

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID GOLD et al.,

Plaintiffs and Appellants,

v.

MELT, INC., et al.,

Defendants and Respondents

B210452

(Los Angeles County
Super. Ct. No. BC377783)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William F. Highberger, Judge. Affirmed.

Bleau Fox, A P.L.C., Thomas P. Bleau, Melissa J. Rhee and Megan A. Childress
for Plaintiffs and Appellants.

Mulcahy Reeves and James M. Mulcahy; Law Offices of Rex T. Reeves and Rex
T. Reeves for Defendants and Respondents.

INTRODUCTION

Plaintiffs executed franchise agreements granting them the right to operate gelato franchises. The franchise agreement contained a “dispute resolution” provision requiring arbitration of disputes between a franchisee and the franchisor, requiring resolution of such arbitration on an individual basis, and prohibiting joining such individual arbitration to a class action or to other parties’ claims. Fifteen plaintiffs, in a class action, sued the franchisor and other defendants who were the franchisor’s officers and employees for unfair business practices, fraud, unjust enrichment, and declaratory relief. Based on the clause prohibiting class actions and multi-party litigation, the trial court sustained a demurrer without leave to amend and dismissed the complaint. Plaintiffs on appeal claim that the clause prohibiting class actions and multi-party litigation was unconscionable and therefore unenforceable. We conclude that plaintiffs have not shown either procedural or substantive unconscionability, and that the trial court properly sustained a demurrer without leave to amend and dismissed the complaint. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs sued defendants Melt, Inc., Melt (California) Inc. and Melt Franchising, LLC, (Melt) and individual defendants Clive V. Barwin, Brandon Barwin, Michael Zorehkey, Rick Zorehkey, Scott Miller, and Alin Cruz, who were alleged to be officers of Melt, and Eddie Ollman, who was alleged to have worked as a real estate developer, store locator, store designer, and consultant on behalf of Melt. Plaintiffs were David Gold and Elena Gold, who owned a Melt Gelato franchise in Valencia, California; EAOA, Inc., a California Corporation; Jong Han, who owned a Melt Gelato franchise in Simi Valley, California; Yoo & Lee Enterprises, Inc., a California corporation; Charindra Liyanage, who owned a Melt Gelato Franchise in Redondo Beach California; Liyanage Investments, LLC, a California limited liability company; Steven Field, who owned a Melt Gelato franchise in Estero, Florida; MMS Management, LLC and MMS Coconut Point, LLC, Florida limited liability companies; John Flannery, who owned a Melt Gelato franchise in Braintree, Massachusetts; and PMI Enterprises, Inc., a Massachusetts

corporation.¹ The complaint alleged that plaintiffs, who owned or operated Melt Gelato franchises, formed a class of persons whom Melt representatives solicited for potential Melt franchise development, who agreed to purchase a Melt Gelato franchise, and who suffered damages resulting from being fraudulently induced to purchase a Melt Gelato franchise and enter into a Melt franchise agreement.

The operative complaint alleged causes of action for damages and injunctive relief under state franchise acts, for restitution and injunctive relief under Business and Professions Code sections 17200 et seq. and 17500 et seq. of the Unfair Competition Law, for damages and injunctive relief under the Cartwright Act (Bus. & Prof. Code § 16700, et seq.), fraud, unjust enrichment, and declaratory relief. The complaint also alleged a cause of action for intentional interference with prospective economic relations brought by plaintiffs Jong Han, Yon Ho Kim, and Young Suk Kim.

On May 16, 2008, defendants Melt, Clive V. Barwin, Brandon Barwin, Eddie Ollman, and Alin Cruz demurred to the operative complaint on the following grounds: (1) plaintiffs misjoined parties by improperly uniting multiple parties even though the dispute resolution provision of the franchise agreement prohibited class claims or multi-party claims; (2) because the law applicable to each plaintiff was the law of the state in which each plaintiff's authorized location was located, plaintiffs failed to allege a proper class action brought by a class comprising plaintiffs from four different states; (3) plaintiffs lacked standing to assert a class or multi-party claim; and (4) the operative complaint failed to state a cause of action and was uncertain.

