AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal

In the Matter of the Arbitration between

Re: 11 145 00752 04
Cable Connection, Inc. and TV Options, Inc.
and Swartzel Electric and Orbital Satellite, Inc.
on behalf of themselves & all others similarly situated (Claimants)
and
Directv, Inc. and it's parent corporation
Hughes Electronics Corporation (Respondents)

PARTIAL FINAL AWARD OF ARBITRATORS

FIRST AMENDED CLAUSE CONSTRUCTION AWARD

We, the undersigned panel of Arbitrators, having been designated in accordance with the arbitration agreements entered into between the above-named parties in those certain contracts referred to as the 1996 Residential Dealer Agreements and the later and more pertinent 1998 Sales Agency Agreements, and having been duly sworn, and having heard the proofs and allegations of the parties, and having previously rendered a Partial Final Clause Construction Award dated February 8, 2005, and Respondent having filed an application for modification dated February 16, 2005 and Claimant having responded by letter dated February 19, 2005, do hereby issue this AMENDED PARTIAL FINAL CLAUSE CONSTRUCTION AWARD, as follows:

This partial final award regarding the construction of the pertinent arbitration clause is issued pursuant to American Arbitration Association Rule 3 of the Supplementary Rules for Class arbitration, and pursuant to Green Tree Financial Corp. v. Bazzle (2003) 123 S.Ct. 2402, 539 U.S. 444 and Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 42 and Keating v. Superior Court (1982) 31 Cal. 3rd 384. Based upon the arbitration clause, the relevant law, the record before this panel and the submissions and argument of counsel, we find that the arbitration clause permits this arbitration to proceed on behalf of a putative class.

BACKGROUND

Claimants are former DIRECTV Dealers who sold, installed, repaired or maintained home satellite services for Respondent across the United States pursuant to contracts known as the 1996 Residential Dealer Agreement and thereafter the 1998 Sales Agency Agreement. Claimants allege that Respondent breached the contracts, engaged in unfair business practices, breached their fiduciary duties, violated California antitrust laws and converted commission payments due to the class.

The Residential Dealer Agreement provided it was to be construed in accordance with and be governed by the laws of California and the Sales Agency Agreement provided that the arbitrators should apply California substantive law to the proceeding except to the extent that Federal substantive law would apply to any claim.

The contracts between the parties, most particularly the arbitration clauses, are silent with regard to the right to bring a class action, thus the issue to be decided is whether the contracts should be construed to permit a class arbitration.

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CONTENTIONS OF THE PARTIES

Claimants contend the contracts do not specifically forbid class arbitration and therefore this right has not been waived. Since the contract is silent and manifests no intent on this question, it must be construed against Respondent as the drafter of the contract. Relying on the case law, Claimants contend this is California's substantive law and should be applied in accordance with the language in the contract.

Respondent contends this is a case where standard rules of contract interpretation should apply and, since the issue is not stated in the contract, it must be presumed that the intent of the parties was to not provide for class arbitration. Since the contract is often stated in the singular, Respondent contends this verifies the intent of the parties that any claim of breach of the contract must proceed on an individual basis.

FINDINGS

The United States Supreme Court held in Green Tree Financial Corp. v. Bazzle (2003) 123 S.Ct.2402, 539 U.S. 444 that the issue of whether a contract that is silent on the issue of class arbitration permits such an action, is for the arbitrators to decide. The arbitration clause of the contracts provides that arbitration shall be in accordance with the rules of the American Arbitration Association. The American Arbitration Association Policy on Class Arbitrations referencing Bazzle states: "Accordingly, the American Arbitration Association will admit demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations when (1)........and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims."

Thus the clause construction aspect under the Association rules provides for class arbitration to be allowed unless the arbitrators find that the arbitration clause forbids it. Since the arbitration clause of the contract provides that California substantive law is to be applied, we look to California appellate law on this subject. Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 72 and Keating v. Superior Court (1982) 31 Cal. 3rd 584, that authorize an arbitration panel, in its discretion, to order arbitration on a class wide basis.

This is an issue of substantive law. Under the circumstances, we construe the arbitration clause to permit class arbitration. Despite the contention of Respondent, we cannot ascertain from the agreement that there was any intent on this issue. We stress that we are not yet requiring class arbitration and are not certifying a class. We are simply saying that the clause in question does not forbid class arbitration and therefore find it is permitted. The determination of whether this action is maintainable as a class arbitration will be the subject of a further hearing to determine if the prerequisites to a class arbitration as set forth in rule 4 of the Association's Supplementary Rules of Class arbitration are met.

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Partial Final Clause Construction Award

We therefore Award as follows:

1. The arbitration clause in the Sales Agency Agreement of the parties permits the arbitration to proceed on behalf of a class.

2. Pursuant to Rule 3 of the Supplementary Rules for Class Arbitrations, we stay all proceedings for a period of 30 days to permit any party to move in a court of competent jurisdiction to confirm or vacate this Clause Construction Award.

