

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18

E-FILED on 11/14/08

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CHAD BRAZIL and STEVEN SEICK  
individually and on behalf of all others  
similarly situated,  
  
Plaintiffs,  
  
v.  
  
DELL INC. and Does 1-10,  
  
Defendants.

No. C-07-01700 RMW

ORDER DENYING MOTION TO DISMISS  
AND MOTION TO STRIKE CLASS CLASS  
ACTION ALLEGATIONS

[Re Docket No. 87]

Defendant Dell Inc. ("Dell") moves 1) to dismiss plaintiffs Chad Brazil ("Brazil") and Steven Seick's ("Seick") second amended complaint; and 2) to strike plaintiffs' class action allegations. For the reasons set forth below, the court denies both motions.

**I. BACKGROUND**

Brazil and Seick bring this suit against Dell, alleging breach of contract, a number of fraud-based claims, unjust enrichment, restitution, and a violation of the Texas Bus & Com. Code §§ 17.41, *et seq.*, for deceptive trade practices.

On June 15, 2006, Seick purchased directly from Dell through its online purchasing process a Dell Dimension B110 desktop computer ("Dimension Desktop") and some associated peripheral Dell products. Second Amended Class Action Complaint ("SAC") ¶ 63. Dell allegedly



1 and 2) the complaint's class allegations failed to meet the requirements of Fed. R. Civ. P. 23. On  
2 July 7, 2008, the court granted the motion to dismiss with leave to amend. In that order, the court  
3 ruled that Texas law applied and that the class definition was non-ascertainable because it included  
4 the phrase "falsely advertised," which would require a legal determination to populate the class.

5 Brazil and Seick filed their SAC on July 25, 2008, bringing a claim under Texas law and  
6 amending their class definitions. Dell now moves again to dismiss, arguing that the FAC's class  
7 action defects have not been cured and that plaintiffs individual claims cannot survive a motion to  
8 dismiss.

## 9 II. ANALYSIS

### 10 A. Motion to Strike Class Allegations

11 Dell first moves to strike the Brazil and Seick's class action allegations, arguing that they  
12 cannot satisfy the requirements of Fed. R. Civ. P. 23. In particular they contend that the complaint's  
13 class definitions are not ascertainable because, according to plaintiffs, class membership cannot be  
14 determined "unless and until Dell is found liable for false advertising *after* trial." Dell Inc.'s Mot. to  
15 Dismiss and Strike Class Action Allegations ("Dell's Mot. to Dismiss") 5 (emphasis in original).

16 Plaintiffs' FAC class allegations defined a "Consumer Class" and "Business Class" as all  
17 persons or entities who are citizens of California who purchased from Dell computer products for  
18 personal or business use that "(1) Dell falsely advertised as discounted from Dell's regular sales  
19 price; (2) Dell falsely advertised as including "free" upgrades and/or "free" add-on products and/or  
20 services; and/or (3) Dell falsely advertised as being subject to a rebate discount from Dell's regular  
21 price." In its July 7, 2008 order striking those class allegations, the court found that, by defining the  
22 class in terms of those persons who purchased products that Dell falsely advertised, Dell would  
23 require the court to reach a legal determination before populating the class. Thus, the court found,  
24 the class could not presently be ascertained. Order Granting Def.'s Mot. to Dismiss the FAC 11.

25 In the present motion to dismiss, Brazil and Seick argue that the SAC's class allegations are  
26 no less defective. The SAC defines the class as follows:

27 All persons or entities who are citizens of the State of California who purchased a  
28 Dell-branded product and/or service from Dell that:

1 (1) Dell advertised as discounted from a regular, list, or reference sales price,  
2 where Dell did not offer for sale, or make substantial sales of, the product or  
3 service at the regular, list, or reference sales price for reasonable period of time  
4 preceding the purchase;