The trial court sustained the demurrer without leave to amend. The trial court found that the provision in the franchise agreements prohibiting class action and multi-party litigation was enforceable, and thus the first through the fifth causes of action and the seventh and eighth causes of action had a misjoinder of plaintiffs because those causes of action improperly united multiple parties, which was prohibited by the

¹ The appeal has been dismissed as to plaintiffs Yon Ho Kim and Young Suk Kim, who owned a Melt Gelato franchise in Las Vegas, Nevada, and as to Kang Won Lee, who owned Melt Gelato franchises in El Cajon and Chula Vista, California.

franchise agreements. As a second ground for sustaining the demurrer, the trial court found that the substantive law of various states would apply to claims of the various plaintiffs, the plaintiffs lacked sufficient unity of interest for a consolidated action and the action was not suitable for class action or consolidation, even if the franchise did not prohibit class and multi-party actions. Each plaintiff, moreover, had asserted multiple claims under laws of states not their own, which claims were improper in light of the choice of law provisions in the franchise agreements. The trial court sustained the demurrer on this ground without leave to amend as to claims asserted by plaintiffs under the laws of states other than their own.

The trial court ordered the matter dismissed as to defendants Brandon Barwin, Eddie Ollman and Scott Miller. The trial court ordered the matter dismissed with respect to all causes of action asserted by Plaintiffs David Gold, Elena Gold; EAOA, Inc.; Steven Field; MMS Management, LLC; MMS Coconut Point, LLC; Kang Won Lee; Yoo & Lee Enterprises, Inc.; Charindra Liyanage; Liyanage Investments, LLC; John Flannery; and PMI Enterprises as against defendants Melt, Inc, Melt (California) Inc., Melt Franchising, LLC, Clive V. Barwin, and Alin Cruz.

Plaintiffs filed a notice of appeal.²

² Plaintiffs filed a notice of appeal “from the Judgment made and entered in the above-entitled action on June 30, 2008, in favor of Defendants Melt, Inc., et al., and against Plaintiffs David Gold, et al.” The notice of appeal erroneously designates the date of the judgment. The document filed on June 30, 2008, was a request by plaintiffs to dismiss without prejudice the cause of action for violation of state franchise acts, which was not a judgment and which, as a voluntary dismissal without prejudice, is not appealable (*Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1342-1343). We construe a notice of appeal liberally in favor of its sufficiency. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 333, fn. 1; Cal. Rules of Court, rule 8.100(a)(2).) A notice of appeal “is sufficient if it identifies the particular judgment or order being appealed.” (Cal. Rules of Court, rule 8.100(a)(2).) Although a notice of appeal is not adequate if it omits any reference to the judgment being appealed (*Shiver, McGrane & Martin v. Littell* (1990) 217 Cal.App.3d 1041), a mistake concerning the date of the order appealed from does not invalidate the appeal where the notice identifies the order sufficiently. (*Verdier v. Verdier* (1953) 118 Cal.App.2d 279, 283.) The clear intention of the notice of appeal was to appeal from an appealable judgment, not from a non-appealable voluntary dismissal of

ISSUES

Plaintiffs claim on appeal that:

1. The trial court erroneously determined that the cooling-off period in the franchise agreement reduced the element of procedural unconscionability so that unconscionability did not need to be addressed;
2. The trial court erroneously created a distinction between commercial contracts (such as franchise agreements) and consumer contracts;
3. The franchise agreements prohibiting multi-party and class action claims are unconscionable, unenforceable, and against public policy.

DISCUSSION

1. *Plaintiffs Forfeit Any Claim of Error From the Sustaining of the Demurrer Without Leave to Amend as to Causes of Action in Which Plaintiffs Violated the Franchise Agreement by Asserting the Law of States Other Than Those in Which a Plaintiff's Franchise Was Located*

The franchise agreement stated that the parties' rights under the agreement, and the relationship between the parties, was governed by and would be interpreted in accordance with the laws of the state in which the Authorized Location was located.³ All

June 30, 2008. Therefore we construe the notice of appeal as having been taken from the judgment of dismissal filed on August 6, 2008, which is an appealable order (*Smyth v. USAA Property & Casualty Ins. Co.* (1992) 5 Cal.App.4th 1470, 1473; *D'Hondt v. Regents of University of California* (1984) 153 Cal.App.3d 723, 726, fn. 2).

