AMERICAN ARBITRATION ASSOCIATION
AAA CASE NO. 11 117 00273 10
CLASS AND COMMERCIAL ARBITRATION TRIBUNAL

DANIELLE DEMETRIOU, and
TAMARA PITTIS on behalf of themselves
and all others similarly situated,

Claimants,

and

EARTHLINK, INC.,

Respondent.

PARTIAL FINAL CLAUSE CONSTRUCTION AWARD

Introduction

I, the Undersigned Arbitrator, having been designated in accordance with the arbitration clause of the EarthLink Internet Service Agreement and the EarthLink DSL and Home Phone User Agreement (the "Agreements") entered into between Claimants, Danielle Demetriou ("Demetriou") and Tamara Pittis ("Pittis") (collectively "Claimants") and Respondent EarthLink, Inc. ("EarthLink" or "Respondent"), having been duly sworn, and having duly examined the proofs and allegations of the parties, do hereby, AWARD as follows:

This partial final award regarding the construction of the pertinent arbitration clauses is issued pursuant to American Arbitration Association ("AAA") Rule 3 of the Supplementary Rules for Class Arbitrations (the "AAA Rules") and the Opinion and Order of October 7, 2009 of the United States District Court for the District of New Jersey (the "Opinion and Order"). Based on my review of the arbitration clauses, the relevant law, the record before me, and the submissions of counsel, I find that the arbitration clauses in question permit the arbitration to proceed on behalf of a class. Nothing in this partial final award implies any view as to whether

this matter will ultimately qualify for class certification under the criteria provided by AAA Rule 4 of the Supplemental Rules for Class Arbitration, or any view of the merits of the underlying disputes.

Background and Allegations

1. Parties, Agreements, and Identity of Putative Class

At all relevant times Demetriou has been a resident of New Jersey, and Pittis, a resident of California. Claimants purchased, pursuant to the Agreements, residential DSL internet and/or telephone service from EarthLink in 2007.

The Agreements were contained in written materials and electronic messages shipped/provided to Claimants in their respective domiciliary states from an EarthLink facility in Texas. The Agreements contained the following provisions with respect to choice of law and arbitration:

> This Agreement is governed by Georgia law without regard to conflict of law provisions. Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration, and administered by the American Arbitration Association under its Commercial Arbitration Rules. Any such arbitration will be governed by Georgia law and will be held in Atlanta, Georgia. The arbitrator will be an expert in the field of internet services. The arbitrator's award shall be final and binding and judgment on the award rendered by the arbitration may be entered in any court having jurisdiction thereof. There shall be no class action arbitration pursuant to this agreement.

EarthLink Internet Service Agreement, ¶11; EarthLink DSL and Home Phone User Agreement, ¶13. The Agreements also contained a severability provision. See, e.g., EarthLink Internet Service Agreement, ¶12.

Claimants complain that EarthLink established procedures for cancellation of services that make cancellation extremely difficult and that it continued to assess service, cancellation, and shipping fees even after they had requested cancellation. Claimants Demetriou and Pittis

complain that they were improperly charged $21.35 and $160.32, respectively. They allege breach of contract and breach of the implied covenant of good faith and fair dealing; unjust enrichment; violations of the: (a) New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. ("CFA"); (b) Consumer Legal Remedies Act, Cal. Civ. Code §1750 et seq. ("CLRA"); and (c) the Electronic Fund Transfer Act, 15 U.S.C. §1693 et seq. ("EFTA"). Claimants seek to represent in this arbitration:

> All persons and/or entities residing in the State of New Jersey and California who purchased from EarthLink, Inc. residential DSL and/or telephone service and were charged for services or cancellation fees after requesting cancellation of EarthLink, Inc. services. . . . (the "Class").

Demand for Arbitration, Exhibit A, ¶26.

2. Prior Proceedings

a. Magistrate Judge Shipp's Report and Recommendation

Claimants initiated this action by filing suit in the United States District Court for the District of New Jersey. Based on the Agreements, EarthLink moved to compel arbitration and to stay the District Court action.

The matter was referred to United States Magistrate Judge Shipp who, on March 9, 2009, pursuant to 28 U.S.C. §636(b)(1)(B) issued a Report and Recommendation that EarthLink's motion to compel arbitration and stay proceedings be denied. (Report and Recommendation at 9.)

