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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KATHI DURAN,

Plaintiff and Respondent,

v.

DISCOVER BANK,

Defendant and Appellant.

B203338

(Los Angeles County  
Super. Ct. No. BC256167)

APPEAL from an order of the Superior Court of Los Angeles County.

Carl J. West, Judge. Affirmed.

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Stroock & Stroock & Lavan, Julia B. Strickland, Scott M. Pearson and Nancy M. Lee for Defendant and Appellant.

Law Offices of Barry L. Kramer, Barry L. Kramer; Strange & Carpenter, Brian R. Strange and Gretchen Carpenter for Plaintiff and Respondent Kathi Duran.

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Discover Bank appeals from the trial court's denial of its motion to compel arbitration. We affirm.

### BACKGROUND

Our most recent opinion in this action contains the following summary of the early factual and procedural history of the litigation: “[The original plaintiff, Christopher] Boehr, a California resident, obtained a credit card from Discover Bank in 1986. Discover Bank is domiciled in Delaware, and the cardholder agreement contained a choice-of-law clause providing for the application of Delaware and federal law. In 1999, Discover Bank amended the cardholder agreement by adding an arbitration clause that prohibited both parties to the agreement from participating in classwide arbitration, consolidating claims, or arbitrating claims as a representative or in a private attorney general capacity. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 152-153 . . . [*Discover Bank I*].)

“In 2001, Boehr filed a putative nationwide class action against Discover Bank in the superior court, alleging claims for breach of contract and violation of the Delaware Consumer Fraud Act. He alleged that Discover Bank had breached the cardholder agreement by imposing late fees and finance charges on payments that were received on the payment due date but after Discover Bank's undisclosed 1:00 p.m. deadline. Boehr conceded in his complaint that, because of the choice-of-law provision, Delaware law would govern his ‘substantive claims,’ but he alleged that ‘other issues related to the contract’ would be ‘governed by California or other applicable law.’ ([*Discover Bank I*], *supra*, 36 Cal.4th at p. 154.)

“Discover Bank moved to compel arbitration on an individual basis. The trial court ultimately determined that the class action waiver was unenforceable under California law and that enforcement of the class action waiver under Delaware law would contravene a fundamental public policy of California law. The trial court severed the class action waiver from the agreement and ordered Boehr to arbitrate his claim, leaving open the possibility that Boehr could certify an arbitration class. Discover Bank then

sought and obtained writ relief from us on the grounds that the Federal Arbitration Act (FAA) preempts California law to the extent that California law renders class action waivers unenforceable. We thus held that the class action waiver provision was enforceable under the FAA and therefore never considered the choice-of-law issue now before us. (*Discover Bank I*, *supra*, 36 Cal.4th at p. 155.)

“The Supreme Court granted Boehr’s petition for review. The court held that under certain circumstances California law does prohibit enforcement of class action waivers without being preempted by the FAA. The Supreme Court acknowledged, however, that we had not decided whether the enforceability of the waiver should be governed by Delaware law rather than California law, pursuant to the choice-of-law provision in the cardholder agreement. The case was remanded to us to resolve that issue and, if necessary, to determine whether the class action waiver would be enforceable under Delaware law. (*Discover Bank I*, *supra*, 36 Cal.4th at pp. 162-163, 172-174.)” (*Discover Bank v. Superior Court* (2005) 134 Cal.App.4th 886, 889-890 (*Discover Bank II*.)

On remand from the Supreme Court, we held that the enforceability of the class action waiver should be governed by Delaware law, under which it is enforceable. (*Discover Bank II*, *supra*, 134 Cal.App.4th at p. 889.) Our analysis of the choice-of-law issue relied on the circumstances that (1) Boehr alleged claims under Delaware law and none under California law, and (2) Boehr sought to represent a putative nationwide class, not a putative class of Californians. (*Id.* at pp. 894-895.) We directed the trial court to grant Discover Bank’s motion to compel arbitration, requiring Boehr to arbitrate on an individual basis. (*Id.* at p. 898.)

On remand from this court, Boehr’s claim against Discover Bank proceeded to arbitration. On January 16, 2007, the arbitrator issued an award in favor of Discover Bank on all of Boehr’s claims. On June 27, 2007, the superior court entered an order confirming the award.

Before commencing the arbitration, however, Boehr moved the superior court for leave to file a first amended complaint, adding claims under the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.) and the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). On June 23, 2006, the court granted the motion.