³ The franchise agreement stated: "Subject to our rights under federal trademark laws and the parties' rights under the Federal Arbitration Act in accordance with Paragraph 12 of this Agreement, the parties' rights under this Agreement, and the relationship between the parties is governed by, and will be interpreted in accordance with, the laws (statutory and otherwise) of the state in which the Authorized Location is located. You waive, to the fullest extent permitted by law, the rights and protections that might be provided through the laws of any state relating to franchises or business opportunities, other than those of the state in which the Authorized Location is located." "Authorized Location" was defined as the franchisor's grant of the right and license to establish and operate a retail Gelato Bar identified by trademarks identified in an appendix to the franchise agreement, in a location identified in each plaintiff's franchise agreement.

plaintiffs brought causes of action under the laws of California, Florida, and Massachusetts; thus plaintiffs violated the franchise agreement by asserting the law of states other than those in which their authorized location was located. The trial court found that plaintiffs attempted to assert multiple claims under laws of states not their own, and because such claims were improper under the choice of law provision in the franchise agreements, sustaining of the demurrer without leave to amend was required. Plaintiffs' opening brief makes no claim of error concerning the sustaining of the demurrer without leave to amend on this ground. Plaintiffs therefore forfeit any claim of error as to dismissal of these causes of action on this ground. (*Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1096.)

2. Plaintiffs Have Not Shown That the Prohibition of Class Actions and Multi-Party Litigation Was Unconscionable

Plaintiffs make three arguments concerning unconscionability: (1) that the trial court erroneously determined that the "cooling-off period" in the franchise agreement reduced the element of procedural unconscionability so that substantive unconscionability did not need to be addressed; (2) that the trial court erroneously distinguished between commercial contracts (such as franchise agreements) and consumer contracts; and (3) that franchise agreements prohibiting multi-party and class action claims are unconscionable, unenforceable, and against public policy.

These claims of unconscionability arise from a "dispute resolution" provision of the franchise agreement, which states, in relevant part: "A. Arbitration; Mediation. Except as qualified below, any dispute between you and us or any of our or your affiliates arising under, out of, in connection with or in relation to this Agreement, any lease or sublease for the Gelato Bar or Authorized Location, the parties' relationship, or the business must be submitted to binding arbitration under the authority of the Federal Arbitration Act and must be arbitrated in accordance with the then-current rules and procedures and under the auspices of the American Arbitration Association. . . . Any arbitration must be resolved on an individual basis and not joined as part of a class action or the claims of other parties."

a. *Unconscionability*

The unconscionability doctrine allows courts to consider numerous factors which may adulterate the contractual process. Any clause of a contract may be unconscionable. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 484.) Provisions in franchise agreements can be examined to determine if they show the characteristics of unconscionability. (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App.4th 396, 407.) Unconscionability includes one party's absence of meaningful choice, together with contract terms unreasonably favorable to the other party. Thus unconscionability had both a procedural and a substantive element. (*A & M Produce Co.*, at p. 486.)

The procedural element of unconscionability focuses on "oppression" or "surprise" arising from unequal bargaining power. The procedural element of an unconscionable contract generally takes the form of a contract of adhesion which the party of superior bargaining strength imposes and drafts and which it forces the subscribing party to adhere to the contract or reject it. Contract terms which are substantively unconscionable may take various forms, but generally are described as unfairly one-sided. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) "[A]lthough adhesive contracts are generally enforced [citations], class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy." (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 160-161.) Civil Code section 1668 prohibits such exculpatory contract clauses: " 'All contracts *which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.*' " (*Discover Bank v. Superior Court.*, at p.161.)

Procedural and substantive unconscionability must both be present for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable. They need not, however, be present in the same degree. A sliding scale is used which disregards the procedural regularity of contract formation that creates the terms, in proportion to the greater harshness or unreasonableness of those substantive terms. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) “In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (*Ibid.*)

b. *Plaintiffs Have Not Shown That the Trial Court Erroneously Failed to Find Procedural Unconscionability or Failed to Consider Substantive Unconscionability*

Plaintiffs argue that the trial court erroneously ruled that a “cooling off period” in the contract “reduces the element of procedural unconscionability to the bare minimum needed to advance to a consideration of substantive unconscionability.” The trial court referred to a provision in the franchise agreement which required franchisees to receive a copy of the franchise agreement at least five business days before the date the franchise agreement was executed.⁴

Plaintiffs seem to have misconstrued the trial court’s ruling. It did not find that the cooling off period eliminated procedural unconscionability and relieved the trial court from addressing substantive unconscionability. As the quotation from the judgment states, the trial court found that the cooling off period reduced procedural

⁴ In the “acknowledgement addendum to franchise agreement,” plaintiffs answered questions and executed the acknowledgement addendum. The third acknowledgment asked: “Did you receive a copy of the Franchise Agreement at least 5 business days prior to the date on which the Franchise Agreement was executed?” Most of the plaintiffs also signed a “receipt” stating that the plaintiff had received the 2005 Uniform Franchise Offering Circular, which included the Franchise Agreement, at least five business days before plaintiff signed that Franchise Agreement.

unconscionability to the bare minimum necessary for the court to consider substantive unconscionability.