Magistrate Judge Shipp reasoned that:

(1) Georgia law with respect to class-arbitration waivers is in conflict with New Jersey public policy;

(2) New Jersey has a materially greater interest in seeing its laws applied;

(3) New Jersey state law would apply in the absence of the choice of law provision; and

(4) the class-arbitration waiver is unconscionable because:

(a) it precludes any realistic challenge to the contract's terms and

(b) the contract is one of adhesion involving small amounts of damages.

(Report and Recommendation at 5.)

As to the first point, the Magistrate Judge noted that, in the context of the small amounts claimed and a contract of adhesion, the class arbitration waiver effectively precluded individual enforcement of rights, was unconscionable, and therefore "[a]s a matter of generally applicable New Jersey contract law, the class-arbitration waiver was therefore unenforceable in this context." (Report and Recommendation at 5.) Georgia law would not find the provision unconscionable. Id.

Given this conflict, the Magistrate Judge next considered each state's interest in the litigation in light of each state's underlying policies and contacts. With respect to policies, the Magistrate Judge concluded that New Jersey has a strong public policy as expressed in the legislative history of the CFA and in the case law construing that statute. In contrast, there is no Georgia case law or statute indicating a strong public policy in favor of class arbitration waivers. With respect to contacts, the Magistrate Judge concluded that Demetriou's residence and physical presence in New Jersey throughout her dealings with EarthLink were more pertinent to the litigation than the fact that EarthLink was a Georgia company with relevant files, documents and information in Georgia. For these reasons, the Magistrate Judge concluded it likely that the Supreme Court of New Jersey would determine that New Jersey has a materially greater interest than Georgia in the enforceability of the class arbitration waiver. (Report and Recommendation at 6-7.)

Third, since New Jersey has a materially greater interest in resolving the underlying controversy, it would then follow that New Jersey law would apply absent the choice of law provision. (Report and Recommendation at 7-8.)

Fourth, the Magistrate Judge noted that the Federal Arbitration Act ("FAA") does not preclude use of state law unconscionability principles to void a class-arbitration waiver. (Report and Recommendation at 8, citing, Homa v. American Express Co., 558 F.3d 225 (3d Cir. 2009).)

Based on this reasoning, Magistrate Judge Shipp denied the motion to compel arbitration and to stay the District Court action. (Report and Recommendation at 7-8.)

b. Opinion and Orders of the United States District Court

EarthLink objected to the Report and Recommendation arguing that Magistrate Judge Shipp erred by declining to enforce the parties' choice of Georgia law, and by applying New Jersey law to find the class-arbitration waiver unconscionable and the arbitration agreement unenforceable. (Opinion and Order at 1.)

United States District Court Judge Hochberg reviewed the parties' submissions and the Report and Recommendation de novo. Pursuant to Fed. R. Civ. P. 78, Judge Hochberg concluded that the treatment of class arbitration waivers in both New Jersey and Georgia was more nuanced and fact-sensitive than described by the Magistrate Judge. Nevertheless, Judge Hochberg found that the Magistrate Judge had correctly concluded the class arbitration waiver was unconscionable. (Opinion and Order at 1-2.)

Then, based on the severability clause, public policy and FAA principles, Judge Hochberg severed the class arbitration waiver and enforced the remaining arbitration provision. (Opinion and Order at 3.) In so doing, Judge Hochberg relied on the Restatement (Second) of Contracts §184 principle and concluded that the class arbitration waiver was "not an essential part of the agreed exchange." (Opinion and Order at 3 n.3.)

EarthLink moved for reconsideration or alternatively for certification for appeal under 28 U.S.C. §1292(b). The District Court denied the motion and ordered that "the arbitration shall commence forthwith in accordance with the Federal Arbitration Act and the terms of the Court's October 7, 2009 Opinion and Order." (Order of January 6, 2010 at 4) (emphasis added).

At the time of the District Court's ruling, Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S.Ct. 1758 (2010) was pending before the Supreme Court. The District Court noted that it would be for the arbitrator to evaluate whether and to what extent the Supreme Court's eventual decision in that matter impacts a motion by Claimants for class certification during the arbitration. (Order of January 6, 2010 at 3 n.1.)

3. The Stolt-Nielsen Decision

a. Procedural History

On April 27, 2010, the United States Supreme Court decided Stolt-Nielsen. There, the Court had before it an arbitration clause that was part of a maritime charter contract between commercial shippers and ship owners. The standardized charter contract in issue had been selected by the shippers. The contract contained an arbitration clause. The clause made no reference to class arbitration.