Next, after the arbitrator issued the award in favor of Discover Bank, Boehr filed a second amended complaint in which he both added Kathi Duran (another holder of a credit card issued by Discover Bank) as a plaintiff, narrowed the proposed putative class to “all persons with billing addresses in the state of California,” and deleted his claims under Delaware law, leaving only the claims under the CLRA and the UCL. Duran later dismissed the CLRA claim.

When Duran opened her credit card account with Discover Bank, her “Cardmember Agreement” contained an arbitration provision that included a class action waiver. The agreement also contained, under the heading “ACCEPTANCE OF AGREEMENT,” the following “opt-out” provision concerning arbitration: “The use of your Account or a Card by you or an Authorized User, or your failure to cancel your Account within 30 days after receiving a Card, means you accept this Agreement, including the Arbitration of Disputes provision on page 11. You may, however, reject the Arbitration of Disputes section by providing us a notice of rejection within 30 days after receiving a Card, at the following address: Discover Card, P.O. Box 30938, Salt Lake City, UT 84130-0938. If you were previously subject to arbitration with respect to any Account, this right to reject arbitration will not apply to you in the event that the Account has been reopened or replacement Cards are sent to you. Your rejection notice must include your name, address, telephone number, Account number and signature and must not be sent with any other correspondence. Calling us to indicate that you reject the Arbitration of Disputes section or sending a rejection notice in a manner or format that does not comply with all applicable requirements is insufficient notice. In order to process your notice, we require that the notice be provided by you directly and not through a third party. Rejection of arbitration will not affect your other rights or

responsibilities under this Agreement or your obligation to arbitrate disputes under any other account as to which you and we have agreed to arbitrate disputes. If you do not send a rejection notice, you will be obligated by the Arbitration of Disputes section with respect to this and any prior account you have had with us, even if you have previously sent a rejection notice with respect to that prior account.” Duran did not reject the arbitration provision of the agreement and has used her card.

On July 20, 2007, Discover Bank moved to compel individual arbitration of Duran’s claim and to stay the litigation pending arbitration. On September 24, 2007, the trial court denied the motion. The court concluded that California law governed the enforceability of the class action waiver and that the waiver is unconscionable and hence unenforceable under California law. Discover Bank timely appealed.<sup>1</sup>

#### STANDARD OF REVIEW

When the relevant facts are undisputed, we review de novo the trial court’s ruling on the enforceability of a contractual choice-of-law provision. (*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1320.) We likewise review de novo the trial court’s ruling on the enforceability of a contractual arbitration provision, given that the relevant facts are undisputed. (*Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1164.)

#### DISCUSSION

##### I. Choice of Law

Discover Bank contends the trial court erred when it determined that the enforceability of the class action waiver is governed by California law. We disagree.

In determining the enforceability of contractual choice-of-law provisions, including those in “consumer adhesion contracts,” California follows section 187, subdivision (2) of the Restatement Second of Conflict of Laws (Restatement). (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 916-918.) “[T]he

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<sup>1</sup> Discover Bank’s request for judicial notice is granted.

proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue . . . .' (Rest., § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.'" (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466, fns. omitted.)<sup>2</sup>

The trial court found, and no party denies, that Delaware has a substantial relationship to the parties or their transaction. Discover Bank does deny, however, that Delaware law on the enforceability of class action waivers is contrary to a fundamental policy of California. We held in *Discover Bank II* that such waivers are enforceable under Delaware law (*Discover Bank II, supra*, 134 Cal.App.4th at pp. 891-893), and Duran does not argue to the contrary. Thus, we must determine whether enforcement of the class action waiver (pursuant to Delaware law) would be contrary to a fundamental policy of California. And to do that, we must first determine whether under California law the class action waiver is unconscionable and hence unenforceable in this case. The trial court concluded that it is, and we agree.

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<sup>2</sup> Technically, the inquiry is not whether there is a conflict with a fundamental policy of California, but whether there is a conflict with a fundamental policy of the state whose law would apply under Restatement section 188 in the absence of a contractual choice of law. (Rest., § 187, subd. (2).) Discover Bank does not argue that Delaware law, or any law other than California's, would apply in this case in the absence of a contractual choice of law.

### A. Enforceability of the Class Action Waiver Under California Law

“To briefly recapitulate the principles of unconscionability, the doctrine has “both a “procedural” and a “substantive” element,’ the former focusing on “oppression” or “surprise” due to unequal bargaining power, the latter on “overly harsh” or “one-sided” results.” [Citation.] The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, “which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” . . . [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.” (*Discover Bank I, supra*, 36 Cal.4th at p. 160.)