Plaintiff cites three cases. *Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159 found that where the contract disclosed no procedural unconscionability, it was not necessary to address whether there was a showing of substantive unconscionability. (*Id.* at p. 1167.) That is not true in this case, however; the trial court stated that the cooling-off period reduced procedural unconscionability to the bare minimum necessary for the court to consider substantive unconscionability, which the court then proceeded to consider. *Nagrampa v. MailCoups, Inc.* (9th Cir. 2006) 469 F.3d 1257 found that where a franchisor had overwhelming bargaining power, drafted the franchise agreement, and presented it to the franchisee on a take-it-or-leave-it basis, that was sufficient to require analysis of whether the contract was substantively unconscionable. (*Id.* at p. 1284.) *IJL Dominicana S.A. v. It's Just Lunch Intern., LLC* (C.D.Cal. Feb. 6, 2009, No. CV 08-5417-VAP (OPx)) 2009 WL 305187, an unpublished federal district court case, similarly held that minimal evidence of procedural unconscionability was sufficient to require examination of substantive unconscionability. (*Id.* at p. 3.) These cases are consistent with the trial court's determination that procedural unconscionability, although minimal, was sufficient to require the trial court to consider substantive unconscionability.

c. Plaintiffs Have Not Shown Error Because of the Trial Court's Distinction Between Commercial Contracts and Consumer Contracts

Plaintiffs argue that the trial court erroneously created a distinction between commercial contracts (such as franchise agreements) and consumer contracts. Plaintiffs claim that this distinction is erroneous under *Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704 (*Sealy*). In *Sealy*, a franchisor and a franchisee entered into a 20-year franchise agreement, in which the franchisees agreed to pay monthly royalty and advertising fees. The franchise agreement defined failure to pay a monthly royalty or advertising fee as a "material breach." When the franchisees failed to make timely royalty and advertising fee payments, the franchisor declared a material breach,

terminated the franchisees, and sued them for breach of contract, seeking \$73,000 in unpaid royalties, and future royalties and payments for the remaining unfulfilled term of the franchise agreement of at least \$495,699. The franchisor obtained a judgment of \$432,510.35, which award of damages included \$301,334 in “estimated future profits” for the nearly eight years remaining in the franchise agreement. (*Id.* at pp. 1706-1709.) *Sealy* reversed the part of the judgment awarding expectancy damages as estimated future lost profits, for two reasons. First, the nonbreaching franchisor was entitled to recover only those damages proximately caused by the specific breach; the franchisee’s breach—its failure to make timely *past* royalty payments and advertising fees owed to the franchisor—was not a natural and direct cause of the franchisor’s failure to receive *future* royalty payments and advertising fees. Therefore the franchisor was not entitled to these damages. (*Id.* at pp. 1709-1710, 1713.)

Second, *Sealy* held that the “lost future profits” damages award would violate the prohibition of “unreasonable, unconscionable or grossly oppressive” damages. (*Sealy, supra*, 43 Cal.App.4th at pp. 1713-1714.) Recovery of past unpaid royalties, attorney fees and costs, and the right to install a new franchisee in what had been the defendant franchisee’s exclusive territory provided the franchisor with a full measure of reasonable damages. Additional damages for “lost future royalties” provided the franchisor with disproportionate compensation which was unreasonable, unconscionable, and a grossly oppressive imposition on its franchisee. (*Id.* at pp. 1715, 1717.) It was in this context that the *Sealy* opinion stated that although franchise agreements were commercial contracts, they exhibited many attributes of consumer contracts. (*Id.* at p. 1715.) These attributes included the inequality of economic resources between franchisees and franchisors, a “gross bargaining disparity” reflected in franchise agreements being offered on a take-it-or-leave-it basis and in those agreements often allowing the franchisor to terminate the agreement or refuse to renew it for virtually any reason. (*Id.* at p. 1716.) *Sealy* concluded that the “lost future profits” award to the franchisor expanded “the already enormous bargaining gap between this franchisor and this franchisee[,]” that such an award would be excessive, unconscionable, and oppressive

under Civil Code section 3359, and would provide the franchisor with disproportionate compensation. (*Sealy*, at p. 1717.) “To sanction such an award in this case would so unbalance the relationship between franchisors and franchisees as to threaten to convert every franchise agreement allowing such damages into an unconscionable and oppressive contract.” (*Id.* at p. 1718.)