5 (2) Dell advertised as including a "free" product or service, where: (a) Dell marked  
6 up the sales price of the product or service to compensate for, in whole or in part,  
7 the value or cost of the "free" product or service; (b) Dell advertised the "free"  
8 offer for six months or more during the 12 months preceding the purchase; (c) Dell  
9 advertised the "free" offer on more than three occasions in any one 12 month  
10 period; or (d) where less than 30 days have elapsed since Dell previously  
11 advertised the "free" offer; or

12 (3) Dell advertised as subject to a "rebate" discount from a regular, list, or  
13 reference sales price, where Dell did not offer for sale, or make substantial sales  
14 of, the product or service at the regular, list, or reference sales price for a  
15 reasonable period of time preceding the purchase (other than when offered in  
16 conjunction with the "rebate" discount).

17 Excluded from the class are entities with assets of \$25 million or more and entities  
18 that are owned or controlled by a corporation or entity with assets of \$25 million  
19 or more.

20 SAC ¶ 78. These revised class definitions do not rely on the problematic phrase "falsely  
21 advertised." But class membership is hardly easy to ascertain. The question for this court is  
22 whether the allegations should be stricken at the pleading stage.

23 Rule 23(c)(1) provides that "as soon as practicable after the commencement of an action  
24 brought as a class action, the court shall determine by order whether it is to be so maintained."  
25 Though that determination is often undertaken after the issue of class certification has been fully  
26 briefed, class allegations can be stricken at the pleading stage as well. *Kamm v. Cal. City  
27 Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975). Whether discovery (or further discovery) is  
28 necessary to refine and clarify class-certification issues is a case-specific determination, but  
dismissal of class actions at the pleading stage is nonetheless rare. *In re Wal-Mart Stores, Inc. Wage  
and Hour Litigation*, 505 F.Supp 609, 615 (N.D.Cal. 2007). Courts are likely hesitant to resolve  
class issues early because "the class determination generally involves considerations that are  
'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *General  
Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (quoting *Coopers & Lybrand v.  
Livesay*, 437 U.S. 463, 469 (1978)). Discovery helps parties clarify the legal and factual predicates  
of the class action, and thus dismissal at the pleading stage is unusual. In *re Wal-Mart*, 505 F.Supp.  
at 615. See also 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL  
PRACTICE AND PROCEDURE CIVIL § 1785.3 (3d 2005) (the practice employed in the majority of class

1 actions is to resolve class certification after an appropriate period of discovery). But when the  
2 necessary factual issues can be resolved without discovery, it is not required. *Kamm*, 509 F.2d at  
3 210.

4 The SAC's revised class definitions eliminate the explicit reliance on a legal concept, but do  
5 not much clarify class membership. In fact, the increased detail seems directed only at factually  
6 specifying false advertising instead of directly relying on it. Moreover, the revised definition hardly  
7 eliminates the necessity of making a legal determination. The false-discount class, for example,  
8 includes purchasers of products "Dell advertised as discounted from a regular, list, or reference sales  
9 price, where Dell did not offer for sale, or make substantial sales of, the product or service at the  
10 regular, list, or reference sales price for reasonable period of time preceding the purchase." This  
11 definition elucidates more than the FAC, but still requires a court determination of what constitutes  
12 "substantial sales," and how long is a "reasonable time." Such a determination would necessarily, it  
13 seems, have to rely on the unstated purpose of the class definition. That is, the court would  
14 determine whether sales were substantial enough, and the period of time sufficient, that the discount  
15 claims were not false. Determining substantiality and reasonableness in this way is still a legal  
16 determination.

17 Furthermore, as Dell rightly points out, populating the proposed class definitions would be  
18 an arduous, fact-bound process. Dell's Mot. to Dismiss 6-8. But the question for this court, at this  
19 stage of litigation, is not whether Dell's class is presently certifiable. On that question, the court has  
20 some doubts. Rather, the court must here decide whether, without further factual development, the  
21 class definitions are manifestly non-ascertainable.