“The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.’ [Citation.] But they need not be present in the same degree. ‘Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.’ [Citations.] 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.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114, italics omitted.)

In determining whether the class action waiver is unconscionable and hence unenforceable in this case, we are aided by the Supreme Court’s decision in *Discover Bank I*, as well as the Court of Appeal’s decisions in *Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283 (*Klussman*) and *Aral v. Earthlink, Inc.* (2005) 134 Cal.App.4th 544 (*Aral*).

In *Discover Bank I*, the Supreme Court held that when a class action 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 I, supra*, 36 Cal.4th at pp. 162-163.) Shortly after *Discover Bank I* was decided, the Court of Appeal decided two cases brought on behalf of putative classes of California residents alleging claims under California law, and the court held that the class action waivers at issue in those cases were unconscionable and hence unenforceable under *Discover Bank I*. (*Klussman, supra*, 134 Cal.App.4th at pp. 1293-1298; *Aral, supra*, 134 Cal.App.4th at pp. 553-557.)

Subject to one qualification, the holdings of all three cases apply straightforwardly here. As in *Klussman* and *Aral*, disputes between the contracting parties (Discover Bank and its cardholders) predictably involve small amounts of damages, the party with the superior bargaining power has allegedly carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, and the obligation at issue is governed by California law (because Duran’s only claim is under California law). Thus, under *Discover Bank I*, *Aral*, and *Klussman*, the class action waiver would be unconscionable and hence unenforceable in this case as well.

To the contrary, Discover Bank argues first that *Discover Bank I*, *Aral*, and *Klussman* do not apply because the cardholders in this case could opt out of the waiver, so the contract is not adhesive. Second, Discover Bank argues that, regardless of whether the opt-out provision makes the agreement nonadhesive, the opt-out provision defeats any finding of procedural unconscionability. We find both arguments unpersuasive.

First, in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 468-472 (*Gentry*), the Supreme Court considered whether a contract containing an arbitration provision with a class action waiver could be procedurally unconscionable despite the presence of an opt-

out provision very similar to the one in Duran’s cardholder agreement. In its discussion, the court said in reference to the opt-out provision that “freedom to choose whether or not to enter a contract of adhesion is a factor weighing against a finding of procedural unconscionability” (*Gentry, supra*, 42 Cal.4th at p. 470), but the court did *not* say that the presence of an opt-out provision automatically renders a contract nonadhesive. That is, the Supreme Court’s discussion indicates that even a contract with an opt-out provision can be a contract of adhesion. Thus, we must reject Discover Bank’s argument that the presence of the opt-out provision is sufficient, on its own, to make the unconscionability rule of *Discover Bank I* inapplicable.

Second, also in *Gentry*, the Supreme Court determined that the presence of an opt-out provision was not sufficient to defeat a finding of procedural unconscionability. (*Gentry, supra*, 42 Cal.4th at pp. 468-472.) The court reasoned that “a conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained some advantage from conceding the term or that, if one party negotiated poorly, it is not the court’s place to rectify these kinds of errors or asymmetries.” (*Id.* at p. 470.) In the case before it, the court concluded that there were “several indications” that the plaintiff’s “failure to opt out of the arbitration agreement did not represent an authentic informed choice,” and that the agreement was therefore “not entirely free from procedural unconscionability.” (*Id.* at pp. 470, 472, fn. omitted.)

The trial court in this case, applying *Gentry*, correctly drew the same conclusions. In *Gentry*, the Supreme Court emphasized that “the explanation of the benefits of arbitration” that had been provided to the plaintiff “was markedly one-sided” and “did not mention” several “significant disadvantages” of the arbitration agreement “compared to litigation.” (*Gentry, supra*, 42 Cal.4th at p. 470.) Here, as the trial court noted, Duran and the members of the putative class received “nothing . . . that explains the

disadvantages of consenting to the arbitration and class waiver provisions; nothing clearly explaining the costs of arbitration; and nothing explaining the practical consequences of a class action waiver.” As in *Gentry*, the absence of any such explanations indicates that Duran and other putative class members’ failure to opt out “did not represent an authentic informed choice” (*Gentry, supra*, 42 Cal.4th at p. 470), and that the agreement consequently was “not entirely free from procedural unconscionability” (*id.* at p. 472, fn. omitted).