Sealy differs from this appeal in several ways. *Sealy* involved a franchisor’s suit for breach of contract against a franchisee, as distinct from the plaintiff franchisees’ suit here against franchisor Melt. The issue in *Sealy* was whether a judgment could properly award damages for unpaid future royalties and advertising fees for the unexpired term of the franchise agreement, an issue not present in this dispute between plaintiffs and Melt. The determination in *Sealy* that the damages award of future profits was unreasonable, unconscionable, or grossly oppressive in violation of Civil Code section 3359 did not depend on attributes shared by commercial and consumer contracts. Plaintiffs have not shown error based on *Sealy*.

d. *Plaintiffs Have Not Shown That Franchise Agreements Prohibiting Multi-Party Litigation and Class Actions Are Unconscionable or Against Public Policy*

Plaintiffs claim that under the law of plaintiffs’ home states,⁵ franchise agreements prohibiting multi-party and class action claims are unconscionable, unenforceable, and against public policy.

i. *California*

Plaintiffs argue that in California, class action waivers in contracts of adhesion are unenforceable, citing *Discover Bank v. Superior Court*, supra, 36 Cal.4th 148 (*Discover Bank*).

⁵ The appeal has been dismissed as to Nevada plaintiffs Yon Ho Kim and Young Suk Kim, and therefore this opinion addresses claims of unconscionability of plaintiffs from California, Florida, and Massachusetts.

In *Discover Bank*, plaintiff alleged that Discover Bank represented to credit cardholders that it would not assess late payment fees if it received payments by a certain date, but Discover Bank in fact assessed those fees if payment was received after 1:00 p.m. on that date, a practice which led to small damages for each individual cardholder but to large damages in the aggregate. After Discover Bank successfully moved to compel arbitration of plaintiff's claim pursuant to its arbitration clause in the cardholder agreement, plaintiff sought to pursue classwide arbitration. A provision in the arbitration agreement, however, prohibited classwide arbitration of disputes. (*Discover Bank, supra*, 36 Cal.4th at p. 152.) Plaintiff contended that class action or arbitration waivers in consumer contracts should be invalidated as unconscionable under California law. (*Id.* at p. 160.)

Limiting its holding to arbitration and class action waivers in consumer contracts, *Discover Bank* held that at least some of those waivers were unconscionable under California law. An element of procedural unconscionability occurs when a cardholder receives an amendment to a cardholder agreement which he is deemed to accept if he does not close the account. (*Discover Bank, supra*, 36 Cal.4th at p. 160.) Class action waivers in cardholder agreements may be substantively unconscionable when they operate as exculpatory contract clauses (which have as their direct or indirect object to exempt anyone from responsibility for his own fraud or willful injury to another's person or property, or for violation of the law) that are contrary to public policy. (*Id.* at p. 161.) Waivers of class actions and class arbitration are not invariably exculpatory clauses. Yet where an individual plaintiff's damages in a consumer case are small and a company that wrongfully exacts that small amount from a large number of consumers will reap a large profit, a class action or arbitration waiver functions as an exculpatory clause. That is because the individual cardholder's prospective recovery is so small that it provides little incentive for that individual to bring a solo action to vindicate his or her rights. (*Id.* at pp. 161, 156-157.) Class action or arbitration waivers are also one-sided; they prohibit cardholders from joining to sue a credit card company, but since credit card companies typically do not join together to sue cardholders in class action lawsuits, the prohibition

has little or no impact on credit card companies. “Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.” (*Id.* at p. 161.)

Discover Bank concluded: “We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163; italics added.)

