

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,)

AAA No. 11 145 00752 04

Claimants,)

v.)

DIRECTV, INC., a California corporation,)
and HUGHES ELECTRONICS)
CORPORATION, a Michigan corporation,)

Respondents.)

**CLAIMANTS' REPLY MEMORANDUM OF LAW IN FURTHER
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 submit this reply memorandum of law in further support of a Clause Construction Award directing this matter to proceed as a classwide arbitration and in opposition to Respondent DIRECTV Inc.'s ("Respondent" or "DIRECTV") Motion to Construe the Arbitration Clause to Preclude Class Action ("Respondent's Motion to Construe").¹

PRELIMINARY STATEMENT

In California, the law is clear: if an arbitration provision is silent on the issue of class action arbitration, then the case may proceed as a class action arbitration. That is the holding of Blue Cross and, despite citing 44 other cases in its brief, Respondent DIRECTV has not pointed to a single one that has overruled or reversed Blue Cross. To the contrary, two AAA Panels have recently relied upon Blue Cross or its rationale in ordering class-wide arbitration when the arbitration provision in question was silent on the issue. See Cole v. Long John Silver's Rest.s Inc., AAA No. 11 160 00194 04, Goldstein v. Ibase Consulting, LLC, AAA No. 11 160 02760 03 (a copy of the clause construction award in each of these arbitrations is attached to the Affidavit of Daniel A. Osborn previously submitted to the Panel).

While Respondent devotes nearly seven pages of its brief to arguing that California procedural law does not apply here, Claimants never argued that it did (this is obviously a result of the briefing format in this case, where the parties exchanged briefs simultaneously and thus did not

¹ Respondent limits its motion, and the discussion therein, to the arbitration provision in the Sales Agency Agreement ("SAA"). According to Respondent, the SAA is the latest agreement and, therefore, the controlling and only relevant agreement. Claimants disagree. For example, some former DIRECTV dealers who are potential members of the class signed a Residential Dealer Agreement ("RDA") but not a SAA. Further, the intent of the parties cannot be judged solely by the latest agreement. Accordingly, the language in both agreements must be considered and Claimants' arguments in their initial memorandum and in this reply memorandum apply to both agreements.

know what arguments the other side was going to make). Instead, Claimants have relied upon California's substantive law relating to contract interpretation (as Respondent acknowledges is appropriate) and that law compels a finding that this case can proceed as a class action arbitration.

There can be no real dispute that the arbitration provision here is silent on the issue of classwide arbitration. In fact, the arbitration provision makes no mention of class actions or class arbitrations at all. Despite these undeniable facts, Respondent argues that the arbitration provision “plainly and explicitly” prohibits classwide arbitration. (Respondent’s Motion to Construe at 24.) Respondent’s principal support for this position: a dissenting opinion in Green Tree, an opinion that has no precedential effect in this proceeding. In dismissing the plurality opinion, Respondent incorrectly argues that only the dissenting Justices examined the arbitration agreements involved in those cases. To the contrary, the justices who formed the plurality studied the contracts and rejected the precise argument being advanced here by Respondent.

Respondent’s fall back position is that silence does not mean silence; it means ambiguity. Under Respondents logic, however, any issue not specifically addressed in a contract creates ambiguity. For example, although the arbitration provision here does not contain any language about whether the parties can take discovery, Respondent’s position would be that the contract is ambiguous on this issue. Claimants, on the other hand, would argue that the contract is not ambiguous; it simply means that the parties, for some reason or for no reason at all, did not include any language regarding discovery. It does not mean that a full-fledged inquiry into the parties’ intent about discovery must be taken.

Claimants urge the Panel not to be influenced by the mass or length of Respondent's submission. Given the limited issue before the Panel, Claimants believe that several portions of

Respondent's brief are completely irrelevant, have been included for the sole purpose of trying to cast Claimants in a negative light, and should not be considered by the Panel. Those portions are:

- Pages 3-12, in which Respondent purports to describe the "Historic Relationship" between DIRECTV and its retailers. These ten pages have nothing to do with clause construction and the accusations of "shoddy" or "illegal" conduct (p. 8) seem particularly unnecessary and inappropriate;
- Pages 35-39, in which Respondent argues, prematurely, against class certification; and
- Appendix A, in which Respondent sets forth, for no apparent reason, detailed information about the contractual relationships between each of the named claimants and DIRECTV.

