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ENDORSED  
FILED  
San Francisco County Superior Court

AUG 25 2000

ALAN CARLSON, Clerk  
REMEDIOS DE LUNA  
Deputy Clerk

5 Attorneys for  
6 MORGAN STANLEY DEAN WITTER ONLINE INC.

7  
8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
9 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

10 FARNUM ALSTON, an individual,  
11 Plaintiff

12 v.

13 DISCOVER BROKERAGE DIRECT, INC. and  
14 DOES 1 through 20, inclusive,  
15 Defendants.

Case No.: 301616

**REPLY MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION TO STRIKE  
CLASS ALLEGATIONS AND CLAIM FOR  
INJUNCTIVE RELIEF AS WITHOUT  
MERIT, AND TO SEVER PLAINTIFF'S  
INDIVIDUAL CLAIM FOR DAMAGES AND  
REFER THAT CLAIM TO ARBITRATION**

Date: September 1, 2000  
Time: 9:30 a.m.  
Dept: 302 (Hon. Ronald E. Quidachay)  
Trial Date: October 2, 2000

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20 **I. INTRODUCTION**

21 The motion filed by defendant Morgan Stanley Dean Witter Online Inc., formerly known  
22 as Discover Brokerage Direct, Inc. ("MSDWO"), under Civil Code §1781(c) seeks an order:

- 23 • Finding that a class action is not proper pursuant to the provisions  
24 of Civil Code § 1781(b) and therefore striking the class action  
allegations;  
25 • Severing plaintiff's individual claim for damages, and referring  
26 that claim to mandatory arbitration pursuant to the terms of  
plaintiff's arbitration agreement with MSDWO; and  
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1 “reversible error” is, of course, properly made to an appellate court.<sup>1</sup> In any event, the record in this  
2 case demonstrates that Alston already has had more than ample opportunity to litigate the appropriate  
3 scope of class discovery, and he should not be heard to raise the issue again.

4 Alston served his first, and only, set of interrogatories and document requests in June  
5 1999. Dissatisfied with MSDWO’s response, he then brought a motion to compel. Although Alston  
6 filed an objection to hearing by the discovery commissioner when he brought this action, his motion was  
7 argued orally before Commissioner Best under Local Rule 8.14(D) on September 29, 1999. This Court  
8 issued a written notice of ruling granting the motion in part and denying it in part on November 23,  
9 1999, but, for whatever reason, the notice of ruling was not mailed to counsel for the parties. After  
10 obtaining the ruling in February 2000, Alston brought a “motion for clarification” in which he sought an  
11 order requiring MSDWO to send a letter to *all* of its California customers rather than, as the ruling  
12 required, to the four customers whose names had been redacted from documents produced in response to  
13 Alston’s document request. This motion also was argued orally before Commissioner Best on May 31,  
14 2000. This Court issued a written notice of ruling denying Alston’s request on June 21, 2000, which  
15 Alston served on July 5, 2000. MSDWO has complied with that ruling by sending a letter to the four  
16 customers.

17 During all of the months in which he was litigating the motion to compel, Alston did not  
18 serve any additional discovery requests directed to class issues (or, for that matter, to any other issues).  
19 Nor did he serve any such discovery requests upon issuance by this Court of its ruling denying his  
20 motion for “clarification.” Alston apparently chose to rest his chances of being able to demonstrate the  
21 appropriateness of class treatment on obtaining a discovery ruling to his liking. He did not get one.

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27 <sup>1</sup> Alston did not seek relief from that order by filing a writ petition.

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1 Now, having litigated the issue twice, and having lost, it ill behooves him to assert his lack of success as  
2 an excuse for his admitted inability to establish the prerequisites for a class action.<sup>2</sup>

3 **B. Alston’s Individual Damages Claim Should Be Severed And Referred To**  
4 **Arbitration**

5 Alston expressly concedes that, “[I]n the absence of a putative class action, . . . his  
6 individual damages claim is arbitrable.” Opp. Memo. At 6:11. In such a case, *Broughton v. Cigna*  
7 *Healthplans of California* (1999) 21 Cal.4<sup>th</sup> 1066, mandates that his individual damages claim must be  
8 severed and referred to arbitration. This Court should enter an order to that effect.