Further, there was "undisputed evidence that the . . . [charter contract] . . . had never been the basis of a class action . . . [and] . . . expert opinion that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." Stolt-Nielsen, 130 S.Ct. at 1769.

The shippers filed a demand for class arbitration with respect to alleged price fixing. The shippers and the ship owners entered a supplemental agreement submitting the question of class arbitration to an arbitrator to determine whether the applicable arbitration clause permitted class arbitration.

As part of this submission, the parties stipulated not just that the charter contract was silent on the issue of class arbitration, but that "no agreement" had been reached on the matter. Id. at 1766.

The arbitral panel's award ruled that the arbitration clause permitted a class proceeding. The panel found persuasive that, after the Supreme Court's decision in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), other arbitrators had construed a wide variety of clauses as allowing class arbitrations and reasoned that the evidence did not show an intent to preclude class arbitration.

The ship owners then applied to the U.S. District Court to vacate the award. The District Court allowed the application and vacated the award reasoning that the panel failed to conduct a choice of law analysis and apply the federal maritime law rule that the contract should be interpreted in light of custom and usage. Stolt-Nielsen, 130 S.Ct. at 1766 (citing Stolt-Nielsen v. AnimalFeeds, Inc., 435 F. Supp. 2d, 382, 384-485 (S.D.N.Y. 2006)).

The Court of Appeals reversed and concluded the panel had not manifestly disregarded either federal maritime law or New York law because there had been no authority before the panel that either a rule of federal maritime custom and usage or New York jurisprudence precluded class arbitration. Stolt-Nielsen, 130 S.Ct. at 1766-1767 (citing Stolt-Nielsen v. AnimalFeeds Inc., 548 F.3d 85, 97-99 (2nd Cir. 2008)).

b. Supreme Court's Analysis and Ruling

The Supreme Court overturned the Court of Appeals. It reasoned that the arbitration panel had improperly rested its decision on the view that permitting class arbitration would be good public policy, "[r]ather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent." Stolt-Nielsen, 130 S.Ct. at 1768-1769 (emphasis added). That is, the panel should have considered whether the FAA, federal maritime law, or New York law provided the default rule of decision. 130 S.Ct. at 1768.

Instead, the panel focused on ascertaining the parties' intent. This was impermissible given the parties' stipulation of "no agreement." The Supreme Court reiterated that "the only task . . . for the panel was to identify the governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration . . .." Stolt-Nielsen, 130 S.Ct. at 1770 (emphasis added). The Court then addressed how the governing rule is to be ascertained in such circumstances.

The Supreme Court began by noting the fundamental precept "arbitration is a matter of consent, not coercion." Stolt-Nielsen, 130 S.Ct. at 1773 (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 479 (1989)). That is, courts and arbitrators must "give effect to the contractual rights and expectations of the parties." Stolt-Nielsen, 130 S.Ct. at 1774. Based on these principles, the Court concluded that a party may not be compelled to submit to class arbitration "unless there is a contractual basis for concluding that the party agreed to do so." 130 S.Ct. at 1775 (emphasis in original). The Stolt-Nielsen arbitral panel's analysis focused instead on the fact that the parties did not intend "to preclude class arbitration." 130 S.Ct. at 1775 (emphasis in original). This approach was "at

war" with the principle of consent. Id. at 1775. The Supreme Court stated that the basis for finding an agreement to participate in class arbitration could not be inferred "solely from the agreement to arbitrate." Id. at 1775 (emphasis added). Notably, the Supreme Court stated "[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." Id. at 1776 n. 10.

The Stolt-Nielsen court also stated:

> In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement . . . This recognition is grounded in the background principle that 'when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.'

130 S.Ct. at 1775 (quoting Restatement (Second) of Contracts §204 (1979) (emphasis added). The Court then examined the reasonableness of adopting the class mechanism in the specific context of the facts before it and concluded that it was not reasonable to adopt such a rule.

Importantly, the Supreme Court did not (1) mandate an express consent to class arbitration; (2) state that it would never be reasonable to supply a contract term permitting class arbitration; or (3) consider the propriety of supplying such a term in the context of small value consumer claims arising from a contract of adhesion arising under the laws of any specific state. Rather, its conclusion related to the circumstances of sophisticated business entities where the complaining party chose the form contract, where there was no evidence of a federal maritime rule of custom and usage or New York rule authorizing class arbitration, and where there was evidence negating the use of the class device in such shipping contracts.

