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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

FARNUM ALSTON, an individual,
Plaintiff,

v.

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

Case No. 301616

**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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I. INTRODUCTION

This is an action brought by a brokerage firm customer after the firm made an error in a wire transfer of funds from one of his accounts and then, having corrected the error, froze the account until the resulting debit balance had been eliminated. Although plaintiff's claim is quintessentially an individual and private one, he pled the case as a class action under the Consumer Legal Remedies Act ("CLRA") and sought not only damages for all those "similarly situated" but also an injunction against the "methods, acts and practices" alleged in the complaint. Discovery has revealed, however, that there are most *four* other customers who experienced events even remotely similar to those alleged by plaintiff. Moreover, like the brokerage firm's other customers, plaintiff signed an agreement to arbitrate any disputes with the firm. Under California law, this case may not proceed as a class action, and plaintiff's individual claim for damages should be severed and sent to arbitration. In addition, the facts of this case do not support injunctive relief on behalf of the "general public" under the CLRA. Accordingly, pursuant to Civil Code § 1781 and (c), defendant Morgan Stanley Dean Witter Online Inc. ("MSDWO"), respectfully requests this Court to enter an order as follows:

- Finding that a class action is not proper pursuant to the provisions of Civil Code § 1781(b) and therefore striking the class action allegations;
- Severing plaintiff's individual claim for damages, and referring that claim to mandatory arbitration pursuant to the terms of plaintiff's arbitration agreement with MSDWO; and
- Finding that plaintiff's claim for injunctive relief is without merit and therefore dismissing the remainder of the action.

II. STATEMENT OF FACTS

This case involves a claim by a Discover Brokerage¹ customer, plaintiff Farnum Alston, arising out of a wire transfer of funds made from one of Alston's MSDWO accounts. On October 29, 1998, Alston gave MSDWO written instructions to wire transfer funds from two of his MSDWO accounts to Imperial Bank and funds from a third MSDWO account to Bank of America. MSDWO

¹ Since the time of the incidents alleged in the complaint, Discover Brokerage changed its name to Morgan Stanley Dean Witter Online Inc. Hereafter, the firm will be referred to as "MSDWO."

1 erroneously wired funds from all three accounts to Imperial Bank. When MSDWO discovered its error,
2 it immediately wired funds from the third account to Bank of America as Alston had requested. But
3 when MSDWO contacted Imperial Bank about reclaiming the funds erroneously wired from the third
4 account, Imperial Bank reported that those funds already had been disbursed to Alston. As a result of
5 the two transfers from the third account (the first erroneous transfer to Imperial Bank and the later
6 corrected transfer to Bank of America), a debit balance arose in that account. After repeated
7 unsuccessful attempts to reach Alston to arrange for a deposit of funds to cover the debit balance,
8 MSDWO placed a “freeze” on the account. The restriction was lifted after Alston made the requested
9 deposit.²

10 Based on no evidence other than the error in his own account, Alston filed this suit
11 containing a single cause of action under the Consumer Legal Remedies Act, Civil Code §§ 1750, et seq.
12 The complaint sought damages on behalf of “all other similarly situated consumers” under Civil Code
13 § 1781 and for Alston personally under Civil Code § 1780. It also sought a permanent injunction
14 “enjoining the methods, acts and/or practices hereinabove described.”³

15 In order to find out whether there indeed were other “similarly situated” customers of
16 Discover Brokerage, Alston propounded interrogatories and document requests asking MSDWO to
17 identify other customers who had complained about funds transfers or whose accounts had incurred a
18 debit balance as a result of a clerical error. MSDWO conducted a thorough search and found that only
19 two customers other than Alston himself had complained about erroneous funds transfers, and two
20 instances in addition to Alston’s account where a debit balance may have resulted from an erroneous
21 wire transfer. (Rosenberg Declaration ¶¶ 3-5.)

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23
24 ² Declaration of Drew Kendell in Support of Defendant’s Motion to Strike Class Allegations and
25 Claim for Injunctive Relief as Without Merit, and to Sever Plaintiff’s Individual Claim for Damages and
Refer That Claim to Arbitration, ¶¶ 3-5.

