

**CALL & JENSEN**  
A PROFESSIONAL CORPORATION

1 Mark L. Eisenhut, Bar No. 185039  
2 Matthew R. Orr, Bar No. 211097  
3 CALL & JENSEN  
4 A Professional Corporation  
5 610 Newport Center Drive, Suite 700  
6 Newport Beach, CA 92660  
7 Tel: (949) 717-3000  
8 Fax: (949) 717-3100  
9 meisenhut@calljensen.com  
10 morr@calljensen.com

11 and Pending Pro Hac Vice Admittance:

12 Michael W. Davis  
13 T. Robert Scarborough  
14 Kara L. McCall  
15 SIDLEY AUSTIN LLP  
16 1 S. Dearborn Street  
17 Chicago, IL 60603  
18 Tel.: (312) 853-7000  
19 Fax: (312) 853-7036  
20 tscarborough@sidley.com  
21 kmccall@sidley.com

22 Douglas B. Brown  
23 Daniel J. Gerber  
24 RUMBERGER, KIRK & CALDWELL, P.A.  
25 Lincoln Plaza, Suite 1400  
26 300 South Orange Avenue  
27 Orlando, Florida 32802-1873  
28 Tel.: (407) 872-7300  
Fax: (407) 841-2133  
dbrown@rumberger.com  
dgerber@rumberger.com

Attorneys for Defendants Orkin, LLC and Rollins, Inc.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA OF CALIFORNIA**

AMIR KHAN, on behalf of himself and all  
others similarly situated,,

Case No. 3:10-cv-02156-VRW

**DECLARATION OF MARK L.**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Plaintiffs,

vs.

ORKIN EXTERMINATING COMPANY,  
INC. a Delaware corporation; ROLLINS,  
INC. a Delaware corporation; ORKIN,  
INC., a Delaware corporation; ORKIN,  
LLC, a Delaware Limited Liability  
Corporation,

Defendants.

**EISENHUT IN SUPPORT OF  
DEFENDANTS' MOTION TO STAY  
ACTION AND COMPEL  
ARBITRATION**

**Date: October 7, 2010  
Time: 10:00 a.m.  
Ctrm: 6, 17<sup>th</sup> Floor**

Complaint Filed: May 19, 2010  
Trial Date: None Set

I, Mark L. Eisenhut, hereby declare the following:

I am an attorney at law licensed to practice before the state and federal courts of the State of California and before this Court. I am a shareholder with the law firm of Call & Jensen, attorneys of record for Defendants Rollins, Inc. and Orkin, LLC.

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently to such facts.

2. Attached as Exhibit 1 is a true and correct copy of the Orkin Service Agreement entered into in November 2006.

///

///

///

**CALL & JENSEN**  
A PROFESSIONAL CORPORATION

1 3. Attached as Exhibit 2 is a true and correct copy of the June 30, 2010 letter  
2 from T. Robert Scarborough requesting that Plaintiff dismiss this matter and file a  
3 demand to arbitrate his claim with American Arbitration Association.

4  
5 4. Attached Exhibit 3 is a true and correct copy of the Order in *Allen v.*  
6 *Rollins, Inc. et al.* dated September 17, 2003, wherein the Court stayed the matter  
7 pending arbitration.

8  
9 5. Attached Exhibit 4 is a true and correct copy of the Order in *Butland v.*  
10 *Rollins, Inc. et al.* dated January 7, 2003, wherein the Court stayed the matter pending  
11 arbitration.

12  
13 I declare under penalty of perjury under the laws of the State of California and of  
14 the United States of America that the foregoing is true and correct, and that this  
15 declaration was executed this 2<sup>nd</sup> day of July, 2010, at Newport Beach, California.

16  
17 /s/ Mark L. Eisenhut  
18 Mark L. Eisenhut

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
CALL & JENSEN  
A PROFESSIONAL CORPORATION

# **EXHIBIT 1**

THIS AGREEMENT PROVIDES FOR RETREATMENT OF THE INFESTED AREA OF THE COVERED STRUCTURE(S) IN THE EVENT THAT SUBTERRANEAN TERMITES OR DRYWOOD TERMITES REINFEST THE COVERED STRUCTURE(S), BUT THIS AGREEMENT DOES NOT PROVIDE FOR THE REPAIR OF DAMAGE CAUSED BY SUBTERRANEAN TERMITES OR DRYWOOD TERMITES.

