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THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KRISTIN CARIDEO and CATHERINE
CANDLER, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

DELL, INC., a Delaware Corporation,

Defendant,

CLASS ACTION

No. C06-1772 JLR

PLAINTIFFS' SUPPLEMENT TO
RULE 60(B) MOTION REGARDING
THE NATIONAL ARBITRATION
FORUM

**Re-noted for Consideration:
Friday, August 28, 2009**

Oral Argument Requested

I. INTRODUCTION AND FACTUAL BACKGROUND

As of July 24, 2009, the arbitration provider designated by Dell in its consumer contract, the National Arbitration Forum (“NAF”), is no longer accepting consumer arbitrations. This announcement came 10 days after a court filing by the Attorney General of Minnesota—the chief law enforcement officer in NAF’s home state—sued NAF and its corporate affiliates for violations of Minnesota’s statutory prohibitions against consumer fraud, deceptive trade practices, and false advertising, based on NAF’s undisclosed financial relationship with one of the country’s largest debt collection law firms. *See Compl., State v. Nat’l Arbitration Forum, Inc.* at ¶ 5 (Minn. Dist. Ct. filed July 14, 2009) (Plaintiffs’ Notice of Supplemental Authority, Ex. A) (Dkt. # 78). Among other things, the lawsuit alleged (with substantial supporting documentation) that, despite having held itself out to consumers as a “neutral” forum, NAF has been deciding tens of thousands of cases in which its owners had an immediate and direct financial interest in seeing one side win. *Id.*

NAF’s collapse also occurred just a few days before a Congressional hearing into NAF’s abusive practices. On July 21, 2009—the day before the hearing—the Domestic Policy Subcommittee of the House Committee on Oversight and Government Reform issued a scathing report detailing its own investigation into NAF. *See Staff of the Domestic Policy Subcomm. of the H. Comm. on Oversight and Government Reform, 111th Cong., Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum* (2009), available at <http://domesticpolicy.oversight.house.gov/documents/20090721154944.pdf>.

Moreover, at the Congressional hearing, NAF’s C.E.O. admitted under oath that, consistently with key allegations of the Minnesota A.G.’s lawsuit, \$42 million in profits from the debt collection enterprise had been distributed to NAF and selected members of its management. *Arbitration or ‘Arbitrary’: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov’t Reform, July 22, 2009*, video webcast at

1 <http://domesticpolicy.oversight.house.gov/story.asp?ID=2551> (oral statements of Michael
2 Kelly, Chief Executive Officer, National Arbitration Forum and Forthright).

3 The Minnesota law enforcement action and the Congressional investigation were only a
4 few of the many clouds that surrounded NAF prior to its abandonment of consumer
5 arbitrations. The Center for Responsible Lending also issued a report, in May 2009, that calls
6 NAF's neutrality into serious question. *See* Joshua M. Frank, Ctr. for Responsible Lending,
7 *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009), available at
8 <http://domesticpolicy.oversight.house.gov/documents/20090721154944.pdf>. After conducting
9 a sophisticated statistical analysis, the report found that arbitrators "appear to favor companies
10 that they expect to give them future business" and that arbitrators receive more cases in the
11 future if they favor firms over consumers. *Id.* at 7–8.

12 Additionally, at least three pending lawsuits charge NAF with bias and misconduct.
13 First, in August 2008, the San Francisco City Attorney sued NAF, alleging that the corporation
14 "is actually in the business of operating an arbitration mill, churning out arbitration awards in
15 favor of debt collectors and against California consumers, often without regard to whether
16 consumers actually owe the money sought." *See* Declaration of Beth E. Terrell ("Terrell
17 Decl.") Ex. A, at ¶ 1. Second, a class action suit in federal court in New York alleges that NAF
18 conspired with banks to induce the banks to include arbitration clauses in the consumer
19 contracts. *See In re Currency Conversion Fee Antitrust Litig.*, 2006 WL 2685082, *2
20 (S.D.N.Y. Sept. 20, 2006). Finally, a third case was filed by a former NAF employee who
21 sought to avoid being forced to arbitrate her sex and age discrimination suit against NAF
22 because of "fraudulent and corrupt practices in the administration of arbitration cases by
23 defendants which draw into question the neutrality of any arbitrator associated in any way with
24 defendants." *See* Terrell Decl. Ex. B, at ¶ 21. The employee alleged that the NAF gave special
25 treatment to repeat arbitration filers, including instructing arbitrators to change decisions where
26 they had found against these parties, refusing to assign any more cases to arbitrators who had

1 decided against the parties, drafting claim forms and fictitious affidavits of service for them,
2 and allowing arbitrators to ask NAF how they should rule. *Id.*

3 The NAF's withdrawal from consumer arbitrations has no bearing on the central
4 question before the Court: whether Dell's class action ban—which prohibits its customers from
5 joining together to hold the company accountable, whether in court or in arbitration—is
6 unconscionable under Washington law. As explained at length in Plaintiffs' previous briefing,
7 that class action ban is exculpatory and unenforceable in this case whether the Court compels
8 arbitration or not; that argument will not be revisited here. However, given that Dell's
9 arbitration clause requires arbitration "exclusively" before the NAF, the fact that NAF has now
10 shut down in the face of law enforcement proceedings against it for corruption has important
11 implications for this case.