Indeed, the Stolt-Nielsen majority emphasized that the parties were sophisticated business entities and that the form contract had been selected by the complaining party. Significantly, the majority did not take issue with the view expressed by the dissent, viz., that the decision had no application to small value consumer claims arising from a contract of adhesion. See Stolt-Nielsen, 130 S.Ct. at 1783.

My task then is to inquire as to what is reasonable taking into account the facts and circumstances of the case as well as the legal frameworks of New Jersey and California. My inquiry will consider the following:

1. The impact of the District Court's decision with respect to unconscionability and severance on the scope of the issues that are for me to decide.
2. The effect of severance on the interpretation of the remaining unsevered contract provisions. That is, the role, if any, the severed waiver has in interpreting the remaining unsevered contract provisions.
3. The applicable default rules and/or rules of decision, if any, based on New Jersey and California contract law principles and statutes.

Discussion and Analysis

1. Unconscionability and Severance

a. The Parties' Positions

Claimants argue that based on Homa v. American Express Co., Inc., 558 F.3d 225 (3rd Cir. 2009), I am bound by the District Court's conclusion of unconscionability. (Claimants' Memorandum of Law on the Clause Construction and in Support of Finding that Class Action Ban is Unenforceable ("Claimants' Opening Brief") at 2.) Further, they argue that the Court's conclusion was correct as to the New Jersey claimant based on the choice of law analysis required by the Restatement (Second) of Conflict of Laws, §187(2) (1969) because: (1) Georgia

law is contrary to the public policy of New Jersey, (2) New Jersey has a materially greater interest in enforcing its laws than Georgia, and (3) New Jersey's interest arises from its interest in protecting New Jersey consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery under its own laws. (Claimants' Opening Brief at 2, 13-17.) Its interests in these respects outweigh the interests arising from the fact that Georgia is EarthLink's principal place of business. (Claimants' Opening Brief at 18-19.)

Claimants argue that an identical analysis applies to the California claimant. (Claimants' Supplemental Memorandum of Law on the Clause Construction and in Support of Finding that Class Action Ban is Unenforceable ("Claimants' Supplemental Brief") at 14-16.) They reason that two California courts have ruled on almost identical facts that class action bans violate fundamental California public policy, and are unconscionable and unenforceable. Id. at 13 n.6 (citing Discover Bank v. Superior Court (Boehr), 113 P.3d 1100, 1110 (Cal. 2005); Szetela v. Discover Bank, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862, 868 (2002); Cohen v. DirectTV, Inc., 142 Cal.App.4th 1442, 48 Cal. Rptr.3d 813 (2006); Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976, 981-2 (9th Cir. 2007); Ting v. AT&T, 182 F. Supp.2d 902, 931 (N.D. Cal. 2002), aff'd with respect to unconscionability, 319 F.3d 1126 (9th Cir. 2003). Further, they note that in Aral v. EarthLink, 134 Cal.App.4th 544, 36 Cal.Rptr.3d 244 (2005) the California Appellate Court determined that EarthLink's class arbitration ban was unconscionable and invalid. Under California law, class actions are considered an important consumer tool in protecting consumers from unscrupulous sellers, "an exigency of the utmost priority." Aral, 134 Cal.App.4th at 564, 36 Cal. Rptr. 3d at 244 (quoting America Online, Inc. v. Superior Court, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, (2001) ("strong public policy" of California).

Respondent maintains that I must conduct an independent analysis, under Rule 3 of the American Arbitration Association's Supplemental Rules for Class Arbitration ("SCRA") (EarthLink's Clause Construction Brief at 3.)

b. Analysis and Conclusion

Here, the District Court has ruled the class arbitration waiver is unconscionable and unenforceable, and ordered that the arbitration proceed without the class arbitration waiver. In so ordering, the District Court stated that "if Plaintiffs eventually move for class certification during the arbitration, the arbitrator can evaluate whether and to what extent the Supreme Court's eventual decision in Stolt-Nielsen impacts that motion." (Opinion and Order at 3 n.1)

I conclude that the October 7, 2009 Opinion and Order limits my inquiry to the impact of the Stolt-Nielsen on clause construction and removes from my consideration the questions of unconscionability and severance of the class arbitration waiver. I do so for two reasons. First, the Order and Opinion permits only two inquiries: (1) consideration of the impact of Stolt-Nielsen and (2) consideration of a motion to certify a class.[1]

Second, the issue of unconscionability "is presumptively for the court, not the arbitrator, to decide." Puleo v. Chase Bank, 605 F.3d 172, 180 (3rd Cir. 2010). See also Homa v. American Express Company, et al., 558 F.3d 225 (3rd Cir. 2009).[2]

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[1] SCRA Rule 4 (a) specifically contemplates court orders such as the Opinion and Order, i.e., under which the arbitrator would proceed directly to the certification stage ". . . where a court has ordered that an arbitration determine whether a class arbitration may be maintained. . .." SCRA Rule 4(a).