22 Plaintiffs contend that the breadth of Dell's deceptive practice is not limited to a subset of  
23 products or dates, but that "the heart of Dell's marketing plan is to intentionally deceive the public."  
24 Indeed, plaintiffs claim that they will prove, at trial, that "Dell has engaged, on a company-wide and  
25 product-wide basis, in false advertising." Whether plaintiffs will ultimately so prove remains to be  
26 seen. But if some of Dell's products are, as plaintiffs seem to suggest, never sold at "regular" prices,  
27 then the class definitions presently advanced could be significantly simplified. The court will not  
28

1 pre-judge whether that is possible before sufficient discovery has been taken. Therefore, the court  
2 will not now strike plaintiffs class action allegations as non-ascertainable.

3 Dell also argues that the SAC's class allegations face individualized reliance, causation, and  
4 injury issues that would have to be determined for each class member. As the class is presently  
5 composed, it appears that reliance, causation, and injury are indeed subject in significant part to  
6 individualized proof. As Dell points out, individual customers may have relied on, chosen to  
7 purchase because of, and been injured by Dell's alleged misrepresentations. On the other hand,  
8 some customers may not. To distinguish between these, individual evidence may be necessary. But  
9 each is also subject to some common proof. As the 11th Circuit wrote of reliance in *Klay v.*  
10 *Humana*, 382 F.3d 1241, 1259 (11th Cir. 2004), "while each plaintiff must prove reliance, he or she  
11 may do so through common evidence (that is, through legitimate inferences based on the nature of  
12 the alleged misrepresentations at issue)." Certification will ultimately depend on whether the  
13 common questions of law and fact predominate over individual ones. Fed. R. Civ. P. 23(b)(3). The  
14 court will not adjudicate that question before class certification is briefed. The court will not now  
15 strike the class allegations because individualized determinations inhere in some of plaintiffs'  
16 claims.

17  
18 **B. Motion to Dismiss Individual Claims**

19 1. *Standing*

20 Dell argues that plaintiffs lack standing to bring any claims besides those arising out of their  
21 individual purchases. Seick and Brazil respectively purchased a Dell Dimension computer and an  
22 Inspiron notebook, both of which, they allege, were subject to false discounts. But the SAC brings  
23 claims for purchases spanning Dell's entire product line, and for alleged misrepresentations of  
24 rebates and included free products as well. Dell contends that these differences between Brazil and  
25 Seick's claims and the rest of the purported class deprive them of standing to bring suit.

26 Dell is correct that, in order to have standing, Brazil and Seick must show that they have  
27 suffered a concrete injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is true that  
28 there is tension in the case law regarding whether intra-class differences implicate standing or the

1 class certification requirements of Rule 23(a).<sup>1</sup> Nonetheless, Brazil and Seick respond that this  
2 argument should properly be addressed in class certification, and the court agrees. In a class action,  
3 standing is satisfied if at least one named plaintiff meets the requirements. *See Armstrong v. Davis*,  
4 275 F.3d 849, 860 (9th Cir.2001). Once standing is established, the requirements of Rule 23(a)  
5 "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims."  
6 *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotations  
7 omitted). Here there is no doubt that Brazil and Seick have standing arising out of their purchases.  
8 The cases cited by plaintiffs, *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088 (N.D.Cal. 2007)  
9 and *Negrete v. Allianz Life Ins. Co. of North Amer.*, 238 F.R.D. 482 (C.D.Cal. 2006), represent cases  
10 where plaintiffs bring suits representing class members whose claims differ in certain ways from  
11 their own. Brazil and Seick seek here to do the same.

12 2. *Breach of Contract Claim*

13 Brazil and Seick allege that Dell has breached the sales agreements covering their purchases  
14 by failing to provide promised discounts. Dell moves to dismiss, arguing that plaintiffs have failed  
15 to plead breach of contract because they cite no specific breached provision of Dell's sales contract.  
16 This is not quite right, since the complaint includes numerous allegations of breached agreements.  
17 SAC ¶ 92-96. Instead, Dell is understandably claiming that 1) the discount statements were not part  
18 of any agreement between the parties; and 2) the statements do not constitute breached promises.  
19 See Dell's Mot. to Dismiss 18-19.