12 First, the unavailability of NAF means that it is impossible for the Court to enforce
13 Dell's arbitration clause according to its terms. Under this circumstance, the law is clear that
14 the Court should simply deny the motion to compel arbitration. Alternatively, however, the
15 Court could sever Dell's unconscionable class action ban and compel arbitration on a class-
16 wide basis. At that point, the parties could agree on a new arbitration provider or petition the
17 Court to choose a provider.

18 Second, if the Court does compel arbitration, it should leave that provider free to
19 provide the rules it sees appropriate. Any suggestion that this Court should dictate the rules to
20 apply in arbitration—so that Dell may benefit from the NAF Code of Procedure, which was
21 promulgated by a disgraced and now defunct entity that was owned to a large extent by lenders
22 —is inappropriate. If this Court compels arbitration, it should not attempt to control the
23 procedures that are to be followed by that arbitration organization.

1 **II. ARGUMENT**

2 **A. Because NAF Was Integral to Dell’s Arbitration Clause, NAF’s Withdrawal from**
 3 **Consumer Arbitrations Provides a Basis for Denying Arbitration Altogether.**

4 Where it is impossible for the chosen provider to conduct the arbitration, the question of
 5 whether the court should grant or deny a motion to compel arbitration turns on whether the
 6 choice of provider was “integral” to the arbitration clause. *Reddam v. KPMG LLP*, 457 F.3d
 7 1054, 1060 (9th Cir. 2006). In *Reddam*, the arbitration clause at issue provided that arbitration
 8 was to be conducted “pursuant to the rules then in effect of the National Association of
 9 Securities Dealers,” but the NASD declined jurisdiction over the parties. *Id.* at 1057. The
 10 Ninth Circuit held that § 5 of the Federal Arbitration Act (“FAA”) authorizes a court to
 11 designate a substitute arbitration provider in such circumstances, but only where the evidence
 12 shows that the chosen forum was not “integral” to the arbitration agreement. *Id.* at 1060. To
 13 determine whether the choice of NASD was integral, the court looked to the clause’s language:

14
 15 The provision in the DBSI customer agreement does select the rules of the
 16 NASD, but does *not* state that the arbitration is to take place before the
 17 NASD itself. Had the latter been intended, the parties could easily have
 18 said so. . . .

19 We see no evidence that the choice [of NASD as a forum] was integral
 20 here—in fact, there was not even an express statement that NASD would
 21 be the arbitrator.

22 *Id.* at 1059–60. Analogizing arbitration clauses to forum-selection clauses, the court explained
 23 that the selection of a specific arbitral forum is not exclusive of all others “unless the parties
 24 have expressly stated it was.” *Id.* at 1061.

25 Here, of course, Dell’s arbitration clause *does* expressly state that its selection of the
 26 NAF was exclusive. Pape Decl. Ex. B at 15 (Dkt. # 15) (providing that arbitration “shall be
 resolved *exclusively* and finally by binding arbitration administered by the National Arbitration
 Forum”) (emphasis added). Furthermore, Dell has consistently argued that its choice of NAF

1 and class action ban constitute the “*core* of the agreement.” Transcript of Proceedings 27 ¶ 1–
2 15 (Dkt. #59) (emphasis added). In the face of the language of the clause drafted by Dell and
3 Dell’s own statements to this Court, this Court should reject Dell’s new position that the NAF
4 is not integral to its arbitration clause, Dell’s Post-Hearing Submission at 3 (Dkt. # 81), and that
5 the Court can simply compel arbitration as though its clause were enforceable as drafted.

6 Where, as here, the selection of a single arbitration provider to the exclusion of all
7 others is an integral term of the contract, § 5 does not apply. *See, e.g., In re Salomon Inc.*
8 *Shareholders’ Litig.*, 63 F.3d 554 (2d Cir. 1995) (noting that, while several courts have held
9 that § 5 permits appointment of a substitute arbitrator, “[n]one of these cases . . . stands for the
10 proposition that district courts may use § 5 to circumvent the parties’ designation of an
11 exclusive arbitral forum”); *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 439
12 (S.C. 2005) (district court did not err in refusing to appoint substitute arbitrator where parties’
13 selection of particular arbitration forum had “wide-ranging substantive implications that may
14 affect, inter alia, the arbitrator-selection process, the law, procedures, and rules that govern the
15 arbitration, the enforcement of the arbitral award, and the cost of arbitration,” and was thus
16 integral to the clause) (internal quotations omitted).¹

17 Given that Dell’s selection of NAF was integral to its arbitration clause, the most
18 principled approach would be to hold that Dell’s clause, which consisted almost entirely of two
19 now-unenforceable provisions—the class action ban and the choice of NAF—cannot be given
20 effect at all. However, as Plaintiffs have previously made clear, their sole concern is that they
21 be able to pursue their claims, whether in court or in arbitration, in the only way feasible: on a
22