Thus class action waivers in contracts of adhesion are unenforceable as unconscionable in the limited circumstances described in *Discover Bank*. Those circumstances are not present in the franchise agreements between Melt and plaintiffs. Those franchise agreements are not consumer contracts involving large numbers of consumers. They do not involve small amounts of damages for each of those consumers.⁶ The Melt franchise agreements do not show that Melt, a party with superior

⁶ Although the prayer for relief in the complaint does not allege specific amounts, elsewhere the complaint makes numerous allegations about defendants’ representations to plaintiffs about amounts necessary to invest in a Melt franchise, income to be expected from operation of a franchise, and the value of a franchise once opened. The amounts alleged are not small. The complaint alleges that on August 24, 2005, defendant Clive Barwin told plaintiff Han it would cost \$200,000 to open a Melt franchise, and that once the store was open it would be worth more than \$400,000. The complaint alleges that on October 27, 2005, Barwin told Han it would cost \$220,000 to open a Melt franchise at Simi Valley Town Center. The complaint alleged that in July 2006, defendant Cruz told plaintiffs Yon Ho Kim and Young Suk Kim it would cost \$260,000 to open a Melt

bargaining power, deliberately cheated large numbers of consumers of individually small sums of money. The elements of unconscionability not being present, we conclude that the class action waivers in the Melt franchise agreements are enforceable.

ii. *Florida*

Plaintiffs argue that in Florida, class action waivers in contracts of adhesion are unenforceable.

Plaintiffs cite two Florida cases in support. *S.D.S. Autos, Inc. v. Chrzanowski* (Fla.App. 1 Dist. 2007) 976 So.2d 600 (*S.D.S. Autos*) held invalid an arbitration provision precluding consumers (lessees of automobiles) from bringing a class action against motor vehicle dealers under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA). The dealers charged an administrative fee which gave rise to small claims that were impractical for consumers to litigate or arbitrate individually, but which were alleged to total a large amount of money when considered collectively. Disallowing class relief would prevent consumers with small individual claims based on motor vehicle dealers' violation of a Florida statute from vindicating their rights under the FDUTPA. (*Id.* at pp. 607-608.) Therefore plaintiffs could not be precluded from seeking class relief. (*Id.* at p. 610.)

franchise. In October 2005, Clive Barwin told plaintiff Lee it would cost \$250,000 to open a Melt franchise. The complaint alleged that Clive Barwin and Cruz told plaintiff Flannery it would cost \$200,000 to open a Melt franchise, and that it would be worth more than double that investment once the store was open. The complaint alleged that in October 2006, Cruz told plaintiff Field that the average profit for a Melt franchise was \$10,000 per month. Clive Barwin made the same representation to plaintiff Han on August 24 and 27, 2005, and (with defendant Ollman) to plaintiff Lee from October to December 2005. The complaint alleged that in January 2006, Clive Barwin told plaintiff Liyanage that other Melt franchise locations had annual revenue of \$450,000, and in May 2006, told plaintiff Flannery that the average profit for a Melt franchise was \$10,000 per month. The complaint alleged that on June 22, 2006, Cruz told plaintiffs Kim that the location chosen for their Melt franchise did \$1,115 per square foot in sales per year. The complaint alleged that in August 2006, Cruz and Ollman told Flannery that the location chosen for his Melt franchise did \$1,000 per square foot in sales per year, and Cruz told Flannery that location would make approximately \$1 million in its first year of operation.

Powertel, Inc. v. Bexley (Fla.App. 1 Dist. 1999) 743 So.2d 570 (*Powertel*) held invalid an arbitration provision requiring customers of Powertel, a cellular telephone company, to arbitrate claims arising from Powertel's service. *Powertel* found the arbitration provision procedurally unconscionable for several reasons. The arbitration provision was also substantively unconscionable because it required customers to give up other legal remedies, limited Powertel's liability to actual damages, and forced customers to waive statutory remedies. By requiring arbitration of all claims, Powertel also precluded the possibility that customers might join together to seek relief that would be impractical for one of them to obtain. Thus the arbitration provision benefited Powertel, but penalized plaintiffs whose claims were too small to litigate individually. (*Id.* at p. 574-576.)

Both *S.D.S. Autos, Inc.* and *Powertel*, therefore, correspond to the limited holding of *Discover Bank*. Both *Powertel* and *S.D.S. Autos* invalidated prohibitions on class relief in consumer contracts that gave rise to claims under consumer protection statutes. (*S.D.S. Autos, supra*, 976 So.2d at p. 610; *Powertel, supra*, 743 So.2d at pp. 576-577.) Plaintiff's Florida authorities do not apply to a case such as this one, which does not arise from consumer contracts involving large numbers of consumers and does not involve small amounts of damages for each of those consumers.