20 As to the first claim, the court finds that the determination of whether the statements on the  
21 website and in the sale confirmation are part of the parties' agreement is inappropriate for a motion  
22 to dismiss. The scope of the sale agreement, and the enforceability of the disclaimer of liability in

---

23  
24 <sup>1</sup> See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 263 (2003) (noting tension in case law regarding  
25 whether standing under Article III or adequacy under Rule 23(a) properly bore on a particular  
26 plaintiff being subject to a different set of race-conscious admission criteria) (citing Burns, *Standing  
27 and Mootness in Class Actions: A Search for Consistency*, 22 U.C.D.L.Rev. 1239, 1240-1241  
28 (1989); *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 149, 102 S.Ct. 2364, 72  
L.Ed.2d 740 (1982) (Mexican-American plaintiff alleging that he was passed over for a promotion  
because of race was not an adequate representative to "maintain a class action on behalf of  
Mexican-American applicants" who were not hired by the same employer); *Blum v. Yaretsky*, 457  
U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (class representatives who had been transferred to  
lower levels of medical care lacked standing to challenge transfers to higher levels of care)).

1 the Terms and Conditions, have not been briefed here. And, in any event, the complaint satisfies the  
2 limited requirements of notice pleading for both inquiries.

3 Dell argues next that the statements do not constitute breached promises because plaintiffs  
4 paid an agreed price for and received the products they purchased. Dell's Mot. to Dismiss 19.  
5 Plaintiffs respond that this is not the case: "Plaintiffs paid for products that formerly cost more  
6 money, but what they paid for was not what they got: Dell breached the contracts by not giving  
7 Plaintiff Seick a product that was formerly priced at \$349, and by not giving Brazil a product that  
8 was formerly priced at \$1,511." Pls.' Opp. to Mot. to Dismiss 18 fn 13. Plaintiffs have thus alleged  
9 Dell breached a promise that was purportedly part of the contract. The exact import of that promise  
10 is not yet before the court. But preliminarily, the court is skeptical of the argument that the crossing  
11 out of an original price changes the nature of the purchased product from, for example, a computer,  
12 to a computer with a certain price-history. Nonetheless, the breach of contract claim in the SAC  
13 survives a motion to dismiss.

14 3. *Fraud Claims*

15 Dell first moves to dismiss all of plaintiffs fraud claims for a failure to plead damage. Dell  
16 argues that "[p]laintiffs have not alleged (and cannot allege) [1] that the specific, individually  
17 configured computers they purchased were worth less than what they paid for them or [2] that they  
18 were represented to have a false value." Plaintiffs have at least alleged the latter claim. SAC ¶ 1,  
19 23, 31, 39, 43. But the former argument misunderstands the purported basis of plaintiffs action for  
20 fraud. Brazil and Seick contend not that the computers were worth less than what they paid, but that  
21 they would not have paid so much, had the representations about discount not been made. Plaintiffs  
22 have thus plead damages to the extent of that overpayment.

23 4. *Unjust Enrichment, Restitution, and Equitable Tolling*

24 Under Texas law, plaintiffs may apparently state a claim for unjust enrichment or restitution.  
25 *Mobil Producing Texas & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916, 919-920 (Tex. App. 2002)  
26 (considering motion for summary judgment on unjust enrichment and restitution claims and  
27 conceding that such claims could be brought). Plaintiffs further can plead unjust enrichment claims  
28 in the alternative with their breach of contract claims. *Id.*

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' allege that Dell conceals its deceptive advertisements by constantly changing them, and thus that the statute of limitations should be subject to equitable tolling. That claim is sufficiently plead by the allegation so stating in the complaint and the attached exhibits to the complaint that suggest the nature of the allegedly concealing changes made by Dell.

**III. ORDER**

- 1. Defendants' motion to dismiss plaintiffs' individual claims is denied.
- 2. Defendants' motion to strike class allegations is denied.

DATED: 11/13/08

  
\_\_\_\_\_  
RONALD M. WHYTE  
United States District Judge