[2] The result would be the same had I the jurisdiction to consider the issue anew and independent of the Opinion and Order. My reasoning would track that of the Magistrate Judge and the District Court.

The language of the CFA, its legislative history, and the decisions in Homa and Muhammad require the conclusion that, under New Jersey law, the class arbitration waiver is unconscionable because it precludes any realistic challenge to its terms and because the contract is one of adhesion, involving small value consumer claims. Given the small size of her claim, Demetriou would not realistically have the incentive to find a lawyer to investigate her claim, and to file a claim and commit the necessary time and financial resources to pursue it in Georgia. Even if she did, it is unrealistic to think she would find counsel who would pursue the case with the risk of receiving no recovery at all, notwithstanding the availability of fees under the statute. As to the California Claimant,

2. Effect of Severance on Interpretation

a. Parties' Positions

Claimants argue that "courts will enforce the remainder of the contract after excising the illegal portion." (Supplemental Memorandum at 12 (citing Schuran, Inc. v. Walnut Hill Assocs., 256 N.J. Super. 228, 233, 606 A.2d 885 (Law Div. 1991).) This approach is consistent with the teaching of the Eleventh Circuit that "[i]f the offensive terms are severable, then the court must compel arbitration according to the remaining, valid terms of the parties' agreement." Terminex International Co. v. Palmer Ranch Ltd., P'ship, 432 F.3d 1327, 1331 (11th Cir. 2005) (emphasis added).

EarthLink argues that even after severance the unconscionable class arbitration waiver should be used to establish the parties' intent with respect to class arbitration, and thereby, reestablish the waiver. (EarthLink's Supplemental Clause Construction Brief ("EarthLink's Supplemental Brief") at 2, 9-10.) It cites four cases in support of this proposition. Smith v. Helms, 140 Ga.App. 267, 231 S.E.2d 778, 779 (1976); Iron Mountain & Helena Rail Road v. Stansell, 43 Ark. 275 (1884); J. B. Colt Co. v. Mitcham, 172 Ark. 55, 287 S.W. 1008 (1926); and Chamberlain v. Fernback, 78 Ill.App. 671, 1897 WL 3055 *1 (1897).

b. Analysis and Conclusion

The cases cited by EarthLink are unpersuasive, old, out-of-jurisdiction, and inapt. In three of the cases, the severed/unenforceable provision was not used as EarthLink argues the stricken waiver should be used here, viz., to effectuate the very purpose of the

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the analysis is even more direct: Aral v. EarthLink, 134 Cal.App.4th 544, 36 Cal.Rptr.3d 229 (2005) has ruled the EarthLink class arbitration waiver unconscionable in the context of small value consumer claims arising from a contract of adhesion.

Further, in light of the severance provision of the contract, I would sever the class arbitration waiver and enforce the remainder of the arbitration clause. See, Muhammad v. County Bank, 189 N.J.1, 912, A2d 88, 103 (N.J. 2006); Delta Funding v. Harris, 189 N.J. 28, 913 A.2d 104 (2006); Primerica Fin. Servs., Inc. v. Wise, 456 S.E.2d 631, 634-35 (Ga. 1995) Restatement (Second) of Contracts § 184.

severed/unenforceable provision. Smith (voided lease not used to establish validity of lease); Iron Mountain (illegal certificates not used to uphold legality of certificates); and J. B. Colt Co. (invalid note not used to establish validity of note). The fourth case, Chamberlain, stands for little more than the proposition that past performance can provide an exception to the statue of frauds.

EarthLink's argument would result in a perverse and nonsensical circularity: a New Jersey court would hold the class waiver unconscionable, strike and sever it, and compel arbitration, but then use the stricken provision to determine the parties' intent and bar any class procedure. Thus, EarthLink would achieve by implication what it could not achieve through intent expressly stated.