11/16/06 0119805  
GRID #



ORKIN Pest Control  
Residential Single-Family Dwelling  
CALIFORNIA 10-YEAR DRYWOOD TERMITE OR  
SUBTERRANEAN TERMITE PROGRAM

THIS AGREEMENT IS CONTINGENT UPON THE APPROVAL AND SIGNATURE OF THE ORKIN BRANCH MANAGER, WHO HAS SOLE AUTHORITY TO EXECUTE IT ON BEHALF OF ORKIN.

6088 ST. A  
S/A 208 806  
Khan  
Khan  
11/03/06  
Does Not Cover Formic Acid Termites

SSS 24  
# 0119805  
PIAN

Customer: 87 Burnham  
Street Address: French St, CA 94539  
City: St. 874 H380, State: St. 402, Zip Code: 8527  
Home Phone: Work Phone

Billing Name (if different): 90 days same as cash  
Billing Address (if different): Jimbo Preventative Plan  
City: State: Zip Code:

1. Service Purchased	1-11	2342
2. Initial Treatment and Control Service Cost		234
3. Other Fees		3100
4. Annual Control Service Fee		2400
5. Upgrade/Change of Cash Price's Initial		2150

Method of Payment: CREDIT CARD  
Type of structure to be treated: Single-Family Dwelling  
Type of infestation: Drywood Termites

1. ORKIN LIMITED CONTROL SERVICE ("Service") (S1):  
A. Orkin shall treat Customer's structure for Drywood and/or Subterranean termites using the treatment specified in the Treatment Report per Inspection Report # \_\_\_\_\_ Orkin does not guarantee that termites will never return to the treated structure (Treated Premises). If termites do return as indicated by evidence of a live Drywood or Subterranean termite infestation, Orkin will retreat this area. This Control Service does not cover any damage to the structure or its contents.

B. IMPORTANT: Service includes liquid treatment to critical and infested areas as specified by Orkin, plus Bait System installation and monitoring as specified by Orkin. If during the effective period of this Agreement, Orkin, for whatever reason, changes the type of bait being used or feeds a bait program in this area, an appropriate alternative treatment method will be determined by and performed by Orkin at no charge to the Customer. The bait stations and all components are not owned by the Customer and may be removed by Orkin at its discretion; at any time, for replacement with an alternative treatment method, upon the termination of this Agreement or if Orkin ceases to offer a bait program in this area. The Control Service coverage of this Agreement will remain in effect through any pre-paid period of coverage. The Control Service Control Service is identical to the Control Service provided in this Agreement for any initial treatment except the Annual Control Renewal Fee as set by this Agreement.

C. CUSTOMER'S OBLIGATIONS: Customer shall be responsible for the initial treatment and for the maintenance of the structure and the maintenance of the Drywood Termites retreatment process.

D. This Control Service shall expire one (1) year from the date of initial treatment; however, for the first ten (10) years, the Customer has the exclusive right to renew the Control Service. By timely payment of the annual renewal. At the end of that ten-year period, the Control Service may be renewed annually with the mutual consent of both parties and thereafter either party may terminate the Control Service only if the other party agrees to do so.

E. Customer is required to make the Treated Premises accessible to Orkin for any inspections and treatments as Orkin deems necessary. This may include removing floor coverings, wall coverings and fixtures, for which the responsibility and costs rest exclusively with Customer. If the Customer fails to comply with these obligations, Orkin may, at its option, terminate the Agreement.

F. The Customer agrees to be solely responsible for maintaining the Treated Premises free from any condition conducive to termite infestation ("Conducive Conditions," see paragraph 9 for explanation). The Customer agrees to be solely responsible for identifying and correcting Conducive Conditions. This responsibility rests exclusively with the Customer, not with Orkin. The existence of any Conducive Condition, that was not timely corrected, including any Conducive Condition existing, but not visible at the time of the execution of this Agreement, will permit Orkin, at its sole discretion, to terminate the Agreement or to require Customer to purchase any additional treatment required as a result of the Conducive Condition.