Discover Bank’s sole response to this line of reasoning is to attempt to distinguish *Gentry* on three grounds. First, Discover Bank points out that the plaintiff in *Gentry* was the employee of the defendant, and that the special nature of the employment relationship informed the Supreme Court’s decision in certain ways. Discover Bank concludes that because Duran and the putative class members are not employees of Discover Bank, *Gentry* is not controlling here. We disagree. It is certainly true that the characteristics of the employment relationship were important for some aspects of the Supreme Court’s analysis—for example, given the employer’s clear preference for arbitration, it was likely that employees “felt at least some pressure not to opt out of the arbitration agreement.” (*Gentry, supra*, 42 Cal.4th at p. 472.) Such considerations did not, however, play any role in the court’s reasoning that because the plaintiff was never given a full and balanced explanation of the costs and benefits of the arbitration provision, the plaintiff’s failure to opt out apparently “did not represent an authentic informed choice” (*id.* at p. 470) and some degree of procedural unconscionability was present.

Second, Discover Bank argues that, unlike the defendant in *Gentry*, Discover Bank made “no attempt to persuade cardmembers that arbitration is better for them than litigation.” That too is true, but again it is not dispositive. Because cardmembers received no explanation whatsoever concerning the costs and benefits of the arbitration provision, their failure to opt out, like the plaintiff in *Gentry*, did not represent an authentic informed choice.

Third, Discover Bank contends that in *Gentry* the Supreme Court’s “finding of substantive unconscionability was not based solely on the allegedly exculpatory nature of a class action waiver, but also on the presence of unwaivable statutory rights of employees.” (Underlining omitted.) Thus, Discover Bank concludes, because there is less substantive unconscionability in this case than in *Gentry*, here the trial court was required to find more procedural unconscionability than in *Gentry* before concluding that the class action waiver was unenforceable—but the trial court could not do that, because of the absence of an employment relationship and of any attempt to persuade cardholders to agree to arbitration.

The argument fails because it is based on a mischaracterization of *Gentry*. The Supreme Court in *Gentry* made no “finding of substantive unconscionability.” Rather, it remanded the case with directions for the trial court to determine in the first instance, under the proper standard, whether the class action waiver was invalid as against public policy. (*Gentry, supra*, 42 Cal.4th at p. 466.) It also determined that, notwithstanding the opt-out provision, the arbitration agreement as a whole (not just the class action waiver) was “not entirely free from procedural unconscionability” (*id.* at p. 472, fn. omitted), so on remand the trial court might also have to consider the plaintiff’s arguments that the arbitration agreement was substantively unconscionable and unenforceable. (*Id.* at pp. 472-473.) The trial court in this case correctly relied on *Gentry* in determining that some elements of procedural unconscionability are present here as well.

For all of the foregoing reasons, we conclude that, despite the opt-out provision, the class action waiver in this case contains sufficient elements of procedural unconscionability to bring it within the rule of *Discover Bank I, Aral, and Klussman*. It is therefore unenforceable under California law.<sup>3</sup>

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<sup>3</sup> Discover Bank also contends that the opt-out provision shows that the class action waiver is not substantively unconscionable, because an “optional” class action waiver “is not exculpatory on its face.” (Underlining omitted.) We disagree. The opt-out provision is relevant to evaluating procedural unconscionability, which relates to oppression or surprise in the formation of the contract, or the inclusion

## B. Fundamental Policy

Having concluded that the class action waiver is unenforceable under California law, we must next determine whether enforcement of such a waiver would contravene a fundamental policy of California. (*Nedlloyd Lines B.V. v. Superior Court, supra*, 3 Cal.4th at p. 466.) Here too we are aided by *Klussman*, which concluded that it would. (*Klussman, supra*, 134 Cal.App.4th at pp. 1294-1298.)

Discover Bank argues that *Klussman* is distinguishable because it involved a class action waiver that was not expressed in the materials that were given to the plaintiff; rather, the waiver was contained in the rules of the National Arbitration Forum, which were incorporated by reference in the materials that the plaintiff received. (See *Klussman, supra*, 134 Cal.App.4th at pp. 1288-1289.) The *Klussman* court found the public policy considerations against enforcement of class action waivers “even more compelling” in that case than in *Discover Bank I* for three reasons: (1) The waiver “was not expressed in the agreement”; (2) the plaintiffs had pleaded claims under California statutes (i.e., the CLRA and the UCL) that “seek to vindicate public rights”; and (3) the plaintiffs sought “to represent only California residents, not a nationwide class as was involved in [*Discover Bank I*].” (*Klussman, supra*, 134 Cal.App.4th at p. 1298, fn. omitted.) Two of those three factors are present here. Thus, although the public policy considerations against enforcement of the waiver are not as compelling here as they were in *Klussman*, they are still, under the reasoning of *Klussman*, “more compelling” than they were in *Discover Bank I*. Moreover, the remainder of *Klussman*’s public policy analysis remains fully applicable, including its observations that “[t]he right to seek classwide redress is more than a mere procedural device in California” and that under *Discover Bank I* class action waivers implicate “the public policy against exculpatory waivers in Civil Code section 1668” because their “impact is to shield a company from