None of these sections relate to clause construction and should be ignored by this Panel. In addition, Claimants urge the Panel to ignore the declarations of Darren F. Nojima and Kathy Thompson, as those declarations also do not touch upon the subject of clause construction. For evidentiary reasons, explained later in this brief, Claimants also submit that the declarations of Messrs. Pohmer, Kunisch and Sardina should be stricken and deemed inadmissible.

Claimants ask this Panel to apply Blue Cross and reject Respondent's irrelevant legal arguments, its tortured reading of the arbitration provision and its submission of superfluous and inadmissible material and issue a clause construction award in favor of classwide arbitration.

ARGUMENT

A. The Arbitration Provisions Do Not Clearly And Unambiguously Preclude Classwide Arbitration

Respondent argues that the language of the arbitration provision in the Sales Agency Agreement is unambiguous, plain and explicit (Respondent's Motion to Construe at 15, 23, 24, 29) in precluding classwide arbitration.

Curiously, neither the words "class" or "classwide" nor the phrases "class action" or "class action arbitration" appear anywhere in the unambiguous, plain and explicit language of the arbitration provisions. Instead, to evidence the unambiguous, plain and explicit intent of the parties, Respondent relies on words such as "both," "either," "this," and "each." (Respondent's Motion to Construe at 24-25.) Respondent also points to the limitation of liability and arbitrator selection provisions. None of these words or provisions unambiguously, plainly or explicitly evidences any intention of the parties regarding classwide arbitration.

In support of its argument, Respondent relies on the dissenting opinion in the Supreme Court's decision in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), calling it "[u]seful precedent." (Respondent's Motion to Construe at 27-28.) In an effort to bolster the usefulness of this dissenting opinion, Respondent suggests that only the dissenting Justices were thoughtful enough to consider the meaning of the contractual language. In fact, however, four of the Justices in the plurality looked at the contract language and rejected the dissent's argument, stating that they "do not believe . . . that the contracts' language is as clear as [the dissent] believes." 539 U.S. at 451. Those same Justices also concluded that the parties in Green Tree "literally" complied with the arbitrator selection provision in the contract at issue in that case. Id.

The language in the arbitration provisions at issue in the present arbitration does not preclude classwide arbitration – not plainly, unambiguously, explicitly, or any other way.

**B. Respondent's Handpicked Dealers Do Not Evidence
A Classwide Intent To Preclude Classwide Arbitration**

Respondent handpicked three DIRECTV retailers "to review the arbitration provision in their contract" and provide a declaration in support of Respondent's motion.² (Respondent's Motion to Construe at 29.) Not surprisingly, each of these retailers now claims that they believed, understood or intended that the arbitration provision in the SAA between their employer and Respondent provided for individual arbitrations. (Respondent's Motion to Construe at 29-31.) These declarations are extrinsic evidence and are neither admissible nor persuasive.

California law states that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity" and "[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible" Cal. Civ. Code §§ 1638, 1639. Extrinsic evidence is not admissible "to vary, alter or add to the terms of an integrated written instrument." Alling v. Universal Mfg. Corp., 5 Cal.App.4th 1412, 1422 n.4 (Cal. Ct. App. 1992), see also (Respondent's Motion to Construe at 29 n. 16.).

Respondent purports to offer this extrinsic "evidence" not in an effort to vary, alter or add to the terms of the SAA, but to explain the meaning of the SAA. (Respondent's Motion to Construe at 29, n. 16.) The SAA and the RDA, by their silence, are clear (just not in the way Respondent would like). Thus, it is precisely to vary, alter and add to the terms of the SAA that Respondent

² Claimants have asked the Panel to strike the declarations because Respondent has withheld certain agreements and amendments to agreements discussed in the declarations. To date, Respondent has only produced the arbitration provisions in the SAAs signed by Declarants' companies.

offers these declarations. Respondent does this despite its own caution to the Panel that "the task of this Panel is to determine what kind of arbitration the four claimants and DIRECTV agreed . . . [not] to add provisions to the contract that were not discussed and about which there was no meeting of the minds." (Respondent's Motion to Construe at 2.)