In addition to its logical failings, EarthLink's argument ignores the proposition that "[i]f the offensive terms are severable, then the court must compel arbitration according to the remaining, valid terms of the parties' agreement." Terminex International Co. v. Palmer Ranch, Ltd P'ship, 432 F.3d 1327, 1331 (11th Cir. 2005) (emphasis added). See also, Schuran, Inc. v. Walnut Hill Assocs, 256 N.J. Super. 228, 233, 606 A.2d 885 (Law Div. 1991); Naseef v. Cord, Inc., 90 N.J. Super. 135, 143, 216 A.2d 413 (App. Div.), aff'd, 48 N.J. 317, 225 A.2d 343 (1966). California jurisprudence is even stronger -- the provision never came into legal existence. Ting v. AT&T, 182 F. Supp. 2d 902, (N.D. Cal. 2002) (citing Tiedje v. Aluminum Taper Milling Co., 296 P. 2d 554, 46 Cal. 2d 450, 453-454, (Cal. 1956) ("A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity. . .") and First National Bank v. Thompson, 212 Cal. 388, 405-06, 298 P. 808 (1931) (contract void due to illegality "has no legal existence for any purpose . . .") (emphasis added).

Once the class arbitration waiver has been stricken, I will accord it no significance whatsoever and analyze the remaining terms of the contract as if the contract had always been silent as to class arbitration. In such circumstances my task is to ascertain what if any terms will be implied as a matter of state law, by examining the full context in which the contract has been made, and the specific claims to be arbitrated.

3. Facts, Circumstances and Applicable Legal Requirements

a. Contrary to EarthLink's Argument, There is a Need to Examine the Specific Circumstances of the Disputed Transactions and State Law Rules

As a preliminary matter, EarthLink argues that Stolt-Nielsen requires an express agreement to class arbitration. (EarthLink's Supplemental Brief at 2 (quoting Stolt-Nielsen, 130 S.Ct. at 1775) ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that he party agreed to do so.")) (emphasis in original). EarthLink further argues that any state law that would supply a default rule permitting class arbitration in the absence of such an express agreement conflicts with Stolt-Nielsen and is preempted. (EarthLink's Supplemental Brief at 12-13.) Thus, since there is no express agreement in this case, there is no reason to consider state default rules.

This preemption argument is flawed in that it assumes and relies on a conflict that does not exist. Stolt-Nielsen did not require an express agreement. See Stolt-Nielsen, 130 S.Ct. at 1776 n.10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-arbitration.") See also dissent's prominent and unrebutted discussion of "stopping points." Stolt-Nielsen, 130 S.Ct. at 1783. Stolt-Nielsen provided a rule that there must be a contractual basis that cannot be inferred solely from the agreement to arbitrate. It, however, did not supply the rules of contract formation. Rather, it left those to state law contract principles.

Thus, I must undertake the inquiry of whether as a matter of contract interpretation under the laws of New Jersey and California it is "reasonable in the circumstances" to conclude that the parties contracted for class arbitration. See Stolt-Nielsen, 130 S. Ct. at 1775.

As I proceed with this inquiry I do so keeping in mind the principle that arbitration agreements should be assessed using "ordinary state law principles that govern the formation of contracts." First Options of Chicago v. Kaplan, 514 U.S. 938, 944 (1995). Further, I do so attentive to how, if at all, the factual and legal contexts of the transactions in issue differ from those in Stolt-Nielsen.

b. Analysis Applicable to New Jersey

The case law and legislative history of the CFA make clear that it was intended to be "one of the strongest consumer protection laws in the nation . . . [and] should be construed liberally in favor of protecting consumers." Huffmaster v. Robinson, 221 N. J. Super. 315, 534 A.2d 435, 437-8 (1986). Central to achieving that purpose is New Jersey's operating default rule that a class action "should be permitted unless there is a clear showing that it is inappropriate or improper." Lusky v. Capasso Bros., 118 N.J.Super 369, 373, 287 A.3d 736 (App. Div. 1972), cert. denied, 60 N.J. 466, 291 A.2d 16 (1972). New Jersey case law supports the conclusion that the class device is particularly appropriate in cases alleging consumer fraud, regardless of the legal theory advanced. Delgazzo v. Kenney, 266 N.J.Super. 169, 180, 628 A.3d 1080 (1993). Claimants rightfully observe that the CFA is "a clear and fully articulated statement of fundamental public policy by the legislature of New Jersey." (Claimants' Supplemental Memorandum at 8.)