G. Prior to making any structural modification or alteration or disturbing the soil in, around or under the Treated Premises, Customer must notify Orkin in writing and purchase any additional treatment required by the changes. If Customer fails to do so, Orkin, at its option, may terminate the Agreement.

H. Customer agrees not to remove, tamper with, or cover the bait stations.

I. Orkin is performing a service and expressly disclaims any guarantee of any kind, whether expressed or implied, for any injury or damage related to the service performed. Customer expressly releases Orkin from any claim for termite damage or repair of any kind.

2. OTHER INFESTATIONS: Customer waives and releases Orkin from any liability for any claim of damages to the structure or its contents caused by an infestation of Wood Destroying Fungi, Formosan Termites, Boring Beetles, or any other Wood Destroying Insects. Customer also waives and releases Orkin from liability for any claim or injuries, damages, or losses of whatever nature or type related to mold or fungal growth.

3. PAYMENTS: The initial payment covers the initial treatment of the bait stations and the first year of control service and is due at the time the initial service is performed. After the first year, the Control Renewal Fee will be assessed on an annual basis. By payment of the Annual Control Renewal Fee, this Agreement may be renewed. As long as Customer keeps the Annual Control Renewal Fee current, Orkin will monitor Customer's structure and maintain the Control Service provided for under this Agreement.

4. CONTROL-FEE PRICE PROTECTION: In order to maintain this Agreement and the Control Service, Customer shall pay the Annual Control Renewal Fee. The Annual Control Renewal Fee for year two (2) of the Agreement will be \$ \_\_\_\_\_ plus tax, where applicable. Thereafter, for the Control Service period, Orkin shall have the right to increase the Annual Control Renewal Fee by an amount not to exceed the consumer price index of by an amount not to exceed ten percent (10%), which may be greater. If Orkin does not increase the Annual Control Renewal Fee in any one or more years, at the next increase Orkin may include any amount it would have been permitted to increase in that prior year or period of years.

4. MEDIATION/ARBITRATION: ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE SERVICES PERFORMED BY ORKIN UNDER THIS AGREEMENT OR ANY OTHER AGREEMENT, REGARDLESS OF WHETHER THE CONTROVERSY OR CLAIM AROSE BEFORE OR AFTER THE EXECUTION, TRANSFER OR ACCEPTANCE OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY TORT AND STATUTORY CLAIMS, AND ANY CLAIMS FOR PERSONAL OR BODILY INJURY OR DAMAGE TO REAL OR PERSONAL PROPERTY, SHALL BE SETTLED BY BINDING ARBITRATION UNLESS THE PARTIES AGREE OTHERWISE. THE ARBITRATION SHALL BE ADMINISTERED UNDER THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION (AAA) AND SHALL BE CONDUCTED BY AAA. IF ADMINISTERED UNDER THE AAA RULES, A CLAIM SHALL BE DETERMINED UNDER THE AAA SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES IN CASES WHERE SUCH PROCEDURES ARE APPLICABLE. ANY OTHER CONTROVERSY OR CLAIM SHALL BE DETERMINED UNDER THE AAA COMMERCIAL ARBITRATION RULES. THE CUSTOMER AND ORKIN AGREE THAT THE ARBITRATION SHALL FOLLOW THE SAID RULES INCLUDING THE TERMS AND CONDITIONS OF THIS AGREEMENT. THE ARBITRATOR'S POWERS TO CONDUCT ANY ARBITRATION PROCEEDING UNDER THIS AGREEMENT SHALL BE LIMITED AS FOLLOWS: ANY ARBITRATION PROCEEDING UNDER THIS AGREEMENT WILL NOT BE CONSOLIDATED OR JOINED WITH ANY ACTION OR LEGAL PROCEEDING UNDER ANY OTHER AGREEMENT OR INVOLVING ANY OTHER PREMISES, AND WILL NOT PROCEED AS A CLASS ACTION, PRIVATE ATTORNEY GENERAL ACTION OR SIMILAR REPRESENTATIVE ACTION. THE AWARD RENDERED BY THE ARBITRATOR(S) SHALL BE FINAL AND BINDING. JUDGMENT MAY BE ENTERED UPON THE AWARD IN ANY COURT HAVING JURISDICTION THEREOF. CUSTOMER AND ORKIN ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING INTERSTATE COMMERCE AND SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT, HEREIN HAVING RECOURSE TO ARBITRATION. CUSTOMER AND ORKIN EACH AGREES TO TRY IN GOOD FAITH TO SETTLE ANY CONTROVERSY OR CLAIM BY AT LEAST FOUR (4) HOURS OF MEDIATION ADMINISTERED UNDER THE AAA COMMERCIAL MEDIATION PROCEDURES. ORKIN AGREES TO PARTICIPATE IN MEDIATION UNDER THE AAA MAY BE LIMITED TO THE LIABILITY described herein. Orkin does not assume any claim for economic, compensatory, or consequential damages relating to the existence of Drywood termites or Subterranean termites or Drywood or Subterranean termite damage, or for increased costs, loss of use, business interruption, diminution of value, or any "stigma" damage due to the presence of Drywood termites or Subterranean termites or Drywood or Subterranean termite damage. The Customer acknowledges that Orkin is performing a service and except for any damage caused by Orkin in the performance of its services, Customer waives any claims for property damage. Customer agrees that under no circumstances shall Orkin be held liable for any amount greater than the amount paid by the Customer to Orkin for the termite service to be performed. Nothing in this Agreement shall be construed as depriving the Customer of remedies available under applicable state consumer protection laws.

