagpeddler Clause Construction Award at 5-6.) Applying Georgia rules of contract construction, including one which requires ambiguous

contracts to be construed against the drafter, the Arbitrator held that the arbitration clause "permits the arbitration to proceed on behalf of a class." (Bagpeddler Clause Construction Award at 6-8.)

The RDA and the Sales Agency agreement were prepared by DIRECTV. The contracts, including the arbitration clauses at issue, were presented to Claimants and the Class for signature, without any opportunity for negotiating. The only choice Claimants and the Class had, take-it-or-leave-it, was in reality no choice. Under California law, the contract is a contract of adhesion. See Neal v. State Farm Ins. Co.s, 188 Cal.App.2d 690, 694 (Cal. Ct. App. 1961) ("The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the arty of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.")

The fact that the RDA and the Sales Agency Agreement are silent as to classwide arbitration does not necessarily make the agreements ambiguous. However, because DIRECTV drafted the RDA and the Sales Agency Agreement, any ambiguities in the contracts, and the arbitration clauses, must be construed against Respondents and in favor of Claimants. Moreover, because the RDA and the Sales Agency Agreement are contracts of adhesion, this principle of contract interpretation must be strictly enforced.

Accordingly, the arbitration clauses in the RDA and the Sales Agency Agreement should be interpreted to permit classwide arbitration and an award should issue directing this matter to proceed as a classwide arbitration.

CONCLUSION

For the foregoing reasons, Claimants respectfully request this panel issue a clause construction award finding that the arbitration clauses at issue in this matter permit classwide arbitration and directing this matter proceed as a classwide arbitration.

BEATIE AND OSBORN LLP

/s/ ________________________________
Daniel A. Osborn
Philip J. Miller
521 Fifth Avenue, 34th Floor
New York, New York 10175
Telephone: (212) 888-9000
Facsimile: (212) 888-9664

-and-

Miles L. Mitzner
MITZNER LAW FIRM, P.L.L.C.
2701 Coltrane Place, Suite Six
Edmond, Oklahoma 73034
Telephone: (405) 844-7600
Facsimile: (405) 844-8585

-and-

Larry Derryberry
Robert N. Naifeh, Jr.
J. Eric Turner
DERRYBERRY, QUIGLEY, SOLOMON & NAIFEH
4800 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
Telephone: (405) 528-6569
Facsimile: (405) 528-6462

ATTORNEYS FOR CLAIMANTS