23 ¹ The cases cited by Dell (Dkt. # 81 at 2–3) are not to the contrary. Rather, in each of those cases—unlike here—
24 the clause either did not require arbitration under a particular provider, or provided that any unenforceable term of
25 the contract was severable. *See Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1220, 1222 (11th Cir. 2000)
26 (finding no evidence that selection of arbitration forum was integral part of clause where clause merely required
arbitration pursuant to particular rules); *Estate of Eckstein v. Life Care Centers of America*, 623 F. Supp. 2d 1235,
1238 (E.D. Wash. 2009) (no evidence that designation of AAA was material term, given that contract contained a
“clear severability clause”); *Deeds v. Regence Blueshield of Ohio*, 141 P.3d 1079, 1081–82 (Idaho 2006) (under
clause calling for arbitration “in accordance with the applicable rules of the AAA,” arbitration could be conducted
by a different provider).

1 class-wide basis. Therefore, if the Court does decide to compel arbitration, Plaintiffs will
2 gladly pursue their claims before a neutral provider, under that provider's rules, so long as that
3 provider is free to determine whether a class should be certified.

4 **B. Any Arbitration Conducted By a Substitute Provider Cannot Proceed Under the**
5 **NAF's Nonexistent Code of Procedure.**

6 Dell argues that if the Court compels arbitration, that arbitration can proceed under the
7 NAF's rules. Specifically, Dell claims that "[t]here is nothing unique about NAF arbitration
8 that cannot be preserved in arbitration administered by another entity," and suggests that "[a]n
9 arbitrator appointed by JAMS or AAA, for example, would be free to apply the NAF rules."
10 Dell's Post-Hearing Submission at 3 (Dkt. # 81). Dell is wrong. Should this Court decide to
11 compel arbitration despite the impossibility of enforcing the clause according to its terms, the
12 law does not permit it to require a substitute arbitration provider to arbitrate this case under the
13 disgraced NAF's now-defunct Code of Procedure.

14 First, Dell's contract only provides for arbitration *by the NAF* "under its Code of
15 Procedure *then in effect*." Pape Decl. Ex. B at 15 (Dkt. # 15) (emphasis added). Unlike the
16 clauses in *Reddam*, *Brown*, *Deeds*, and other cases Dell cites, its arbitration clause contains no
17 provision for a different provider to apply NAF's Code of Procedure. More to the point,
18 because the NAF has ceased all consumer arbitrations, its Code of Procedure is no longer "in
19 effect." Rather, the only NAF rules in effect for new cases are those for Internet domain name
20 disputes. See National Arbitration Forum, Rules and Forms, at [http://www.adrforum.com/-](http://www.adrforum.com/-main.aspx?itemID=330&hideBar=False&navID=357&news=3)
21 [main.aspx?itemID=330&hideBar=False&navID=357&news=3](http://www.adrforum.com/-main.aspx?itemID=330&hideBar=False&navID=357&news=3) (last visited Aug. 19, 2009).
22 Thus, Dell's proposal that a substitute arbitration forum can simply apply NAF's rules is
23 nothing more than an offer to renegotiate a term of its contract—an offer that Plaintiffs do not
24 accept. See, e.g., *Flyer Printing Co. v. Hill*, 805 So.2d 829, 833 (Fla. Ct. App. 2001) (where
25 plaintiff had rejected defendant's "unilateral offer to amend the agreement," court was "not
26 authorized to remake the parties' contract").

1 Second and more importantly, any suggestion that the NAF's Code of Procedure
2 provides adequate and fair rules for arbitrating consumer disputes—after the NAF has been
3 forced to withdraw from all consumer arbitrations in the face of law enforcement actions
4 against it and a Congressional inquiry into its practices—cannot be taken seriously. While
5 Dell's in-house counsel previously testified that NAF was “a consumer-friendly forum,” Pape
6 Decl. ¶ 8 (Dkt. # 15), it is puzzling that Dell would continue to defend the NAF and seek to
7 “preserve[]” its rules, now that the fallacy of this position has been demonstrated. Other
8 corporations that had previously required arbitration before the NAF are responding by publicly
9 declaring that they will no longer require their customers to arbitrate at all. *See Terrell Decl.*
10 *Ex. C, at C3.* Regardless, it would be entirely inappropriate for this Court to require a reputable
11 arbitration organization such as JAMS or AAA to follow the rigged and discredited rules of a
12 defunct organization (NAF), which used to advertise for business from lenders specifically on
13 the grounds that it was less protective of consumer rights than competitors such as JAMS or
14 AAA. Therefore, if the Court compels arbitration it must allow whatever substitute
15 organization replaces NAF to apply the rules that it deems appropriate.

16 III. Conclusion

17 This Court should hold that Dell's class action ban and Texas choice-of-law clause are
18 unenforceable under *McKee* and grant relief from its Order compelling individual arbitration.
19 In the alternative, the Court should sever Dell's class action ban and compel arbitration, with
20 the proviso that any such arbitration must be conducted pursuant to the rules selected by the
21 neutral substitute arbitration provider.
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1 DATED this 24th day of August, 2009.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on August 24, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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