5. LIMITED ASSIGNABILITY: This Agreement is assignable as a retreat only Agreement to the new owner of the property under the following conditions: (a) the new



- CONTACTED AT THE TIME OF THE INITIAL INSPECTION TO REPORT ANY DAMAGE TO THE EXISTENCE OF DRYWOOD TERMITES OR SUBTERRANEAN TERMITES OR DRYWOOD OR SUBTERRANEAN TERMITES DAMAGE, OR FOR INCREASED COSTS, LOSS OF USE, BUSINESS INTERRUPTION, DIMINUTION OF VALUE, OR ANY "STIGMA" DAMAGE DUE TO THE PRESENCE OF DRYWOOD TERMITES OR SUBTERRANEAN TERMITES OR DRYWOOD OR SUBTERRANEAN TERMITES DAMAGE. THE CUSTOMER ACKNOWLEDGES THAT ORKIN IS PERFORMING A SERVICE AND EXCEPT FOR ANY DAMAGE TO THE STRUCTURE CAUSED BY ORKIN IN THE PERFORMANCE OF ITS SERVICES, CUSTOMER WAIVES ANY CLAIMS FOR PROPERTY DAMAGE. CUSTOMER AGREES THAT UNDER NO CIRCUMSTANCES SHALL ORKIN BE HELD LIABLE FOR ANY AMOUNT GREATER THAN THE AMOUNT PAID BY THE CUSTOMER TO ORKIN FOR THE TERMITES SERVICE TO BE PERFORMED. NOTHING IN THIS AGREEMENT SHALL BE CONSTRUED AS DEPRIVING THE CUSTOMER OF REMEDIES AVAILABLE UNDER APPLICABLE STATE CONSUMER PROTECTION LAWS.
- 6. LIMITED ASSIGNABILITY:** This Agreement is assignable as a retreat only Agreement to the new owner of the property under the following conditions: (a) the new owner presents the Orkin branch office written notice requesting that the Agreement be assigned; (b) Orkin conducts an inspection of the property, the results of which are satisfactory to Orkin; (c) Orkin consents in writing to the assignment of the Agreement; and (d) the new owner pays a transfer fee.
  - 7. REINSPECTION:** Orkin shall reinspect the treated structure as deemed necessary by Orkin or once a year, if requested by Customer, and if shall be a full or limited inspection as required by California law. An annual inspection will be made by Orkin if required by applicable State law or regulations. Any reinspection is separate from and independent of Customer's obligation to pay the annual renewal.
  - 8. CHEMICAL INFORMATION WARNING:** Virtually all pesticides have some odor which may be present for a period of time after application. If you or any member of your household believes you have a sensitivity to chemical odor or chemicals, Orkin recommends that you not have an initial or a subsequent service performed at your premises until you have consulted with your family physician. At your request, Orkin will provide information about the chemicals to be used in treating the premises.
  - 9. CONDUCTIVE CONDITIONS:** Conductive Conditions include, but are not limited to: roof leaks; improper ventilation; faulty plumbing; and water leaks or intrusions in or around the structure; inherent structural problems, including, but not limited to: wood to ground contact; masonry failures; and settlement of the foundation; foam insulation; stucco construction; expanded polystyrene or styrofoam molded insulation systems; siding (including vinyl, wood and metal) in contact with the ground; mulch or other protective ground covering; and firewood, trash, lumber, wood, mulch, shrubs, vines, and other plants or ground covering in contact with structure.