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in the contract of the challenged provision. Substantive unconscionability relates to the effects of the contract, or of the challenged provision, after formation. (See generally *Discover Bank I, supra*, 36 Cal.4th at p. 160.) Thus the opt-out provision relates only to procedural unconscionability—it does not mitigate the substantively harsh or unfair effects of the class action waiver for cardholders who fail to opt out.

liability for many small instances of exploitation.” (*Klussman, supra*, 134 Cal.App.4th at p. 1296.)

For the foregoing reasons, we reject Discover Bank’s argument that *Klussman* is relevantly distinguishable, and, for the reasons expressed in *Klussman*, we conclude that enforcement of the class action waiver in this case would contravene a fundamental public policy of California.

### C. Materially Greater Interest

That brings us to the final stage of the choice-of-law analysis, where we must determine whether California has a materially greater interest than Delaware in determination of the enforceability of the class action waiver in this case. (*Nedlloyd Lines B.V. v. Superior Court, supra*, 3 Cal.4th at p. 466.) Again following *Klussman*, we conclude that it does.

In *Discover Bank II*, we concluded that California did not have a materially greater interest because the plaintiff asserted two claims under Delaware law and none under California law on behalf of a putative nationwide class. (*Discover Bank II, supra*, 134 Cal.App.4th at pp. 894-895.) Neither of those factors is present here—Duran asserts a single claim under a California statute on behalf of a putative class of California residents. On this issue, then, this case is on all fours with *Klussman*, which held that “California’s fundamental public policy interest in protecting its residents is materially greater than Delaware’s interest in uniformity among its corporate citizens.” (*Klussman, supra*, 134 Cal.App.4th at p. 1300 [“California’s interest in providing effective protection for California customers of out-of-state banks when they are overcharged, defrauded, abused and harassed” outweighs “Delaware’s interest in uniform regulation of the business practices of banks incorporated under its laws”].)

Discover Bank does not attempt to distinguish *Klussman* on this point, even though the trial court expressly relied on it. Instead, Discover Bank argues that the trial court erred by ignoring California’s “interests in comity, tolerance, protecting the parties’ expectations, and obviating problems that would otherwise arise from differences in

opinion and law among states.” We are not persuaded. The interests that Discover Bank describes are all facets of California’s general interest in enforcing contractual choice-of-law provisions. That interest is already protected by California law, under which a contractual choice-of-law provision must be enforced unless a court determines that all of the requirements of a demanding multi-step test are satisfied. (*Nedlloyd Lines B.V. v. Superior Court, supra*, 3 Cal.4th at p. 466.) For purposes of the last step of that test, however, California’s interest in enforcing contractual choice-of-law provisions does not show that California lacks a materially greater interest than the chosen state (Delaware) in the determination of the issue under consideration (enforceability of the class action waiver). The question is not whether California has a general interest in enforcing choice-of-law provisions. It does, and that interest is protected by the test itself. Rather, the question is whether California has a materially greater interest than Delaware in determining the enforceability of the class action waiver in this case, in which the plaintiff alleges a single claim under California law and on behalf of a putative class of California residents. The trial court, following *Klussman*, concluded that it does, and Discover Bank has not shown that the trial court erred.

To summarize: (1) Delaware has a substantial relationship to the parties or their transaction; (2) class action waivers are enforceable under Delaware law; (3) application of Delaware law here would conflict with a fundamental policy of California, whose law prohibits enforcement of the class action waiver under the circumstances of this case; and (4) California has a materially greater interest than Delaware in determination of the enforceability of the class action waiver. The contractual choice of law therefore shall not be enforced, and California law shall govern the issue.

## II. Enforceability of the Class Action Waiver

For the reasons described in Part I.A, *ante*, the class action waiver is unconscionable and hence unenforceable under the circumstances of this case.<sup>4</sup>

### DISPOSITION

The order is affirmed. Respondent shall recover her costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.\*

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<sup>4</sup> Discover Bank contends that Duran’s “unconscionability arguments” are “preempted by” the FAA. We must reject that contention, because the Supreme Court rejected it in *Discover Bank I, supra*, 36 Cal.4th at pp. 163-173.

\* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.