Defendants assert that no Florida authority holds that a contract provision prohibiting multi-party litigation or arbitration is unenforceable generally or is unenforceable in a franchise agreement. Defendants cite *VoiceStream Wireless v. U.S. Communications* (Fla.App. 4 Dist. 2005) 912 So.2d 34 (*VoiceStream Wireless*), in which four corporations (the dealers) contracted with VoiceStream, a wireless service provider, to sell cellular phone service and contract with subdealers to do the same. The dealers later sued VoiceStream, alleging violations of the Florida Franchise Act and tortious interference with a business relationship. VoiceStream moved to stay the litigation pending arbitration, based on an arbitration clause in the contract. That arbitration clause did not prohibit multi-party litigation or class-wide arbitration. However, it did require submission of all claims between the dealers and VoiceStream to binding arbitration, and

gave VoiceStream the right to submit such disputes to an arbitration or mediation service of its choosing. *VoiceStream Wireless* found no procedural unconscionability, despite the dealers' inability to negotiate terms and the lack of an alternative source for the product those dealers sought to obtain from VoiceStream. "These parties were entering into a business agreement which provided that VoiceStream was going to supply the Dealers with a product they would use in their business venture." (*Id.* at p. 39.) No facts supported the argument that a substantial disparity existed between the parties, and therefore *VoiceStream* rejected the argument that the dealers had unequal bargaining power. The dealers were conducting a commercial transaction, were represented by experienced business persons, and had ample opportunity to read the contract and seek advice of counsel. No evidence showed that the contract was executed during a vulnerable time or that the dealers were not aware of the consequences of signing the contract. The arbitration agreement was not hidden or in fine print, and there was no indication that circumstances surrounding execution of the contract hindered the dealers' ability to understand its terms. (*Ibid.*) The "take it or leave it" nature of the adhesive contract did not require a finding of procedural unconscionability. (*Id.* at p. 40.)

VoiceStream Wireless also found that the contract was not substantively unconscionable. Although the arbitration clause gave VoiceStream discretion to choose which entity would conduct the arbitration, it required arbitration of all disputes between the parties. Although the arbitration clause gave VoiceStream the choice of the forum in which to conduct the arbitration, "[t]he fact that a forum selection clause in a contract executed between two commercial entities may make proceeding on one's claim more expensive than if the forum selection clause was not included, is not so outrageous as to require the arbitration clause to be found substantively unconscionable." (*VoiceStream Wireless, supra*, 912 So.2d at p. 41.)

VoiceStream Wireless indicates that Florida law would not find an arbitration clause in a franchise agreement prohibiting multi-party litigation or class-wide arbitration to be unenforceable. As in *VoiceStream Wireless*, the plaintiffs appeared to lack the ability to negotiate terms of the Melt franchise agreement. The complaint does not allege that plaintiffs had no alternative source for gelato franchises, that a substantial disparity existed between the parties to the Melt franchise agreement, or that the plaintiffs were inexperienced business persons, lacked an opportunity to read the contract and seek advice of counsel, or were not aware of the consequences of signing the contract. The arbitration agreement was not hidden or in fine print. The adhesive nature of the Melt franchise agreement would not require a finding of procedural unconscionability. Finally, even though the prohibition of multi-party litigation or class-wide arbitration would make it more expensive for individual plaintiffs to litigate claims against Melt, *VoiceStream Wireless* indicates that Florida law would not find that provision so outrageous as to determine the arbitration clause to be substantively unconscionable.

Thus we conclude that the class action waivers in the Melt franchise agreements would be enforceable under Florida law.

iii. *Massachusetts*

Plaintiffs argue that in Massachusetts, class action waivers in contracts of adhesion are unenforceable.