In 2006, the New Jersey Supreme Court provided a fuller articulation of this policy in Muhammad v. County Bank of Rehobeth Beach, Delaware, 189 N.J. 1, 912 A.2d 88 (2006). There, the New Jersey Supreme Court considered an unconscionability challenge to a class

arbitration waiver in the context of a small value consumer fraud claim under the CFA. The Court noted that without access to a class device individual claimants will be frustrated by their diminished ability to attract competent counsel and "wrongful conduct" will be "functionally exculpate[d]." Muhammad, 189 N.J. at 21, 912 A. 2d at 100. Most significant to the analysis in the instant matter, the Court noted that "[a]s a matter of generally applicable state contract law" the claimant Muhammad should have access to "the mechanism of a class wide action, whether in arbitration or in court litigation." 189 N.J. at 22, 912 A. 2d at 100-101 (emphasis added).

The Court emphasized the essential role of the class device in state contract law noting that its analysis was founded not only on the ability of the individual plaintiff Muhammad to vindicate her statutory rights under the CFA, but also on a "consideration of the public interests affected by the contract . . . [that] . . . compels a broader inquiry into how class-action waivers affect the various interests protected under the CFA." 189 N.J. at 25, 912 A.2d at 102. These "various interests" included the public interest in Muhammad and her fellow consumers being able to effectively pursue their rights under the CFA. Under New Jersey law then, the availability of the class procedure is integral to vindicating both the rights of those asserting small value consumer fraud claims arising from contracts of adhesion and the related public interests.

For the reasons noted above, this case is very different from Stolt-Nielsen, and I find it reasonable in the circumstances to imply an agreement authorizing class arbitration as to Demetriou. [3]

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[3] This conclusion is buttressed by the EarthLink's inclusion of a severability provision in its agreements. Given its experience in Aral v. EarthLink, Inc., 134 Cal.App.4th 544, 36 Cal.Rptr.3d 229 (2d Dist. 2005) where an identical class waiver was stricken, EarthLink was on notice well before the contracts in issue here that there was a substantial risk in some jurisdictions that the waiver would be found unconscionable. With that knowledge, it had to understand that unless the class waiver was severed the whole arbitration provision would be stricken and any dispute would be resolved in court proceedings where the class mechanism would likely be available. See Kristian v. Comcast Corp., 446, F.3d 25, 54 (1st Cir. 2006).

c. Analysis Applicable to California

California strongly favors class procedures in small value consumer claims arising from contracts of adhesion where it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers. See Discover Bank v. Superior Court (Boehr), 36 Cal.4th 148, 30 Cal.Rptr.3d 76 (2005). This is so regardless of whether the dispute is litigated or arbitrated. 36 Cal.4th at 165, 30 Cal.Rptr.3d at 89. The foundation of this principle is the same as in New Jersey: a class waiver becomes in practice an exemption of or an unlawful exculpation of the party from responsibility for its own fraud or willful injury to another.

In Discover Bank the California Supreme Court further explained a finding of substantive unconscionability for class action waivers in consumer contracts linking it to public policy as enunciated by the California Legislature.

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

36 Cal.4th 161, 30 Cal.Rptr.3d at 85 (quoting Civil Code section 1668) (emphasis in original).

In addition, Discover Bank observed that "class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights." Id. at 161, 30 Cal. Rptr. at 86. Discover Bank rejected the notion that a state could prohibit a "contractual waiver of statutory consumer remedies, including the right to seek relief in a class action" but not when that waiver is "contained in a validly formed arbitration agreement." 36 Cal.4th at 164, 30 Cal.Rptr.3d at 73. The Court reasoned that nothing in the FAA or any

Supreme Court case required the suspension of "general contract law principles" to justify such a distinction. 36 Cal.4th at 166, 30 Cal.Rptr.3d at 90.

These same considerations animated the California Supreme Court's decision almost twenty years ago to devise the procedure of class wide arbitration. See Keating v. Superior Court, 31 Cal.3d 584, 613-614, 183 Cal.Rptr. 360 (1982), overruled on other grounds in Southland Corp. v. Keating, 465 U.S. 1 (1984). Since then, this approach has been regularly endorsed in subsequent Court of Appeal decisions. See, e.g., Sanders v. Kinko's Inc., 99 Cal.App.4th 1106, 121 Cal.Rptr.2d 755 (2002); Blue Cross of California v. Superior Court, 67 Cal.App.4th 42, 78 Cal.Rptr. 779 (1998).[4]

These underlying concepts were also explored in Szetela v. Discover Bank, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (2002). There, the court stated:

> By imposing this clause [class arbitration waiver] on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that the remedies will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness.