  - 10. ENTIRE AGREEMENT:** This Agreement and the attached Treatment Report shall be the entire Agreement between Customer and Orkin. No other agreements, understandings or representations, whether written or oral, with respect to the Agreement shall be binding as they shall be merged into and superseded by this Agreement. Customer warrants and acknowledges that Customer has not relied on or been induced by any other agreements, understandings or representations, whether written or oral, in signing this Agreement. The terms of the Agreement stated herein may not be amended or altered unless a written change is approved and signed by a Corporate Officer of Orkin. No other employees or agents of Orkin have authority to amend or alter any part of this Agreement. If any provision or portion thereof of this Agreement is found to be invalid or unenforceable, it shall not affect the validity or enforceability of any other part of this Agreement. Provided, however, that as to paragraph 4, MEDIATION/ARBITRATION, if the sentence precluding the arbitrator from conducting an arbitration proceeding as a class, representative or private attorney general action is found to be invalid or unenforceable then the entirety of paragraph 4 shall be deemed to be deleted from this Agreement.
  - 11. APPLICABLE LAW:** This Agreement shall be governed by and construed under the laws of the State of Georgia, without regard to its conflicts of laws principles.
  - 12. FORCE MAJEURE (Circumstances beyond Orkin's control):** Orkin's obligations under this Agreement shall be canceled if Orkin cannot perform its responsibilities due to Acts of God, including, earthquakes, storms, fires, floods, or because of a material change in circumstances, including, but not limited to, acts of war, strikes, unavailability of termiticides, baits or other supplies from ordinary sources.
  - 13. TERMINATION BY ORKIN:** Orkin may terminate this Agreement, without notice, if the obligations set forth in this Agreement are not met by Customer, or in the event of a change in state or federal law or regulation that materially affects Orkin's obligations under this Agreement.
  - 14. MONEY BACK GUARANTEE: ORKIN GUARANTEES THAT IF CUSTOMER IS NOT COMPLETELY SATISFIED WITH ORKIN'S TREATMENT FOR DRYWOOD TERMITES AND SUBTERRANEAN TERMITES, ORKIN WILL REFUND CUSTOMER'S INITIAL TREATMENT CHARGE AND ANY PREPAID CONTROL RENEWAL FEES IF CUSTOMER CONTACTS ORKIN IN WRITING AT THE BRANCH ADDRESS BELOW WITHIN 30 DAYS AFTER CUSTOMER'S INITIAL TREATMENT, AND ORKIN FAILS TO RESOLVE CUSTOMER'S PROBLEM WITHIN 30 DAYS AFTER RECEIVING IT. A REFUND BY ORKIN OF CUSTOMER'S INITIAL TREATMENT CHARGE AND ANY PREPAID CONTROL RENEWAL FEES WILL RESULT IN CANCELLATION OF THIS AGREEMENT AND THE CONTROL SERVICE.**