Plaintiffs cite two federal cases applying Massachusetts law in support. *Storie v. Household International, Inc.* (D.Mass. Sept. 22, 2005, No. 03-40268-FDS) 2005 WL 3728718 (*Storie*), an unpublished federal district court case applying Massachusetts law, held that an arbitration clause in the Arbitration Rider in a home equity loan contract, in which either party could invoke binding arbitration, was not procedurally unconscionable, despite being a contract of adhesion. The *Storie* court was not persuaded that the take-it-or-leave-it character of the arbitration clause, combined with plaintiffs' financial distress (due to a recent decrease in their stock portfolio, a modest income, unsecured debt, and a high debt-to-income ratio) and defendants' "intrusive marketing" unfairly influenced plaintiffs' decision to enter into the contract containing the arbitration

clause. Because plaintiffs did not allege that the arbitration clause was riddled with improprieties in its formation, was hidden or obscured in a prolix form, or had the potential for unfair surprise, or that plaintiffs lacked sufficient time to consider the agreement, *Storie* found the Arbitration Rider was not procedurally unconscionable. (*Id.* at p. 9.) *Storie* stopped there, and did not reach the issue whether the arbitration clause was substantively unconscionable. (*Id.* at p. 10.) *Storie* thus provides no support for the unenforceability of class action waivers.

Skirchak v. Dynamic Research Corp. (2007) 508 F.3d 49 (*Skirchak*) affirmed the striking of a class action waiver on grounds of unconscionability. Plaintiffs filed a class action complaint against their employer alleging violations of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201 et seq.) and the Massachusetts Minimum Fair Wage law because of the employer's failure to pay "exempt" employees for overtime work. The employer moved to dismiss the complaint and compel arbitration in accordance with its dispute resolution program which, it claimed, required arbitration of all disputes and required plaintiffs to proceed in arbitration individually and not in a class action. The trial court issued an order compelling arbitration, but struck the prohibition of class actions as unconscionable under Massachusetts law. Defendant employer appealed the latter order striking the class action waiver. (*Skirchak*, at p. 52.) *Skirchak* found the waiver unenforceable under Massachusetts law, based on several circumstances. (*Id.* at p. 59.) First, the timing of the employer's imposition of the class action waiver occurred in a lengthy e-mail sent to employees two days before Thanksgiving. It did not state that it modified the employment contract, and in fact said that there was no limitation or change to employees' substantive legal rights. Employees would have to search the e-mail and its multiple attachments to find the assertion that the employee consented to the changed terms of employment by returning to work the following Monday, and no other response was required from employees. The *Skirchak* court found that the class action waiver was hidden and did not provide fair notice to employees; provided no opportunity for employees to signify acceptance of the contractual term waiving statutory rights (the FLSA provided that actions for FLSA violations could be brought as class actions); and

that notice of the class action waiver was communicated less effectively as compared to how the employer handled other personnel issues. (*Id.* at pp. 60-61.) *Skirchak* limited its decision to the circumstances in the case, and expressly did not decide if class actions under the FLSA could ever be waived by agreement, or whether such waivers of FLSA class actions were against public policy. (*Id.* at pp. 52, 62.) Thus *Skirchak*'s decision affirmed the striking of the class action waiver as procedurally unconscionable. The facts and circumstances in *Skirchak* have no analogy to those of the Melt franchise agreement. The Melt franchise agreement did not contain contradictory and ambiguous statements about the class action waiver; it gave plaintiffs at least five days from receipt of the franchise agreement to execute that agreement; the class action waiver was not buried in e-mailed attachments totaling more than 35 pages, but instead appeared in a clearly labeled "dispute resolution" provision of the Melt franchise agreement; plaintiffs' acceptance of the contractual term had no analogy to the method of acceptance required in *Skirchak*; and the class action waiver in the Melt franchise agreement did not waive plaintiffs' statutory rights,⁷ as occurred in *Skirchak*. *Skirchak* thus does not indicate that under Massachusetts law the Melt franchise agreement would be found procedurally unconscionable.

Plaintiffs have not shown that under Massachusetts law the franchise agreements prohibiting multi-party and class action claims were unenforceable as unconscionable.

⁷ Plaintiffs allege that the Melt franchise agreement violated a Massachusetts statute, MA St Pt.I, T. XV, Ch. 93A, § 2 and that this was a violation of plaintiffs' statutory rights in Massachusetts. Ch. 93A, § 2, however, did not create a statutory right to multi-party or class action litigation. Ch. 93A, § 2 prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Under Massachusetts law, "when waiver of statutory rights is at issue, Massachusetts generally requires that the waiver be both knowing and voluntary." (*Skirchak, supra*, 508 F.3d at p. 59.) Because plaintiffs have no statutory right to multi-party or class action litigation in Massachusetts, this rule is not implicated.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.