97 Cal.App.4th at 1101, 118 Cal.Rptr.2d at 868.

Such a practice contradicts "the California legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general (see, e.g., Bus. & Prof. Code,

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[4] Thus, at the time of contracting and long before the Stolt-Nielsen decision, "Keating [v. Superior Court] judicially authorized class wide arbitration in a case in which the arbitration agreement at issue was silent on the matter." Discover Bank , 36 Cal. 4th at 158, 30 Cal. Rptr. at 83.

§17200, et seq.)." 97 Cal.App.4th at 1102, 118 Cal.Rptr.2d at 868. Such a practice violates consumers' "rights by prohibiting any effective means of litigating Discover's business practices . . . it violates public policy by granting Discover a 'get out of jail free' card while compromising important consumer rights." 97 Cal.App.4th at 1101, 118 Cal.Rptr.2d at 868.

Crucially, the California claimant in this matter is asserting, among other things, a statutory cause of action based on the CLRA. That statute specifies as part of its remedial scheme that actions brought under its provisions may be prosecuted as class actions. Ca. Civ. Code §§1752, 1781. Further and just as significantly, that statute provides that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Id. §1751.

The significance of such statutory provisions was considered at length in Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002). There the Court analyzed the effect of a waiver as an issue of contract formation under California state law. Id. at 921-922. It noted that the insertion of an unconscionable provision in a contract is "unlawful." Id. at 921-922 (quoting Cal. Civ. Code §1770(a)(19). This was significant to the Court's analysis in that "'[i]t is essential to the existence of a contract that there should be . . . a lawful object . . ..' Cal. Civ. Code §1550(3)." Ting, 182 F. Supp. 2d at 921 (emphasis added). Further, "[s]omething that is 'contrary to the policy of express law' is unlawful." Ting, 182 F. Supp. 2d at 921 (quoting Cal. Civ. Code §1667.)

The Ting court continued its analysis of the contract formation principles with reference to the statutory framework

> [P]arties agreeing to arbitrate statutory claims must be deemed to 'consent to abide by the substantive and remedial provisions of the statute. Otherwise, a party would not be able to fully vindicate [his or her] statutory cause of action in the arbitral forum.'

Ting, 182 F. Supp. 2d at 926 (quoting Armendariz v. Foundation Health Psychcare Services, 24 Cal.4th 83, 101, 99 Cal.Rptr. 2d 745, 6 P.3d 669 (2000) (emphasis added). This is a logical corollary of the principle that the remedial and deterrent function of a statute will be served "so long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum. . .." Ting, 182 F. Supp. at 927, quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991). See also Armendariz, 24 Cal.4th at 101, 99 Cal.Rptr.2d at 745, 6 P. 3d 669 ("an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights.")

Just as with Demetriou, the factual circumstances and legal framework underlying Pittis' claims are dramatically different than those in Stolt-Nielsen. Indeed the differences are even more pronounced given the statutory cause of action pressed by Pittis and the legal context of California decisional law. In these circumstances, it is reasonable to conclude that class arbitration is available to Pittis as well.

CONCLUSION AND AWARD

Having considered the arguments and submissions of the Parties, and based on the foregoing, I find and conclude as follows:

1. The Arbitration Clause is construed to permit this arbitration to proceed as a class.
2. Respondent's objections to processing this arbitration as a class are overruled and dismissed.
3. Pursuant to Supplementary Rules for Class Arbitration, I retain jurisdiction but these proceedings shall be stayed for 30 days to permit any Party the opportunity to move a court of competent jurisdiction to confirm or vacate this Partial Final Clause Construction Award.

4. If each Party informs the AAA in writing during that period of this stay that it does not intend to seek judicial review of this Partial Final Clause Construction Award, or once the requisite time period expires without any Party have informed the AAA that it has sought judicial review, the AAA shall promptly arrange a case management conference.

All issues and/or arguments raised by the Parties have been considered, but not all have been expressly addressed in this Partial Final Clause Construction Award. Any such arguments not so addressed in this Partial Final Clause Construction Award are hereby rejected and denied.

I, Brendan M. Hare, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Clause Construction Award.

DATE: September 1, 2010

Brendan M. Hare

Brendan M. Hare, Arbitrator