26 ³ See Complaint, Prayer ¶ 1. A copy of the Complaint in this action is attached to the Declaration
27 of Judith M. Rosenberg in Support of Defendant’s Motion to Strike Class Allegations and Claim for
28 Injunctive Relief as Without Merit, and to Sever Plaintiff’s Individual Claim for Damages and Refer
That Claim to Arbitration (“Rosenberg Declaration”) as Exhibit A.

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III. ARGUMENT

Under the CLRA, a plaintiff may bring a claim both on his own behalf under section 1780 and on behalf of a class of "other consumers similarly situated" under section 1781. In this case, Alston purports to assert both types of claims, and each must be analyzed separately. The class action claim may not be maintained unless Alston can satisfy the prerequisites set forth in section 1781(b). As discussed under the first heading below, Alston cannot satisfy those prerequisites, and therefore the class allegations should be stricken, leaving only Alston's individual claim under section 1780. A plaintiff may seek both damages and injunctive relief under that section, but, as discussed under the second heading below, the California Supreme Court has held that, where the plaintiff has agreed to arbitrate disputes, only his claim for injunctive relief on behalf of the general public may remain in court; his claim for damages must be severed and sent to arbitration. Since Alston in fact has signed an agreement to arbitrate any disputes with MSDWO, his claim for damages should be severed and ordered to arbitration. Finally, as discussed under the third heading below, this is not a case in which injunctive relief is appropriate, or even possible. Since the claim for injunctive relief is the only claim remaining after the class action allegations are stricken and the damages claim is ordered to arbitration, this action should be dismissed.

A. The Class Action Allegations Should Be Stricken Because Plaintiff Cannot Satisfy the Requirements for CLRA Class Treatment Mandated by Civil Code Section 1781(b)

Civil Code § 1781(b) sets forth the requirements for class actions brought under the Consumer Legal Remedies Act. It provides as follows:

(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if *all* of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

1 (4) The representative plaintiffs will fairly and
adequately protect the interests of the class.

2 (Emphasis added.)

3
4 Plaintiff in this case is unable to satisfy either of the first two conditions specified in the
5 statute. The undisputed evidence is that only *four* other customers of MSDWO ever complained about
6 erroneous wire transfers, or had debit balances arise in their accounts as a result of erroneous transfers.
7 There is absolutely nothing “impracticable” about bringing five people before this Court. Under the
8 CLRA, it is plaintiff’s burden “to identify class members and prove sufficient numbers to justify the
9 certification of a class. *State ex rel. Department of Motor Vehicles v. Superior Court* (1998) 66
10 Cal.App.4th 421, 434. He cannot meet that burden, and his class claims, accordingly, should be stricken
as without merit for that reason alone.

11
12 Moreover, even if five people could be considered sufficiently numerous to constitute a
13 class, it is readily apparent that individual factual questions would predominate over common ones.
14 Under such circumstances, a CLRA class action is inappropriate. For example, in *Caro v. Procter &*
15 *Gamble Co.* (1993) 18 Cal.App.4th 644, the plaintiffs alleged that defendant had misrepresented its
16 orange juice as “fresh” when in fact it was made from concentrate and sought to represent a class of
17 consumers who had purchased the product. The trial court denied class certification of the CLRA and
18 other claims, and the Court of Appeal affirmed, holding that since class members would have to prove
19 individually the existence of liability and damages, the requirement that common questions predominate
20 was not met. 18 Cal.App.4th at 669.⁴

21 Here, the Complaint alleges that Alston is seeking relief under the CLRA on behalf of
22 himself and “all other consumers similarly situated.” (Complaint ¶ 18.) The only MSDWO customers
23 “similarly situated” to Alston are those whose requests for wire transfers of funds were erroneously
24 executed, a debit balance arose in the account after the error was corrected, and the account was

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26 ⁴ The Court of Appeal implicitly held that it was plaintiff’s burden to make the necessary factual
27 showing of common issues of fact, holding that “Caro [the plaintiff]. . . failed to establish factually
28 another prong of the community of interest requirement, to wit, predominant questions of law or fact.”
Id. at 667.