**CANCELLATION: CUSTOMER MAY CANCEL THIS AGREEMENT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION.**

Inspector Name (PRINT) Long Trish Employee ID # or Certification # FR 33583  
 Branch Street Address 3663 Arch rd # 6  
Stockton, CA 95215  
 City Stockton State CA Zip Code 95215  
 Branch Telephone Number 877-552-6556  
 THIS AGREEMENT IS NOT VALID UNTIL APPROVED BY THE BRANCH MANAGER  
 Branch Manager's Signature [Signature] Date 11/13/06  
 Customer's Signature [Signature] Date 11/3/06  
 AQ1073 8/2005 California

## **EXHIBIT 3**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

FILED  
2003 SEP 17 P 3 13  
MIDDLE DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE, FLORIDA

**ELIZABETH ALLEN and  
WILLIAM ALLEN, on behalf of  
themselves and all others similarly  
situated,**

**Plaintiffs,**

vs.

**CASE NO. 3:02-cv-545-J-25HTS**

**ROLLINS, INC. and  
ORKIN EXTERMINATING COMPANY, INC.,**

**Defendants.**

---

**ORDER**

**THIS CAUSE** is before this Court on Defendants' Amended Motion to Dismiss or Stay Proceedings (Dkt. 58), and Plaintiffs' response thereto (Dkt. 67). By this Motion, Defendants seek to dismiss or stay these proceedings pending arbitration. A hearing was held on the instant Motion on August 27, 2003. Upon consideration, having heard the arguments of counsel and reviewed the pleadings and depositions filed by the parties this Court finds as follows:

Plaintiffs filed this putative class action lawsuit for: I) breach of contract; II) civil remedies for criminal acts under Florida law; III) violation of Section 817.42, Florida Statute for misleading advertising; IV) violation of Florida's Deceptive and Unfair Trade Practices Act, Florida Statute § 501.201 *et. seq.*; V) negligence in treating and repairing Plaintiffs' home; VI) agency; VII) joint venture; VIII) joint enterprise; IX) alter ego; and X) declaratory and injunctive relief regarding the terms of Defendants' contract.

The lawsuit arises out of a Subterranean Termite Agreement ("the Agreement") entered into by Plaintiffs and Orkin. Plaintiffs ask this Court not to enforce the arbitration clause included within

86



the agreement because it is both procedurally and substantively unconscionable.<sup>1</sup> Plaintiff claims that the clause is procedurally unconscionable because it contains hidden and confusing language and substantively unconscionable because it lacks mutuality of obligation, limits the remedies available to aggrieved consumers, and is too costly. Plaintiffs further request that the Court decide the class certification issue prior to deciding whether to enforce the arbitration clause in the

---

<sup>1</sup>The arbitration clause provides:

In the event of any dispute (as defined herein below) arising out of or relating to this contract, or the breach thereof, the parties first agree to participate in at least four (4) hours of mediation in accordance with the commercial mediation rules of American Arbitration Association, before having recourse to arbitration, or judicial forum subsequent thereto.

If the mediation procedure provide for herein doe not resolve any such dispute, the parties agree that all disputes between the parties shall be resolved by binding arbitration administered by the American Arbitration Association in accordance with its commercial arbitration rules and pursuant to the federal arbitration act, 9 U.S.C Section 1 et seq, judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

The term "dispute" shall mean any action, dispute, claim or controversy of any kind, whether in contract or in tort, under either statutory or common law or both, now existing or hereafter arising between the parties in any way pertaining to (1) this contract or any related agreement, document or instrument; (2) any incidents, omissions, acts, practices or occurrences arising out of any service or product furnished or agreed to be furnished under this contract causing property damage to either party and it is asserted that the other party or its agents, employees or representative may be liable, in whole or in part; (3) all claims by either party against the other for actual, consequential, punitive, exemplary or statutory damages, attorneys fees or penalties of any kind whatever; and (4) specific performance or the recovery of damages in tort, or pursuant to the provisions of the deceptive trade practices act. The award of the arbitrators issued pursuant hereto shall be final, binding and non-appealable.

Agreement, and also seek discovery to demonstrate the unconscionable nature of the arbitration clause.

The arbitration clause, at issue here, is subject to the Federal Arbitration Act ("FAA"). See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (noting that "[t]he parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama."). Under section 2 of this act, arbitration agreements are "valid, irrevocable, and enforceable, save on such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). In light of this language, the Supreme Court declared that state law is applied "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Casarotto*, 517 U.S. at 687 (citations omitted). Under Florida contract law, an "arbitration clause can be defeated by any defense existing under the state law of contracts." *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (1st DCA 1999).