3. Each party shall notify the American Arbitration Association case administrator whether such a motion is filed.

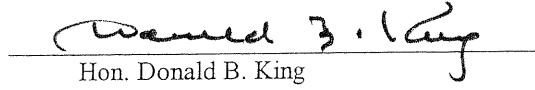
This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date — Hon. Armand Arabian

Date — Richard Chernick

3/10/05

Date



Hon. Donald B. King

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal
No. 11 145 00752 04

CABLE CONNECTIONS, INC.; TV OPTIONS, INC.; SWARTZEL ELECTRIC, ORBITAL SATELLITE, INC.,
Claimants and Respondents by Counterclaim,

and

HUGHES ELECTRONICS CORPORATION,
Respondent

and

DIRECTV, INC.;
Respondent and Counterclaimant.

DISSENT OF RICHARD CHERNICK TO PARTIAL FINAL CLAUSE CONSTRUCTION AWARD*

I respectfully dissent.

The determination which must be made in this phase of this proceeding is whether the parties intended by their separate Cable Sales Agency Agreements ("Agreement") that Claimants could pursue claims against Respondent DIRECTV on behalf of a putative class of similarly situated contracting parties. AAA Supp. Rules for Class Arbitration, Rule R-3 ("whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class"). *See Bazzle v. Green Tree Financial Corp.*, 539 U.S. 444 (2003).

California substantive law governs the parties' contractual relationship. Agreement, §§ 18.1, 18.12(a). Thus, the parties' mutual intent must be determined as a matter of contract interpretation, in accordance with familiar principles of California law.

There is ample indication in the parties' Agreement that they intended their disputes to be resolved by arbitration between them separately and individually, and not in a class-wide arbitration. Section 15 of the Agreement states that the provisions of the Agreement are for the benefit only of the parties thereto. Section 18.5 provides that the

Agreement may only be amended by a writing signed by both parties. The arbitration clause itself provides that arbitration ay be commenced "at the request of either party" and that each party shall select one arbitrator. Agreement, § 18.12(a). Numerous other provisions suggest, as a matter of grammar or syntax as well as substance, that the parties intended their disputes to be resolved in an individual arbitration proceeding, not a class-wide arbitration. *See, e.g.*, §§ 17 (limitation of liability).

It is the obligation of a court or arbitrator to ascertain the objective intent of the parties (Cal. Civil Code § 1636) from the plain meaning of the words they choose to use in their agreement, if that is possible (Cal. Civil Code § 1638), in order to give effect to the mutual intentions of the parties as they existed at the time of contracting. The disputed provisions must be read in their entirety, and a meaning that encompasses and is consistent with all of the pertinent provisions should be determined (Cal. Civil Code § 1641). To the extent that the actual words chosen by the parties are ambiguous, resort should be had to the parties' negotiations and any relevant subsequent conduct that might aid in determining what the parties actually intended their agreement to mean at the time they entered into the transaction (Cal. Civil Code §§ 1647, 1648).

The Agreement, fairly read, strongly suggests that the parties intended their disputes to be subject to arbitration solely between the named parties to the agreement. California substantive law requires that the arbitrators ascertain the parties' mutual, objective intent; applying well-established principles of contract interpretation, it is clear that the Agreement evidences that intent.

The procedural law that applies to this proceeding is the Federal Arbitration Act. Agreement, § 18.12(a), (c). This means that the Commercial Rules of the AAA and the procedures authorized by the FAA control the determination of process issues, not California law. *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1269 (9th Cir.), *cert. denied*, 123 S. Ct. 114 (2002); *Yuen v. Superior Court*, 121 Cal. App. 4th 1133, 1140 (2004 (Mosk, J., concurring).

California authority relied upon by Claimants supporting their claimed right to proceed with their claims as a class is for this reason inapplicable. *See Keating v. Superior Court,* 31 Cal. 3d 584 (1982); *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (1998). In any event, the principles articulated in those cases address the right of a court to determine the entitlement of parties to proceed in a class-wide arbitration; *Bazzle* imposes that duty on the arbitrators for different reasons and on an entirely different premise.

The basis for the right of a court to order the consolidation of separate proceedings into a class-wide arbitration is the California Arbitration Act's provision permitting consolidation of cases where the disputes arise out of the same transaction or a series of related transactions and where common issues of law or fact create the possibility of conflicting rulings. Cal. Code Civ. Proc. § 1281.3. There is no obligation of a court under this provision to consider whether the parries intended the consolidation of their separate claim with other, similar claims; and there is no element of contractual

consent required by the *Keating* or *Blue Cross* analyses or holdings. Thus, the California jurisprudence on this subject is not only superseded by *Bazzle* and the AAA Supplemental Class Action Rules, but it is inapplicable in any event as a procedural rule inapplicable to this proceeding which is governed by the FAA.

The Agreement at issue establishes that it was not intended by the parties that their individual dispute might be combined with other disputes and resolved in a class-wide arbitration. This Panel should order this matter to proceed with those individual claims stated by the separate, named Claimants against Respondent DIRECTV.

DATED: January 21, 2005 and March 7, 2005

Richard Chernick
Arbitrator

*** This Dissent, originally attached to the Partial Final Clause Construction Award, is intended to be fully applicable to the amended Partial Final Clause Construction Award issued on or about March 7, 2005.**