9 **C. Alston’s Claim For Injunctive Relief Under The CLRA Is Without Merit**

10 In his complaint, Alston asks the Court to “enjoin the methods, acts and/or practices  
11 hereinabove described.” (Complaint, Prayer, ¶ 1.) Since what was “hereinabove described” was a series  
12 of events that began with an erroneous wire transfer, MSDWO could only infer that Alston was seeking  
13 an injunction barring similar mistakes in the future. Even Alston apparently recognizes that such an  
14 injunction would be improper and unworkable, since he now argues in his opposition papers that what  
15 he *really* wants is an injunction “prohibiting Discover from freezing customer’s accounts in an attempt  
16 to correct its own errors, or, at a minimum, establishing reasonable limits as to the amount of assets that  
17 can be frozen (in this case \$66,000) and the time at which such a freeze must be lifted.” Opp. Memo. at  
18 6:26-7:1.

19 Even if the Court were to accept Alston’s reformulation of his prayer, there is no basis for  
20 injunctive relief under the CLRA. With its moving papers, MSDWO submitted the declaration of its  
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22 <sup>2</sup> In its moving papers, MSDWO also demonstrated that Alston failed to meet the second requirement  
23 for class treatment set forth in Civil Code § 1781(b): that common questions predominate over  
24 individual questions. Alston’s only response is that, “When the focus is a frozen account, all members  
25 of the class need only prove two common elements – Discover unlawfully froze my account and caused  
26 me damages.” Opp. Memo. at 4:19-20. As pled, however, the complaint is premised on the allegation  
27 that MSDWO engages in a “pattern and practice of wrongfully, unfairly and improperly executing  
28 transactions contrary to the instructions of its customers, causing its customers to suffer damages, and  
retaliat[ing] against those clients that demand proper performance . . .” Cmpl. ¶ 18, Ex. A to the  
Rosenberg Declaration. As MSDWO pointed out in its opening brief, such allegations raise a host of  
individual issues as to both liability and damages that are not susceptible of proof on a classwide basis.

1 operations vice president, Drew Kendell, explaining *why* Alston’s account had been “frozen”: As a  
2 result of the clerical error, MSDWO had wired the same \$66,000 to two different banks, but when it  
3 contacted the second bank in an effort to recover the money, it was informed that *the funds already had*  
4 *been disbursed to Alston*. Kendell Decl. ¶4. Then, when Mr. Kendell attempted to contact Alston to  
5 arrange for him to return the funds that he should not have received in the first place, Alston did not  
6 respond to his messages. *Id.* ¶ 5. It was only then that MSDWO placed the freeze on Alston’s accounts.  
7 *Id.* Significantly, Alston has submitted no declaration contradicting any of these facts.

8           How is this conduct objectionable? According to Alston, MSDWO’s Customer  
9 Agreement “does not authorize Discover to freeze a customer’s account – whether or not the debit  
10 balance is created by Discover’s error.” Opp. Memo. at 1:25-27. Alston makes this assertion without  
11 providing the Court with a copy of MSDWO’s Customer Agreement; so that the Court is not misled,  
12 MSDWO’s counsel has downloaded and printed out the Customer Agreement, which is publicly  
13 available on MSDWO’s Website. (A copy is attached to the Supplemental Declaration of Robert T.  
14 Sullwold.) Paragraph 5(e) of the Agreement gives MSDWO broad powers over the assets held in  
15 customer’s accounts, including the right to “use and/or transfer” securities and other property “without  
16 regard to [MSDWO] having made any advances in connection with such securities and/or property and  
17 without regard to the number of Accounts you may have with [MSDWO].” These broad powers surely  
18 encompass the right to “freeze” a customer’s account.

19           Even if, however, Alston’s interpretation of the Customer Agreement was correct, it does  
20 not help him, since this is not an action for breach of contract, but for relief under the CLRA. The  
21 statute lists 23 categories of “proscribed practices,” the vast majority of which involve some form of  
22 misrepresentation or false advertising. Civil Code § 1770(a). Alston has not alleged, and he certainly  
23 has offered no evidence, that MSDWO represents that it will not freeze a customer’s account when a  
24 debit balance arises, and no such representation can be found in the Customer Agreement. But without  
25 proof of misrepresentation or false advertising, there is no basis for a finding of liability under the  
26 CLRA and therefore no predicate for issuing injunctive relief. *Cf. Kagan v. Gibraltar Sav. & Loan*



1 damages to trial in court. And, since his only remaining claim for injunctive relief under the CLRA is  
2 without merit, this action should be dismissed.

3 DATED: August 25, 2000

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