1 temporarily frozen until the debit balance was cleared. There can be little doubt that each individual
2 class member's right to recover would depend on proof of facts unique to that customer. Each customer
3 would need to show, at a minimum:

- 4 • What wire transfer instructions were given to MSDWO;
- 5 • How MSDWO failed to carry out those instructions;
- 6 • Whether and when the customer discovered that MSDWO had not
7 carried out his instructions;
- 8 • Whether and when the customer notified MSDWO of the error;
- 9 • What action, if any, MSDWO took to correct the error.
- 10 • What effect, if any, the correction had on the balance in the
account;
- 11 • Whether the failure to carry out the instructions or any subsequent
12 action taken by MSDWO caused the customer an economic loss;
and
- 13 • What the economic loss was.

14 Where the "ability of each member of the class to recover clearly depends on a separate set of facts
15 applicable only to him," *Silva v. Block* (1996) 49 Cal.App.4th 345, 350, a class action is not appropriate.
16 That is the case here, and plaintiff's class allegations should be stricken for that reason, separate and
17 apart from plaintiff's failure to establish numerosity.

18 In CLRA cases, "[t]he burden of furnishing the court with the necessary evidence to
19 identify [class] members rest[s] squarely with plaintiffs." *Cooper v. American Savings & Loan*
20 *Association* (1976) 55 Cal.App.3^d 274, 286. When the evidence furnished by plaintiffs is "clearly
21 insufficient to meet this burden", a trial court may properly exercise its discretion to dismiss the class
22 action portion of the suit. *Id.* Since Alston cannot sustain his burden of proving either of the first two
23 required conditions of class certification, his class allegations should be stricken.

24
25 **B. Plaintiff's Individual Claim For Damages Should Be Severed**
26 **And Sent to Arbitration As Required By *Broughton v. Cigna***
Healthplans of California

27 Under the CLRA, a plaintiff who does not seek relief on behalf of a class under section
28 1781 nevertheless may seek individual damages and an order "enjoining the methods, acts, or practices"

1 alleged to violate the CLRA under section 1780. The California Supreme Court, however, recently held
2 that, where the plaintiff has agreed to arbitrate disputes, he cannot pursue his claim for individual
3 damages in court; rather, that claim must be severed and sent to arbitration.

4 The case is *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066. In that
5 case, plaintiff, through his guardian ad litem, filed a complaint alleging that he had suffered severe
6 injuries at birth. His complaint contained two causes of action, one for medical malpractice, the other
7 for violation of the CLRA. Under the latter cause of action, plaintiff sought the remedies available
8 under section 1780: actual damages, punitive damages, attorneys' fees, and "an order enjoining
9 [defendant's] deceptive methods, acts, and practices." Defendant moved to compel arbitration based
10 upon a mandatory arbitration provision contained in a form signed by plaintiff.

11 The trial court held that the CLRA cause of action was not arbitrable, and the Court of
12 Appeal affirmed. On review, the Supreme Court distinguished between CLRA claims for injunctive
13 relief asserted "on behalf of the general public" and CLRA claims for damages allegedly suffered by the
14 plaintiff personally. It held that the former were not subject to arbitration but that the latter were. 21
15 Cal.4th at 1079-1088. Where the same complaint alleged both "public" injunctive claims and "private"
16 damages claims under the CLRA, and the plaintiff had entered into a binding arbitration agreement, the
17 claim for individual damages should be severed and sent to arbitration, with only the claim for injunctive
18 relief on behalf of the general public remaining in court. 21 Cal.4th at 1088.

19 Here, as in *Broughton*, the complaint seeks both damages and injunctive relief under the
20 CLRA. As the preceding section demonstrated, plaintiff may not obtain *damages* on behalf of "similarly
21 situated" consumers, since the prerequisites for class certification under the CLRA are not met. Yet the
22 plain holding of *Broughton* is that an individual claim for damages under the CLRA *is* "amenable to
23 arbitration." 21 Cal.4th at 1085. Likewise, the *Broughton* Court, relying on United States Supreme
24 Court authority, made it clear that, "when a suit contains both arbitrable and inarbitrable claims, the
25 arbitrable claims should be severed from those that are not arbitrable and sent to arbitration." 21 Cal.4th
26 at 1088. *Broughton* thus mandates that plaintiff's individual claim for damages must be severed and
27 sent to arbitration.