Plaintiffs assert that the arbitration provision should not be enforced as it is unconscionable.<sup>2</sup>

---

<sup>2</sup>Under Florida contract law, a court may refuse to enforce a contract if it is found to be unconscionable. A determination of unconscionability is comprised of both procedural and substantive unconscionability. *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (1st DCA 1999).

The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed

Plaintiffs aver that the Agreement is an adhesion contract and as such is procedurally unconscionable.<sup>3</sup> As evidence of an adhesion contract Plaintiffs assert the pre-printed contract contained an arbitration provision which could not be changed either by the consumer or the agent of Defendant, and should a consumer question an agent of Orkin regarding the arbitration agreement "she will get no meaningful response" (Dkt. 67, pg. 10) as Orkin has provided its employees no specific training on arbitration or customer's questions regarding arbitration. Plaintiffs, further, assert several provisions of the contract are inconsistent and are capable of multiple interpretations.

When claims of fraud, unconscionability, lack of mutuality or contract of adhesion pertain to the contract as a whole, not to the arbitration clause alone, those issues should be resolved in arbitration.

If, after evaluating the nature and sufficiency of the allegations, the district court concludes that [Plaintiff] has alleged fraud, duress or unconscionability with respect to the arbitration clause itself, then judicial consideration of these issues is mandated before arbitration of the state claims can be compelled. If, on the other hand, [Plaintiff's] claims of adhesion, unconscionability, waiver of judicial remedies without knowledge, and lack of mutuality of obligation *pertain to the contract as a whole*, and not to the arbitration provision

---

contract terms . . . the substantive component focuses on the agreement itself. As the court explained in *Kohl v. Bay Colony Club Condominium, Inc.*, 398 So.2d 865, 868 (Fla. 4th DCA 1981), a case is made out for substantive unconscionability by showing that "the terms of the contract are unreasonable and unfair."

*Powertel*, 743 So. 2d at 574.

<sup>3</sup> An adhesion contract is a "standardized contract form offered to consumers of goods and services on essentially [a] 'take it or leave it' basis without affording [the] consumer [a] realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing in the form contract." *Powertel*, 743 So. 2d at 574 (quoting Black's Law Dictionary, 6th Ed. (1990)).

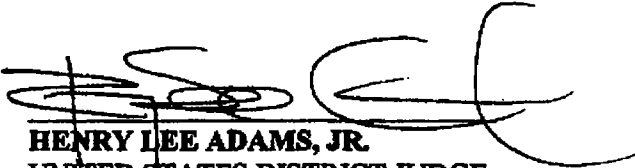
*alone, then these issues should be resolved in arbitration.*

*Benoy v. Prudential-Bache Securities, Inc.*, 805 F.2d 1437, 1441 (11th Cir.1986)(emphasis added; citations omitted); *see Rollins, Inc. v. Foster*, 991 F.Supp. 1426, 1435 (M.D. Ala. 1998)(asserting “courts have expressly rejected the argument that an arbitration clause is automatically invalid if contained in a contract of adhesion” and “the court must limit its review to the terms of the clause itself and how those terms are unconscionable to the party seeking avoidance of the clause”). As Plaintiff seeks to attack the entire contract as procedurally unconscionable, and not merely the arbitration clause, such claims must be presented in arbitration. Accordingly, this Court declines to address Plaintiffs’ remaining assertions regarding the arbitration clause or the issue of class certification.

Accordingly, it is **ORDERED**:

1. Defendants’ Amended Motion to Dismiss or Stay Proceedings (Dkt. 58) is **GRANTED**.
2. This action is **STAYED** pending arbitration.
3. The Clerk is **DIRECTED** to administratively close this case.

**DONE AND ORDERED** in Chambers this 17th day of September, 2003.

  
**HENRY LEE ADAMS, JR.**  
**UNITED STATES DISTRICT JUDGE**

Copies to: Counsel of Record; Courtroom Deputy