Even if this Panel finds that the language is ambiguous due to that silence, the extrinsic evidence submitted by Respondent fails to resolve the ambiguity. Respondent seems to be suggesting that the Panel accept the statements in the declarations as evidence, classwide, that the parties intended to preclude classwide arbitration. Considering Respondent's indignation at the Claimants' purported attempt to speak for thousands of other DIRECTV dealers (Respondent's Motion to Construe at 1-2), it is surprising that Respondent will so readily grant its three chosen dealers that authority. DIRECTV currently has almost 6,000 independent retailers and has, historically, had well over 10,000 independent retailers. (Respondent's Motion to Construe at 6.) Declarants, and Claimants, comprise only a fraction of one percent of the current DIRECTV dealers. Neither group can presume to speak for the class regarding the meaning of the contract language, which, ultimately, must speak for itself.

Respondent has submitted no relevant extrinsic evidence regarding the intent of the Claimants in this arbitration. To the contrary, Respondent seems to concede that the issue of classwide arbitration was not discussed and the parties did not reach agreement. (Respondent's Motion to Construe at 2.) Therefore, to the extent this Panel determines that the contracts' silence has created uncertainty, no extrinsic evidence has resolved that ambiguity.

Pursuant to California contract interpretation law, any uncertainty remaining after application of the other rules “should be interpreted most strongly against the party who caused the uncertainty to exist.” (Cal. Civ. Code § 1654.) In this case that is Respondent.

Finally, as Respondent repeatedly argues, the issue before this Panel is construction of the arbitration provisions in the agreements between Claimants and DIRECTV.³ Because the agreements between Claimants and DIRECTV do not prohibit classwide arbitration, under California law, this arbitration may proceed on behalf of a class.

C. Classwide Arbitration Is Permitted Under Any Of The Possibly Applicable Procedural Rules

Respondent argues that Claimants are not entitled to classwide arbitration because the parties agreed that "the procedural law for the arbitration would be supplied by the AAA [American Arbitration Association] and the FAA [Federal Arbitration Act]."⁴ (Respondent's Motion to Construe at 15.) Respondent also implies that Claimants instead seek to apply California procedural

³ In determining whether classwide arbitration is available under the agreements signed by Claimants and DIRECTV, contrary to Respondent's claim, it is not necessary to "construe the contracts of each and every DIRECTV retailer." (Respondent's Motion to Construe at 32.) The contracts of all retailers are substantially the same as those signed by Claimants. It also is not necessary, as Respondent seems to suggest, to obtain or accept extrinsic evidence of the intent of every DIRECTV dealer. The contract language is clear. Finally, notwithstanding Respondent's dire predictions for the effect of classwide arbitration on thousands of DIRECTV dealers, it is precisely their ability to opt out of a classwide arbitration that protects their rights.

⁴ Although the SAA specifically called for the application of California substantive law and the FAA, the RDA did not distinguish between California substantive law and California procedural law nor did it mention the FAA.

law and specifically, California arbitration procedures. (Respondent's Motion to Construe at 15-19.) Respondent misstates Claimants' position.⁵

Claimants seek only to proceed with a classwide arbitration pursuant to the AAA's rules. In fact, as Respondent concedes, "the AAA rules in effect for this arbitration include the newly-developed AAA Supplemental Rules for Class Arbitrations." (Respondent's Motion to Construe at 14.) Moreover, nothing in the FAA prohibits classwide arbitration. See 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 . . .")

Respondent is correct that Claimants rely on the decisions in Blue Cross of California v. Superior Court, 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779 (Cal. Ct. App. 1998) and Keating v. Superior Court, 31 Cal3d 584, 183 Cal.Rptr. 360 (1982). Respondent is incorrect, however, to suggest that Claimants cite these decisions in an effort to apply the California Code of Civil Procedure. Claimants rely on Blue Cross and its progeny, and to a lesser extent Keating, for their explanation of California law regarding interpretation of a contract that is silent regarding classwide arbitration. In Blue Cross, the California Court of Appeals concluded that "when [an] arbitration agreement between the 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]." 67 Cal.App.4th at 59.

⁵ Having asserted that the AAA's rules and the FAA govern this arbitration, Respondent does not claim that either prohibits classwide arbitration. Nor does Respondent contend that either affect the clause construction issue before this Panel.

In the present case, the AAA rules provide for classwide arbitration and the FAA does not preclude it. Under these circumstances, the arbitration provisions should be interpreted under California law to permit classwide arbitration.

CONCLUSION

For the foregoing reasons, and those set forth in Claimants' initial memorandum of law, 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.

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