1 In *Broughton*, the plaintiff argued that, even if CLRA claims for damages were subject to
2 arbitration, *his* damages claim was not arbitrable for other reasons. No such argument can be made by
3 plaintiff here. The Federal Arbitration Act ("FAA") provides that arbitration provisions in any "contract
4 evidencing a transaction involving commerce" are "valid, irrevocable, and enforceable, save upon such
5 grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.⁵ Here, when he
6 opened his account, plaintiff signed a contract requiring him to arbitrate any disputes with MSDWO.
7 (Rosenberg Declaration, Exhibits B and C.) A contract between a customer and a brokerage firm is a
8 contract "evidencing a transaction involving interstate commerce" and therefore is governed by the
9 FAA, "[e]ven if little or no actual securities activity occurred under the agreement between the
10 parties . . ." *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.* (10th Cir. 1993) 13 F.3d 330, 333. Nor
11 do any grounds exist for "revocation" of plaintiff's agreement to arbitrate. The complaint alleges that
12 the arbitration provision is "unconscionable," but the courts long ago rejected unconscionability as
13 grounds for refusing to enforce an arbitration provision in a brokerage firm customer agreement. *Cohen*
14 *v. Wedbush Noble Cooke* (9th Cir. 1988) 841 F.2d 282; *Gonick v. Drexel Burnham Lambert, Inc.* (N. D.
15 Cal. 1988) 711 F.Supp. 981.

16 Consistent with *Broughton*, this Court should sever plaintiff's individual claim for
17 damages under the CLRA and order him to submit it to arbitration.⁶

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23 ⁵ Copies of all federal statutes and cases cited in this memorandum are included in the Appendix of
24 Federal Authorities in Support of Defendant's Motion to Strike Class Allegations and Claim for
25 Injunctive Relief as Without Merit, and to Sever Plaintiff's Individual Claim for Damages and Refer
That Claim to Arbitration, filed herewith.

26 ⁶ MSDWO did not move to compel arbitration when this action was initially filed because the
27 Code of Arbitration Procedure of the National Association of Securities Dealers precludes an NASD
28 member firm from seeking to enforce an arbitration agreement against a customer who has "initiated in
court a *putative* class action." NASD Code of Arb. Proc. § 10301(d)(3) (emphasis supplied). Once the
class allegations are stricken, as they should be here, the bar is removed.

1 C. **Any Remaining Claim for Injunctive Relief Under the CLRA**
2 **Should Be Dismissed Because a Party Cannot Be Enjoined**
3 **From Making a Mistake**

4 Although this action may not proceed as a class action, and although Alston's individual
5 claim for damages should be severed and sent to arbitration, Alston may argue that this case should still
6 proceed in this Court on his CLRA claim for injunctive relief. There is, however, no merit to that claim,
7 and it, too, should be dismissed.

8 First, as the Supreme Court stated in *Broughton*, "the evident purpose of the injunctive
9 relief provision of the CLRA is not to resolve a private dispute but to remedy a public wrong." 21
10 Cal.4th at 1080. But this case involves just such a "private dispute" between Alston and MSDWO.
11 Alston instructed MSDWO to transfer funds out of his three brokerage accounts to two banks; MSDWO
12 transferred funds from one of those accounts to the wrong bank and then corrected its error; the
13 correction resulted in a debit balance in the account, and MSDWO froze the account until the debit
14 balance had been eliminated. According to Alston, during the period in which his account was frozen,
15 he "incurred loses [sic] based on his inability to sell certain securities plaintiff then viewed as volatile
16 and/or increasingly risky, and to invest in certain other securities he identified as potentially profitable."
17 (Complaint ¶ 15.) A dispute arising from facts such as these implicates only private, not public,
18 interests. Under *Broughton*, this is not the kind of case for which the injunctive relief provisions of the
19 CLRA were enacted to remedy.

20 Second, an injunction should be issued only where necessary to prohibit particular acts
21 that are reasonably certain to occur again and again:

22 [T]he express codified purpose of a prohibitory injunction is to prevent
23 future harm to the applicant by ordering the defendant to refrain from
24 doing a *particular act*. (Civ. Code § 3420; Code Civ. Proc., § 525.)
25 Consequently, injunctive relief lies only to prevent threatened injury and
26 has no application to wrongs that have been completed. (*Gold v. Los*
27 *Angeles Democratic League* (1975) 49 Cal.App.3d 365, 372.) It should
28 neither serve as punishment for past acts, nor be exercised in the absence
of any evidence establishing the *reasonable probability the acts will be*
repeated in the future.

Scripps Health v. Marin (1999) 72 Cal.App.4th 324, 332 (emphasis
added).

1 Here, because the acts alleged are unique to Alston -- a clerical error that, when corrected, resulted in a
2 debit balance that caused an account to be frozen until the debit balance was cleared -- there is scant
3 likelihood that the same series of acts will ever occur again, and, therefore, no purpose to be served by
4 issuing an injunction to prevent their recurrence.

5 Third, even if the same series of events *was* likely to recur, it is difficult to imagine how
6 an injunction could be framed to prevent their recurrence. The prayer in Alston's complaint asks the
7 Court to "enjoin the methods, acts and/or practices hereinabove described". (Complaint, Prayer, ¶ 1.)
8 Although plaintiff attempts to characterize MSDWO's conduct in various ways, in fact what he
9 "describes" is a clerical mistake:

10 On or about October 29, 1998 plaintiff instructed Discover to make
11 certain wire transfers from one of plaintiff's accounts with Discover so
12 that plaintiff could close his purchase of a parcel of real property.
13 Discover failed to follow plaintiff's instructions, and wired funds to the
14 wrong account.

15 (Complaint, ¶ 7.)

16 By his prayer for injunctive relief, Alston seems to be asking the Court to enjoin
17 MSDWO from making mistakes in the future. This is clearly not an appropriate exercise of the Court's
18 discretion. An unfortunate fact of life is that people do make mistakes, no matter how hard they strive
19 for perfection. It is useless to enjoin a corporation from making errors. Errors of one sort or another
20 (although not necessarily errors exactly like the one at issue here) will invariably occur, whether or not
21 there is a signed order from a court prohibiting mistakes, because a corporation is made up of imperfect
22 human beings.

23 The California Supreme Court has held that, in order to survive a challenge based on
24 vagueness, an injunction must be "definite enough to provide . . . a standard of conduct for those whose
25 activities are proscribed. . . ." *Walker v. Superior Court* (1988) 47 Cal.3^d 112, 141. An injunction
26 prohibiting clerical errors in executing wire transfer instructions would provide no specific standard of
27 conduct to guide those at MSDWO who are responsible for such transactions above and beyond what
28

1 those individuals already know and understand, i.e., that they should perform their job duties accurately
2 and completely.⁷

3 IV. CONCLUSION

4 Alston's claims under the CLRA have no merit. First, his class action allegations should
5 be dismissed because there are only five potential members of the class, each of whom would have to
6 prove a myriad of individual facts in order to recover. Second, his individual claims for damages are
7 subject to an enforceable arbitration agreement, and should be severed and referred to arbitration. Third,
8 his remaining claim for injunctive relief on behalf of the "public" is invalid because the injury he is
9 alleging is private, not public, and because the wrongs he alleges occurred as the result of a clerical
10 mistake, which is not a suitable subject for an injunction. Accordingly, the action should be dismissed
11 in its entirety, and costs of suit awarded to defendant MSDWO.

12 DATED: August 4, 2000

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Robert T. Sullwold
Attorneys for Defendant
Morgan Stanley Dean Witter Online, Inc.

25 ⁷ Moreover, an injunction that purports to enjoin securities industry employees from making
26 clerical mistakes might be considered an impermissible attempt to "micro-manage" that industry. For
27 example, a trial court enjoined a bank from charging more than \$1.73 per item for checks returned
28 because of insufficient funds. The Court of Appeal concluded that the trial court abused its discretion to
grant injunctive relief by entering its order, finding that this sort of injunction was "an entirely
inappropriate method of overseeing bank service fees." *California Grocers Assn. v. Bank of America*
(1994) 22 Cal.App.4th 205, 218-219.